HEARING OFFICER, CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. 306-01

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: **JULIE ORTIVEZ-POWELL,**

And

Agency: DENVER HEALTH AND HOSPITAL AUTHORITY, a body corporate and a political subdivision of the State of Colorado.

NATURE OF APPEAL

The Appellant Julie Ortivez-Powell, ("Appellant" or "Ms. Powell") is a Career Service Employee and has challenged her dismissal from her position as Laboratory Technician with the Denver Health and Hospital Authority (the "Hospital"). The Hospital dismissed the Appellant due to an alleged course of conduct that occurred over a period of time from 5/15/00 through 5/9/01. The Hospital contends that during this period, Appellant altered certain test results on a blood-testing instrument. In support of its assertion that it may impose discipline on the Appellant, the Hospital contends that Appellant is guilty of: gross negligence or willful neglect of duty, carelessness, dishonesty, insubordination, jeopardizing the safety of others, failing to meet standards of performance, failure to observe departmental policies, and carelessness, all in alleged violation of Career Service Rules.

Appellant denies all wrongdoing. She is unable to explain the alterations. She contends that the predisciplinary meeting prior to her termination was inadequate and that she is therefore entitled to a reversal of the hospital action or other relief. Finally, she contends that the discipline imposed is too harsh given the circumstances and her service record and that the Hospital did not follow progressive discipline. Appellant is requesting that the disciplinary action be reversed, or if a rule violation is found, that the discipline be reduced.

INTRODUCTION

The Denver Health and Hospital Authority is a body corporate and political subdivision of the State of Colorado created pursuant to CRS Title 25,

Article 29. Since the Appellant is a Career Service Employee, the rules of the Career Service Authority are applicable, and shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held before Michael L. Bieda, Hearing Officer for the Career Service Board. Appellant was present, and was represented by her attorney, Mr. Charles F. Kaiser, Esq. The Hospital was represented by Mr. Mark Wiletsky, Esq., with Ms. Karen Gillenwater serving as the advisory witness on behalf of the Hospital.

The following witnesses were called and testified at hearing: Ms. Karen Gillenwater, Dr. Stephen Bodor, M.D., Joseph Fanciulli, Barbara Stewart, and the Appellant, Ms. Julie Ortivez-Powell.

Exhibits 1-4, 6-12, and A-H, J-K, N-Q, were admitted into evidence by either stipulation or by ruling of the Hearing Officer and were considered in this decision. (Exhibits 5,I, L, and M which were not admitted or considered.)

ISSUES ON APPEAL

- Whether the Hospital proved by a preponderance of the evidence that the Appellant violated the various provisions of the Career Service Rules as alleged?

- If so, whether the disciplinary action taken by the Hospital, namely dismissal from employment, was reasonably related to the seriousness of the offense(s), considering all of the circumstances, as required by Career Service Rules?

- Whether the predisciplinary meeting was according to law, and if not, what relief, if any, is appropriate?

JURISDICTION

The alleged course of conduct that gave rise to this disciplinary action by the Hospital occurred between 5/15/00 through 5/9/01. The Appellant was notified of the Hospital's contemplation of disciplinary action on July 5, 2001. A predisciplinary meeting was held on July 16th, 2001. Appellant was advised of the disciplinary action being taken against her by a letter dated July 23rd, 2001. The Appellant filed her appeal with the Career Service Hearing Office on July 31st, 2001. Neither party has contested the jurisdiction of the Hearing Office to hear and decide this appeal.

Based upon these facts the Hearing Officer finds that this appeal has been timely filed, and that under CSR §§ 19-10 (b) and 19-27, the Hearing Officer has jurisdiction and authority to affirm, reverse or modify the actions of

the Hospital giving rise to this proceeding.[1]

RELEVANT FACTS

The Hearing Officer has considered the exhibits and testimony, assessed the credibility of the witnesses and now makes the following findings of fact which were established by a preponderance of the evidence.

Prior Discipline, Warnings and Performance Record

The Appellant received a verbal reprimand on September 20, 1999 for absenteeism.

Background

Ms. Powell's immediate supervisor is Ms. Karen Gillenwater. Her second level supervisor is Ms. Barbara Stewart. The appellant worked for the Hospital for over seven years. She was assigned to the Montebello lab. One of her primary responsibilities was to run the Coulter Counter "CC" tester. This instrument tests and provides data on several aspects of human blood. Through sophisticated technology, it can provide a reading on the number of white blood cells, red blood cells, hematocrit, platelets, Hemoglobin, lymphocyte count, lymphocyte percent and other scientific measurements. These tests are done at the request of the treating physician and are vital to the diagnosis and treatment of a number of diseases, including leukemia and cancer.

Ms. Powell's duties and responsibilities included testing the CC instrument for accuracy every morning before testing any blood samples. During this testing procedure the CC instrument generated a series of Coulter "control slips" with printed numerical values for the various categories tested.

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[1] CSR §19-10(b) provides:

> Actions Subject to Appeal
> An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.
> * * *
> b) Actions of an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.
> * * *

CSR §19-27 provides:

> The Hearings Officer shall issue a decision in writing affirming modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.
> * * *

Appellant then writes these numerical values by hand on a log sheet that is referred to as a "IQAP". These numerical values are very precise, are accurate to at least three decimal places and must be analyzed and recorded with precision in order to insure the accuracy of the instrument and the reliability of the results. Errors in the testing, measurement or recording procedures could truly be a matter of life and death to affected patients.

The values taken during the testing of the CC instrument are then compared to a series of values provided by the manufacturer of the instrument. These values are actually a "range" within which each criterion must fall in order to insure the instrument's accuracy. A value outside of the "range" requires further testing, or other action by the operator, including contacting the supervisor, before any blood may be tested.

During a routine audit procedure, the Appellant's supervisor, Ms. Karen Gillenwater, along with an assistant Ada Dickerson, undertook a review of the CC lab records of the Montbello lab where Appellant worked. In the process, Ms. Dickerson was chronologically organizing the control strips generated by the CC when she discovered the numerical values on a number of the control strips had been altered by hand written changes. These alterations were immediately brought to Ms. Gillenwater's attention. The control strips that had been altered had values printed by the CC instrument that were outside the acceptable range. The altered changes caused the otherwise errant values to fall within the acceptable range.

Ms. Gillenwater found that the altered strip values (as opposed to the values actually recorded by the instrument) had been transferred to the IQAP log. Normally, only the IQAP logs and not the control strips are reviewed to insure that the CC instrument is within tolerance limits. These IQAP logs are sent to the Coulter Corporation, the manufacturer of the instrument, to assess the commercial control samples and the accuracy of the instrument. If the correct, unaltered strip values had been transferred to the IQAP, corrective action by the Appellant would have been required. Under standard operating lab procedures, no patient results should have been reported without first resolving the deviation.

A number of procedure options are required when the CC instrument tests outside of the normal range, including documenting the problem, repeating the test, checking expiration dates on control samples and other materials, checking storage conditions, checking testing techniques, and notification to the supervisor for further action. However, since the altered values were recorded in the IQAP, Appellant took no such corrective action.

The thirteen dates when the control strips were altered were 5/15/00, 5/19/00, 2/19/01, 2/23/01, 3/2/01, 3/6/01, 3/7/01, 3/19/01, 4/20/01, 4/23/01, 4/26/01, 4/27/01, and 5/9/01. All of these dates were days when Appellant was on duty at the Montbello lab. During these times she had exclusive

responsibility and control over the testing procedure and preparation of the control slips and the IQAP. During the period in question, the Appellant was the only laboratory technician assigned to the Montbello laboratory. Although other technicians sometimes filled in for her, the control slips were altered only on dates that Appellant worked. The altered control slips contained no initials, which is consistent with the fact that Appellant was the only technician assigned to the Montbello lab and therefore never initialed her control slips. When other technicians filled in for Appellant they always initialed their control slips. The Appellant's initials appeared on each of the entries in the IQAP report containing the altered control slip values.

A handwriting expert reviewed the entries on the IQAP for these dates and opined that they were in fact written by the Appellant. The Appellant does not deny making these entries in the IQAP.

The handwriting expert was not able to provide an opinion on the altered values on the control slips, due to the small size of the sample.

DISCUSSION AND CONCLUSIONS OF LAW

As an employee with over seven year's service, Ms. Ortivez-Powell had attained Career Status as a Career Service Employee. Under Career Service rules she may not be dismissed without just cause.[2]

Appellant is accused of violating the following Career Service Rules, Executive Orders, or Departmental Rules and Regulations:

§16-50 Discipline and Termination

A. Causes for dismissal.

> The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.
>
> 1) Gross negligence or willful neglect of duty.
>
> * * *

[2] CSR §5-62 provides:
Employees in Career Status
An employee in career status
1) may be disciplined or dismissed only for cause, in accordance with Rule 16, DISCIPLINE.

3) Dishonesty, including but not limited to: altering or falsifying official records or examinations; accepting, soliciting, or making a bribe; lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours; using official position or authority for personal profit or advantage, including kickbacks; or any other act of dishonesty not specifically listed in this paragraph.

* * *

7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing.

* * *

14) Failure to use safety devices or failure to observe safety regulations which results in injury to self or others; jeopardizes the safety of self or others; or results in damage or destruction of City and County property.

* * *

CSR §16-51 Causes for progressive Discipline

The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore this is not an exclusive list.

(2) Failure to meet established standards of performance including either qualitative or quantitative standards.

* * *

(5) Failure to observe departmental policies. (Procedure for Coulter & 540 Cell Counter and Startup Procedure.)

(6) Carelessness in performance of duties and responsibilities.

* * *

(10) Failure to comply with the instructions of an authorized supervisor.

Analysis

The City Charter, §C5.25 (4) and CSR §2-104 and §2-10 (b) (4) require the Hearing Officer to determine the facts in this matter "*de novo*". The Colorado Courts have held that this requires an independent fact-finding hearing considering evidence submitted at the *de novo* hearing and a resolution of factual disputes. *Turner v. Rossmiller*, 35 Co. A. 329, 532 P. 2d 751 (Colo. Ct. of App., 1975).

It is well established that the party advancing a position or claim has the burden of proving that position. In civil proceedings, including administrative hearings such as this, that burden is by a "preponderance of the evidence". To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not (See Colorado Civil Jury Instructions, 3:1).[3] The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (See Colorado Civil Jury Instructions, 3:5).[4] The ultimate credibility of the witnesses and the weight to be given their testimony are within the province of the Administrative Law Judge or Hearing Officer. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). As the trier of fact, the Hearing Officer determines the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995).

The Hospital claims in its letter of dismissal that Appellant violated numerous Career Service Rules as outlined above. The Hospital therefore has the burden of proving the allegations contained in the letter of suspension by a preponderance of the evidence.

The handwriting on the IQAP is undoubtedly the Appellant's. She worked on the days in question. She had custody and control of the control slips and the IQAP. The alterations were done to bring the tests results within tolerance limits. By altering the control slips and then entering the altered values on the IQAP, Appellant avoided the additional and cumbersome procedures required

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[3] The notes on use of Instruction 3:1 state: Generally, in all civil cases, "the burden of proof shall be by a preponderance of the evidence, . . ." citing C.R.S. § 13-25-127.

[4] The content of this instruction was approved as an instruction in *Swaim v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3 P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (E. Cleary 3 ded. 1984).

when the instrument exceeded acceptable tolerance limits. Thus she had motive. The evidence, taken in its entirety, although circumstantial, is overwhelming against the Appellant. Given these findings, the Hearing Officer concludes that the Hospital has proved a prima facia case, by a preponderance of the evidence, that Appellant altered the control slips, and then entered the false data onto the IQAP.

The Appellant contends that she has no knowledge of the control slips that were altered. She claims that at one time control slips existed that supported the entries that she made into the IQAP, however she is unable to produce them, nor can she explain their absence. She infers that someone else at some other time generated control slips with the exact same or similar values as those on the IQAP and then altered them. The unknown individual would have "destroyed" the original slips that support the IQAP entries. In essence she claims she was "framed".

There are a number of problems with Appellant's position. First there is no credible evidence that supports her contention. Her denial at hearing, standing alone, is insufficient. Second, there has been no credible evidence that would support a conclusion that Ms. Gillenwater, or anyone else had any reason or motive to alter the control slips. Indeed, the evidence strongly suggests that the control slips were already in their altered state when Gillenwater received them.

Appellant suggests that perhaps the motivation to frame her was that she was a Career Service employee, and that the Hospital is seeking to replace all Career Service employees with more recently hired Hospital employees. The Hearing Officer is mindful of the provision of CRS §25-29-107 (1), which prohibits discrimination by the Hospital against city employees for any purpose[5]. In the enabling statute that created the Hospital Authority, the state legislature evidenced concern about the possibility of such a practice. This is sufficient reason for the Hearing Officer to take any allegations of such conduct very seriously. However, in this case, Appellant has provided no credible evidence, direct or circumstantial, that would support a finding of such conduct by the Hospital.

It is also noteworthy that Ms. Gillenwater, the primary complaining witness against Appellant and her immediate supervisor, is also a Career Service employee of 29 years. Thus, the evidence strongly suggests that there is a lack of motive or reason for Gillenwater or other Hospital employees to frame Appellant.

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[5] CRS 25-29-107 (1) provides:

. . . No city employee shall be discriminated against in training, promotion, retention, assignment of duties, granting of rights and benefits, or any other personnel action. Promotion or a change in position shall not be contingent upon the employee becoming an employee of the authority.

Third, the framing process would have been so complex as to be beyond belief or reason. It would have involved manually generating control slips from the CC instrument that exactly matched the IQAP records, then altering them by hand and then destroying the slips that supported the IQAP records. This would seem like a great deal of trouble to accomplish what could be done much easier. Simply destroying some of the records or control slips would have accomplished the same purpose. Appellant was responsible for maintaining the records. Without the backup control slips, the IQAP is called into question, and Appellant would be suspected of either falsifying the IQAP or failing to maintain proper records, both of which, standing alone, are serious charges.

If the control slips are so easily generated manually as the Appellant contends, why wouldn't the "framer" simply generate new slips that deviated from the IQAP and leave it at that? Then it would be made to appear that Appellant had not recorded the appropriate data from the slips, also a serious dereliction of duty.

Both Dr. Bodor and Ms. Gillenwater testified that in their expert opinions, it is impossible to generate a manual control slip from the CC instrument. Even if it were possible, the statistical probability against generating a control slip at some later time with identical test values as on a particular slip, is astronomical. Each slip contains seven separate values, accurate to several decimal places. To reproduce these values in combination in a single retest not once but thirteen times is even more unlikely. The chances against such an event are in the millions if not billions, and are even less likely than winning the Power Ball Lottery.

Moreover, the Appellant's assertion that it is possible to manufacture false data and false readings on the CC instrument flies in the face of all of the Hearing Officer's experience with the scientific method, scientific testing and scientific instruments. If a scientific instrument such as the CC is designed to allow the manufacture of results to reflect whatever results the operator wishes, the whole point of an objective instrument is lost. It would be like designing a thermometer to allow the operator to move either the mercury or the scale to reflect a temperature reading to the operator's liking. The integrity of the entire testing process would be hopelessly compromised.

Finally, if the Appellant had been framed as she infers, the person doing the framing would have been tripped up by the events of February 23, and February 26, 2001. The control slips reveal that there are in fact two control slips dated "2/23/01." One of the slips is altered, one is not. The one that is not altered also bears the initials of another lab technician, Ada Dickers. The evidence established that Ms. Dickers actually worked the Montbello lab on February 23, 2001, because Appellant was on leave that particular day. It is also uncontroverted that Ms. Dickers entered the values from the February CC test run into the IQAP log. The handwriting expert confirmed this fact independently.

When Appellant returned on Monday, February 26th, she printed out a control slip. However, she failed to advance the date on the CC instrument. Thus it still showed "2/23/01" instead of the correct date of "2/26/01". The control slip for that day was altered, similar to the others, and the altered value was hand written, by the Appellant onto the IQAP log.

The alleged framer had no way of easily knowing that one of the control slips for "2/23/01" was actually run by Dickers instead of Appellant. If the framer was looking for a "2/26/01" control slip, no such slip existed. How could the framer have known to choose the "2/23/01" slip? If the framer choose "2/23/01", how would he/she have known which slip to alter? Again, the "framer" theory is so convoluted and complex as to be beyond believability.

The question remains as to why the Appellant would make an obvious alteration on the control slips. The evidence strongly suggests that normally the control slips are not reviewed, only the IQAP log. The tolerance ranges in the manual vary from one test sample to the next, thus the necessity to check the results of each sample. It does not appear likely that an operator would memorize the ranges since they vary.

The evidence suggests that when comparing the control slips to the manual containing the tolerance ranges, Appellant used the control slip as a note pad to remind herself which of the values were out of range, and what the correct tolerance limit needed to be. She then later used the control slip, along with her handwritten notations, to prepare the IQAP log, assuming that no one would ever see the control slips. Thus, her real intent appears to have been to alter the IQAP logs, which were reviewed, not the control slips, which were not reviewed.

The Appellant's lack of a plausible explanation, together with the overwhelming circumstantial evidence against her, taken as a whole, can only lead to the conclusion that Appellant altered the slips and the IQAP to save herself the trouble of taking further corrective action with the CC instrument.

Adequacy of Predisciplinary Meeting

The Appellant contends that the predisciplinary meeting was inadequate and that she is therefore entitled to reinstatement with full back pay. A predisciplinary meeting is required by Career Service Rule §16-30.[6] That same

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[6] CSR §16-30 provides:

Pre-disciplinary Notification of Contemplation of Suspension, Involuntary Demotion or Dismissal and Notice of Pre-disciplinary Meeting.

When required.

Before an employee with career status is suspended, involuntarily demoted or

requirement has been mandated by the United States Supreme Court in *Cleveland Board of Education v. Loudermill*, et al., 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 53 U.S. L.W. 4306 (1985).

The predisciplinary meeting took place on July 16th, 2001. The Appellant was present along with her legal counsel. Dr. Bodor, Ms. Barb Stewart, Mr. Terence Shea and Ms. Gillenwater also attended the meeting on behalf of the Agency. During the meeting Appellant's counsel asked to have copies of the control slips and the IQAP logs, which was honored. The meeting was adjourned for a brief time at Appellant's request to allow Appellant and her counsel to review the documents. When they reconvened that same day, Appellant's counsel requested that the meeting be postponed and that the Hospital have the documents reviewed by a handwriting expert, at the Hospital's expense, to determine if they in fact contained Appellant's handwriting. At no time did Appellant or her counsel indicate that they had further evidence or information for the Agency to consider beyond that which had already been presented.

The Agency, acting through Gillenwater, Stewart and Bodor, indicated that they would consider the request after conferring with their own legal counsel and that they would advise Appellant and her counsel of their decision. Later the Hospital decided to deny the request for review of the documents by an expert, and issued its disciplinary decision that dismissed Appellant from her employment.

The due process requirements of the predisciplinary meeting were specifically addressed by Justice White in *Loudermill:*

> The foregoing considerations indicate that the pretermination "hearing" though necessary, need not be elaborate. . . In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. (Citing *Mathews v. Eldridge*, 424 U.S., at 343). Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.
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> . . . Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. (Citing *Bell v. Burson*, 402 U.S., at 540.)

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dismissed, the appointing authority or designee shall hold a pre-disciplinary meeting. A pre-disciplinary meeting is not required for verbal warnings or written reprimands.
* * *

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. (Citations omitted). The tenured public employee is entitled to oral and written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. (Citing *Arnett v. Kennedy*, 416 U.S., at 170-171). To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.
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> *Cleveland Board of Education v. Loudermill*, at 545-546.

Career Service Rules provide that the purposes of the pre-disciplinary meeting are to allow the employee to correct errors in the agency's information and to allow the employee to tell their side of the story. Under Career Service rules the pre-disciplinary meeting is not an adversarial meeting, and testimony under oath and cross-examination of witnesses is not allowed[7] These requirements conform to the requirements annunciated by the Supreme Court in *Loudermill.*

The evidence suggests that Appellant and her counsel may have been confused as to the purpose of the predisciplinary meeting. Apparently they believed that they were entitled to a second predisciplinary meeting. During the entire predisciplinary meeting, which lasted at least one hour and twenty minutes, neither Appellant nor her counsel indicated that they had other mitigating or exculpatory evidence to present for consideration. She denied that she had altered the control slips and requested a handwriting analysis. Prior to the meeting the Appellant had notice of the charges, as evidenced by the notice of contemplation of disciplinary action. At the meeting, she had an opportunity, along with her counsel, to view the evidence, and in fact was given a copy of the control slips. She was given an opportunity to explain the evidence against her and to present her side of the story. After the completion of the meeting, the

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[7] CSR §16-30 states:
Pre-disciplinary Notification of Contemplation of Suspension, Involuntary Demotion or Dismissal and Notice of Pre-disciplinary Meeting.

* * *

B. The purposes of the pre-disciplinary meeting include the following:
   1) To allow the employee to correct any errors in the agency's information or facts upon which it proposes to take disciplinary action; and
   2) To allow the employee to tell his or her side of the story and present any mitigating information as to why the disciplinary action should not be taken.

C. Since a predisciplinary meeting is not an adversarial meeting, testimony under oath or direct or cross examination of a witness shall not occur.

Agency determined that it had reasonable grounds to believe that the charges against Appellant were true and supported the proposed action.

At the hearing on the merits, the Appellant produced little or no evidence beyond that produced at the meeting. She continued to deny having made the alterations but was unable to give any plausible explanation for their existence, the absence of CC slips to back the IQAP log or the discrepancies between the CC slips and the IQAP. Indeed, at the appeal hearing on the merits, the Appellant produced no evidence indicating that she had in any way been prejudiced by the Agency's refusal to honor her request for a handwriting expert. Even though the Agency did later engage such an expert for the evidentiary hearing on the merits, the evidence, if anything, proved to be incriminating instead of exculpatory.

The Appellant has provided no legal authority to persuade the Hearing Officer that the standards set forth in *Loudermill* and the Career Service Rules are not the appropriate standards for a pre-termination hearing. The Hearing Officer therefore concludes that the Appellant received a full and adequate predisciplinary meeting. As far as the requirements of the Career Service rules and applicable case law, the meeting was completed. The fact that the Agency chose not to hire a handwriting expert at that time does not make the meeting deficient. The fact that Appellant offered no other explanation or evidence to the charges made any further inquiry unnecessary.

Since the pretermination was adequate, the question of the appropriate remedy is moot, and will not be addressed further.

For these reasons the Appellant's request that the decision of the Agency be reversed because of an inadequate pretermination meeting, is denied.

Violation of Department Regulations

Upon full consideration of all statements testimony and exhibits, the Hearing Officer finds and concludes that Appellant's conduct, as outlined above, violated the following Career Service Rules:

§16-50 1) Gross Negligence or willful neglect of duty.

3) Dishonesty

7) Refusing to do assigned work which employee is capable of performing.

14) Failure to observe safety regulations which jeopardizes the safety of others.

§16-51 2) Failure to meet established standards of performance.

5) Failure to observe departmental polices in the use and start up of the Coulter T540 Cell Counter.

6) Carelessness in performance of duties and responsibilities.

10) Failure to comply with the instructions of an authorized supervisor.

Justness of Discipline

CSR §16-10 states:

> The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. **The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record.** The appointing authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance. (Emphasis added).
>
> The disciplinary action taken must be a consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

Thus, while the Hearing Officer may defer to the discipline imposed by the Hospital, he is required to make an independent, *de novo* finding and determination as to the reasonableness of the discipline to be imposed, consistent with Career Service Rules.

In this case Appellant was dismissed. There have been no mitigating circumstances argued or presented on behalf of the Appellant. The agency alleged in its disciplinary notice that the actions of Appellant invalidated the results of the patient tests, thereby endangering those patients. The evidence presented at hearing supports that allegation. By compromising the testing process, Appellant has jeopardized the health of all of those patients whose physicians relied upon those blood tests in making their treatment recommendations. Those decisions involved a multitude of medical conditions, including such deadly diseases as cancer and leukemia. This type of conduct, with such potentially serious consequences, cannot be tolerated. Regardless of Appellant's prior performance and disciplinary history, there is no discipline, short of dismissal, that can achieve the desired result, namely zero tolerance for

such reprehensible conduct.

First Motion for Post-Hearing Relief

The Appellant has filed two post hearing motions seeking post-hearing relief. The first motion seeks to have the Hearing Officer order the Agency, under the Colorado Open Records Act, to produce certain instruction manuals related to the CC testing instrument. According to the Appellant's second motion for post-hearing relief, the Agency agreed to voluntarily make the requested manuals available to the Appellant.

The Appellant also requested in her first motion that the Hearing Officer withhold issuance of a decision until the Appellant had an opportunity to review those manuals, which the Appellant's counsel has now done. Finally, the Appellant requested in her first motion that she be allowed to supplement the hearing exhibits to add relevant portions of the instruction manuals. The Appellant has in fact now provided such portions to the Hearing Officer by way of her second motion for post-hearing relief.

The Agency filed a response to the motion opposing the relief requested. The first motion for post-hearing relief now appears moot and therefore will not be considered further.

Second Motion for Post-Hearing Relief

In the second motion for post-hearing relief, Appellant seeks to have the Agency again produce the manual in question relating to the CC instrument, and to have the Hearing Officer "reopen" testimony for the limited purpose of showing that: "it was possible to manually enter test results on the Coulter Counter control slips." The Agency filed a Response opposing the second motion for post-hearing relief.

The Hearing Officer has considered the Appellant's motion in light of the entire file and all testimony presented and now makes the following additional findings and conclusions related thereto:

There are no provisions in Career Service Rules that either prohibit or permit post-hearing relief. However the Hearing Officer has broad discretionary powers under CSR §2-104. In particular there are two provisions that are applicable. In the first paragraph of §2-104 entitled "Powers and Duties of the Hearings Officer" the rule states . . . "(the Hearings Officer) shall perform those duties and functions necessary to render a final determination of the matter in dispute,. . ." Paragraph g) states that the powers and duties of the Hearings Officer shall be: g) "Related duties: to perform such other duties as may be necessary to implement and maintain an efficient, fair and speedy system of appeal adjudication." Thus, the Hearing Officer concludes that the ability to hear and determine post-hearing motions including motions for post-hearing relief is

necessary to the efficient, fair and speedy system of appeal adjudication and is necessary to render a final determination of the matter in dispute. Therefore post-hearing relief is permitted under Career Service Rules.

Since there is no specific Career Service Rule on the subject, the Hearing Officer looks to the Colorado Rules of Civil Procedure, Rule 59, for guidance. Rule 59 does not specifically mention the reopening of the evidence prior to judgement. However, if certain criteria are met it does permit a new trial after judgement has been entered on all or part of the issues. Thus, by analogy, such relief would be available where, as here, no final judgement has yet been entered. In this case the most applicable criteria would be "accident or surprise" or "newly discovered evidence."

With regard to both criteria, the Appellant admits that her counsel was provided with the manual for inspection and review during the discovery process and prior to the hearing. Yet the Appellant neither endorsed the manual as an exhibit in her Pre-hearing Statement as Ordered by the Hearing Officer, nor did she subpoena the manual for hearing. She now claims that it is an important piece of evidence to provide an alternative explanation of how there were "printed test results that differed (without the manual alterations) from those entered on the Coulter Control Log . . ."

Since the predisciplinary meeting Appellant has maintained that she did not make the alterations. Thus, she should have known all along that the manuals might be relevant to her theory of the case. Therefore the language in the manual is neither newly discovered nor a surprise. She has provided no evidence that her failure to endorse it or subpoena it at hearing was the result of an "accident". Moreover, under Rule 59, CRCP, she must also show that the accident or surprise was one which ordinary prudence could not have guarded against. There is no allegation or showing of such here.

Appellant also argues that the fact that both Dr. Bodor and Ms. Karen Gillenwater testified at hearing that it is impossible to manually dictate the results of the test run on the CC necessitates reopening the evidence to allow it as rebuttal. However, if the manual in fact states as Appellant alleges, then apparently it is the only documentary evidence to show that it is possible to create an altered control slip. Certainly Appellant could foresee the likelihood of questioning both Dr. Bodor and Karen Gillenwater on this point on cross-examination. Again, this argument of "surprise" in not persuasive.

The language that is cited as being in the manual itself does not, even on its face, appear to support Appellant's contention that test results can be manually altered or controlled. The language cited in Appellant's second motion states:

> This option lets you automatically increment or manually input the test numbers after each sample run. Use [SEL] to display the SET

> TEST NUMBER field. Press [ADV] to call up the auto incrementing function. Use [SEL] to display NEXT TEST = XXX. Enter the desired test number using the numeric keypad. To finalize the selection use either [ENTER] or [ADV].

This language is of a technical nature and refers to a "test number". Appellant provides no explanation in her motion as to what is meant by a "test number". The Hearing Officer recognizes that there may be a difference between a "test number" and a "test result". Appellant provides no affidavit or other proffered evidence that would provide an explanation of what this language truly means. The Agency on the other hand, provides the affidavit of Dr. Bodor, who testified as an expert at hearing on the workings of this instrument. He states in his affidavit that the "test number" referred to above is actually the "sample identification number" or "sample ID". He states again that changing this number does not alter the results of the test. He further states in his affidavit that:

> I spent over an hour trying other approaches to alter test results. Even after multiple attempts and different approaches I was unable to manually enter test results, or to think of a way to do so.

Ms. Gillenwater provided a similar affidavit. Accordingly, the Hearing Officer concludes that Appellant's contention that this language is proof that CC test results may be altered manually by the operator is inadequate and in error.

Towards the end of the first day of two days of testimony, Appellant's counsel requested that the Hearing Officer order the Agency to produce the manual under the guise of the Colorado Open Records Act. The Hearing Officer has reviewed the pertinent portions of the record and the colloquy between the Hearing Officer and both counsels on this issue. At that time the Appellant was unable to make a sufficient showing of relevancy to persuade the Hearing Officer that the manual should be admitted, even if produced. Appellant has still failed to persuade the Hearing Officer that this information would be admissible under a Rule 403 inquiry.[8]

Finally, even if the Appellant could demonstrate that the test results could be manually dictated by the operator, for the reasons stated in the body of these findings, such a showing would be inadequate to rebut the strong circumstantial evidence against Appellant as to the ultimate issue. The circumstantial evidence overwhelmingly established that she was responsible for making the hand written alterations on the CC slips and then transferred them to the IQAP log for the purpose of avoiding the additional efforts required to bring the instrument within acceptable limits.

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[8] Rule 403 of the Colorado Rules of Evidence provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The Appellant's second motion for post hearing relief is therefore DENIED.

CONCLUSION

1. The Agency has proved, by a preponderance of the evidence, that Appellant has violated numerous provisions of the Career Service Rules, as set forth above.

2. Considering all of the circumstances, the Agency's action of dismissing Appellant from employment was reasonably related to the seriousness of the offenses committed, and is the appropriate discipline to achieve the desired result.

3. The predisciplinary meeting provided to the Appellant was according to law, and therefore Appellant is not entitled to any relief related thereto.

4. The Appellant is not entitled to post-hearing relief.

ORDER

For the foregoing reasons, the action of the Hospital of dismissing the Appellant, Julie Ortivez-Powell, from her employment as a Laboratory Technician, is hereby AFFIRMED, without modification.

Dated this 20 day of

December 2001.

Michael L. Bieda
Hearing Officer for the
Career Service Board

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