

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

Appeal No. 196-02

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**FINDINGS AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**LINDA S. ORTIZ**, Appellant,

v.

Agency: DENVER HEALTH AND HOSPITAL AUTHORITY, DENVER HEALTH MEDICAL CENTER.

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**INTRODUCTION**

For purposes of these Findings and Order, Linda S. Ortiz shall be referred to as "Appellant." Denver Health and Hospital Authority, Denver Health Medical Center shall be referred to as the "Hospital" or "DHHA". The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held on July 25, 2002, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and represented by Michael O'Malley, Esq. The Hospital was represented by Richard Stubbs, Esq., Assistant City Attorney. Christina Callanan served as the Hospital's advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Hospital:

Appellant, Robert A. Esquivel, Martha Debra Evans, Christina Callanan

The following witnesses were called by and testified on behalf of the Appellant:

None

The following exhibits were offered and admitted into evidence on behalf of the Agency:

Exhibits 1 - 7, 10 - 11, 14 -18

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

None

The following exhibits were admitted into evidence by stipulation:

Exhibits 1 -7, 10 - 11, 14-17

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

None

#### **NATURE OF APPEAL**

Appellant is appealing her forty-hour suspension for alleged violations of CSR §§16-50 A. 1), 7) and 20) and 16-51 A. 2), 4), 6) 10) and 11) and is requesting return of the lost pay and benefits.

#### **ISSUES ON APPEAL**

Whether Appellant violated CSR §§16-50 A. 1), 7),and 20) and 16-51 A. 2), 4), 6), 10) and 11)?

If Appellant violated any provisions of CSR §§ 16-50 and 16-51, what is the appropriate sanction?

#### **PRELIMINARY JURISDICTIONAL MATTERS**

None.

#### **FINDINGS OF FACT**

1. Appellant is a registered nurse. She has been an R.N. for eleven years. For the last six years, she has been an "advanced R.N," (a Hospital designation) at Denver Health and Hospital Authority. Appellant is a non-exempt employee.

2. In addition to regular nursing duties, as an advanced R.N., Appellant is responsible for precepting new nurse employees, acting as the charge nurse for

the floor and shift to which she is assigned, and generally teaching and being a resource to other nurses.

3. Appellant is assigned to the seventh floor at the Hospital. On March 14, 2002, she was working on 7 East. Sometime late into her shift she learned that there was a family of a patient waiting on the floor. The patient was still in surgery; she had not yet been brought to the floor.

4. The patient was assigned to a room 709. It is a room that can accommodate three patients.

5. The nurse assigned to take care of the patient informed Appellant that the family wanted a private room. The family asked to speak to the charge nurse, so Appellant went into room 709 to speak with them. She saw a gentleman (the patient's husband), a woman (the patient's sister) and a child (the patient's child) in the room. Appellant testified that she did not know who the woman was, that she talked only to the husband.

6. Appellant testified that she identified herself to the family. According to her, the husband asked for a private room. She told him that she could not give him one at that moment. The husband then asked for a supervisor. Appellant told him she would get Deb Evans, her direct supervisor. She also told one of the family members to get off the bed because it was a clean bed for the patient. The person made no objection and got off the bed.

7. Appellant went to Ms. Evans' office and told her that the patient's family wanted a private room. Ms. Evans asked her how many rooms were available. Appellant told her that there were six empty rooms. Ms. Evans told her to give them a room. Ms. Evans gave Appellant her business card and told her to give it to the family and, if they have any more problems, they were to call her.

8. Appellant went back to the patient's family and told the husband that they would move the patient into a private room. She also gave him Ms. Evans' card and told him that her manager said that, if he had any further problems, not to hesitate to call.

9. Appellant did not provide the husband or Ms. Evans with a report on the patient's status.

10. According to Appellant, private rooms are supposed to be held for outreach (*i.e.*, reserved for out-of-area patients who are brought to the Hospital because it is a "Number 1" trauma center). Other reasons for private rooms might be special considerations (*i.e.*, isolation patients, fetal demise – for private grieving).

11. Appellant testified that she must attend staff meetings once a month. She stated that customer service is frequently discussed. She stated that part of

the Hospital's mission statement provides that each patient must be treated with dignity.

12. The husband of the patient, Robert A. Esquivel, is a Hospital employee. Mr. Esquivel testified that he had worked as a nurse for fifteen years, although he is not working as a nurse now. He is currently an enrollment specialist for Medicaid.

13 Mr. Esquivel testified that his wife, Suzanne Esquivel, had a partial hysterectomy on March 14, 2002. Ms. Esquivel arrived at 6:30 a.m. for 11:00 a.m. surgery. Due to complications involving another patient, the surgery was rescheduled for 1:00 p.m.

14. Ms. Esquivel's sister, Lori Birch, and her eight-year-old son were at the Hospital during the day. Ms. Birch last saw Ms. Esquivel at 1:00 p.m. After her sister went into surgery, Ms. Birch took the Esquivel son and went to wait on the 7<sup>th</sup> floor.

15. Mr. Esquivel arrived at the Hospital at 5:00 p.m. He went to the nurse's station on the 7<sup>th</sup> floor. The unit clerk told him that she had not heard anything about the status of Ms. Esquivel. During this conversation, Ms. Esquivel asked for a "single bed room." The clerk said she would send in a nurse who would be able to relocate Ms. Esquivel.

16. Mr. Esquivel stated that he asked for the private room because the partial hysterectomy was very stressful for his wife as it meant that she could have no more children.

17. Mr. Esquivel went to the room and was speaking to his sister-in-law about the fact that she and his son had been there all day and that his son was hungry.

18. Mr. Esquivel stated that his wife had been assigned to a bed next to the window. He also stated that there was one other patient in the room when he got there and that another one was brought into the room about a half an hour later.

19 About fifteen or twenty minutes after Mr. Esquivel talked to the floor clerk, Appellant walked in and said, "Absolutely not, she can't have a private room." Mr. Esquivel replied, "What?" Appellant stated, "Absolutely not, she can't have a private room. They are for tuberculosis/infectious patients."

20. Mr. Esquivel stated that he knew Appellant was medical personnel because she was wearing scrubs, but that she had not introduced herself before stating that his wife could not have a private room. He stated that she had her hands on her hips, she was shaking her head, her tone was angry and she had a negative attitude. He stated that she made him very uncomfortable and he

concluded that he would not receive any help from her. For these reasons he asked for her supervisor's business card and telephone number.

21. According to Mr. Esquivel, Appellant said, "okay" to the request for her supervisor's business card and telephone number and left. About ten or fifteen minutes later, Appellant reappeared and told him that the move was okay, but that, if an infectious patient came in, his wife would have to be moved again. Appellant was still rude and angry – her tone of voice and body language were negative.

22. During this second conversation, Appellant rolled her eyes at Mr. Esquivel, looked over to his sister-in-law, who was lying on the bed originally assigned to Ms. Esquivel, and told Mr. Esquivel that "she's not supposed to be on the bed; it's a clean bed." Mr. Esquivel was surprised that Appellant addressed him rather than addressing his sister-in-law directly. He felt it this was rude behavior.

23. Mr. Esquivel stated that it was clearly evident to him that by Appellant's facial expressions, body language, and tone of voice, she was either having a bad day or just rude.

24. Mr. Esquivel then went to locate his wife since she was still not on the 7<sup>th</sup> floor. He spent some time trying to locate her after a clerk told him to go look for her himself. He eventually went to see a patient-representative, who told him that his wife would be up in half an hour. More than half an hour went by and Mr. Esquivel was becoming more upset. He decided to call Ms. Evans and talk to her about his disappointment in how he was being treated by the department.

25. Appellant had left Ms. Evans' business card in room 709. Mr. Esquivel took it and called Ms. Evans at home. He told her that Appellant had upset him, that was now eight hours since his sister-in-law had last seen his wife, and that no nurse had told them what was going on. Ms. Evans called him back a few minutes later and told him that his wife was out of surgery and that she out be coming up soon. She also told Mr. Esquivel to put everything that had happened into writing and that she was sorry for the problems.

26. Ms. Evans testified that, on March 14, 2002, she worked from approximately 7:00 or 7:30 a.m. until 7:00 p.m. She stated that she first learned that a family wanted a private room from a telephone call made by Appellant. Appellant told her that a family waiting in a room requested to talk to Appellant's supervisor. Ms. Evans asked her why. Appellant told her that they wanted a private room. Ms. Evans asked how many private rooms were available. Appellant told her that six rooms were available that night. Ms. Evans asked her what the problem was. Appellant stated that they might need them for either outreach or isolation patients. Ms. Evans asked if there were any isolation patients. Appellant told her, "No." Ms. Evans asked if there were any trauma or outreach patients. Appellant told her, "One." Ms. Evans asked if there was a room available for that patient. Appellant said that there was. Ms. Evans then asked "So why is there a

problem?"

27. Ms. Evans testified that they could have converted a semi-private room into a private room. She also testified that a hysterectomy patient would be better in a private or semi-private room because of the "trauma issues" for the patient. She also stated that Appellant should have done her best to accommodate the family's needs and requests. She stated that Appellant should have known this because she is an advanced R.N.

28. Ms., Evans told Appellant, "If these people are upset, we should try to accommodate their needs." She instructed Appellant to explain to the family that, if they needed the room for an isolation patient, they may have to move her, but that they would try to accommodate her as much as possible. Ms. Evans asked Appellant if she could handle this or should Ms. Evans talk to the family. Ms. Evans stated that she asked this because she "wanted to make sure Linda would not upset the family more." Appellant told Ms. Evans she could handle it.

29. Ms. Evans stated that she arrived home at 7:40 p.m. and that her pager went off. She called the number and spoke with Mr. Esquivel. He was very upset. He told her that Appellant came into the room, did not introduce herself, was rude and confrontational, and told a family member to get off the bed. He was also upset because he didn't know what was going on with his wife.

30. Ms. Evans apologized to Mr. Esquivel for her staff and asked to call him back with information regarding his wife's status.

31. Ms. Evans stated that she had left the Hospital thinking that the situation had been resolved but that it, in fact, had escalated. She expected Appellant to remedy the situation but that she actually made it worse. She also testified that Appellant should have been able to handle the situation appropriately without coming to Ms. Evans for direction.

32. Chris Callanan, Director of Nursing, was in a meeting with Ms. Evans when Appellant's phone call came in and only heard Ms. Evans' side of the conversation.

33. Ms. Callanan testified that Appellant, as a charge nurse, was responsible for the families on Seven East. She was supposed to be a problem solver and serve as a patient advocate. She expected Appellant to use critical thinking and resolve issues on her own.

34. Ms. Callanan testified that the census on Seven East was low on the evening of March 14 as there were only twenty-five patients assigned that evening. She stated that the census count was low on the other floors and that they could have accommodated any trauma patients that came in.

35. Ms. Callanan stated that Ms. Esquivel should originally have been assigned to a private room, or, if no private room was available, to a semi-private room.

36. Ms. Callanan testified that the Esquivel family should have been in the operating room waiting area and that, since they were waiting in the "wrong" place, a problem was indicated. Ms. Callahan testified that, when she first met with Mr. Esquivel, Appellant should have asked, "What's going on? Why are you here? What can I do to help?" She stated that she would expect an advanced R.N. to ask these things even if the customer didn't ask about his wife's status.

37. *Standards of Performance, Denver Health's Approach to Customer Service* (Exhibit 14) provides, in relevant part:

### **INTRODUCTION**

\* \* \*

A customer is someone who receives a product or service from us and our organization. They may be a patient, patient family member, client, coworker, staff, physician, volunteers, other departments, vendors and community members. Anyone who counts on the results of our work is our customer.

**EXCELLENCE ALWAYS ENDURES....IT REAMINS LONG AFTER COST IS FORGOTTEN.**

### **OUR VALUES**

"We promise to treat patients, visitors, and each other with courtesy, dignity, and respect."

\* \* \*

"We believe in keeping our promises."

### **COURTESY & RESPECT**

At Denver Health, we believe that we are here to serve our customers. Our customer's most basic expectation is to be treated with courtesy and respect. We are committed to providing the highest quality of service and meeting our customers' needs with utmost care, courtesy and respect.

**Our commitment must be related in our behaviors.**

- Listen carefully to what our customers have to say. Avoid interrupting people unnecessarily.
- Treat everyone as if he or she is the most important person in our facility.
- Practice politeness at all times. Rudeness is never acceptable.
- Meet the customer's immediate need or gladly take him or her to someone who will.
- Apologize for problems and inconveniences.
- Thank our customers for choosing Denver Health.
- Exceed our customers' expectations.
- Make appropriate small talk with customers, for example, in elevators or hallways.
- Let customers go first; hold doors open.
- Speak to the customer first. Include the adult child or parent in the conversation when appropriate.
- Make eye contact with the customer when they are speaking to you.
- Recognize that our customers have a sense of urgency and show them we value their time. Customers are not an interruption of our work; they are our reason for being here.

## **SENSE OF OWNERSHIP**

Every Denver Health Employee must feel a sense of ownership toward his or her job. By this we mean taking pride in what we do, feeling responsible for the outcomes of our efforts, and recognizing our work reflects ourselves.

### **Take pride in this organization as if you owned it.**

- Be sure you know and understand the responsibilities of your job. Take charge of and accept these responsibilities.

\* \* \*

- Strive to do the job right the first time. Focus on customers' needs.
- Do not say, "it's not my job." If you are unable to meet a request, be responsible for finding someone who can.
- Perform your work in a timely manner. Meet customers' need as soon as possible.

\* \* \*

- Conduct yourself as a professional.

- Live the values of this organization.

\* \* \*

## **COMMUNICATION**

The goal of communication is understanding. We must be committed to listening attentively to our customers in order to fully understand their needs. Close attention must be given to both verbal and nonverbal message. Our message to customers should be delivered with courtesy, clarity and care. We must avoid confusing customers and speak in terms they can easily understand.

## **GREETINGS AND INTRODUCTIONS**

- Make eye contact with the customer or family member while you are speaking.
- Greet every customer with a warm and friendly smile.
- Introduce yourself clearly and promptly by stating your name, title and your role in the customer's care; make sure your ID badge is visible.
- Address a customer by his/her social title (Mr., Mrs., Ms., Sr., Sra.) and last name unless they tell you otherwise. Customers love to hear the sound of their name.
- Use "please" and "thank you," "sir and ma'am" in all conversations when appropriate.
- Listen to your customer's concerns in ways that show them you care.
- A customer should never be addressed as Honey, Sweetie, etc.

## **CUSTOMER INFORMATION AND EDUCATION**

\* \* \*

- Speak with customers whenever possible. After you explain something or conclude a conversation ask
  - How was your service?
  - Did you find everything okay?
  - Do you understand what I told you?
  - Do you have any additional questions?
  - Is there anything else I can help you with?

\* \* \*

## CUSTOMER ACKNOWLEDGMENT & WAITING

At Denver Health, we recognize that our customers' time is valuable. We strive to provide our customers with prompt service by acknowledging them, keeping them informed of delays, and making them comfortable while they wait.

- Promptly welcome customers in a friendly manner, smiling warmly, and introducing yourself. Don't allow anyone to feel ignored. Recognize that the customer is sick or worried and every minute seems like an hour.
- Acknowledge the customers' presence. Look up from your work and make eye contact.
- Greet and comfort customers first. Do not make them wait, even if you are busy.

\* \* \*

- Provide a comfortable atmosphere for waiting customers.

\* \* \*

- Offer refreshments and reading materials to waiting family members.
- Customers' families are as important as our customers. Update family members periodically while a customer is undergoing a procedure.
- Always thank customers for waiting and apologize for delays and inconveniences.

38. The position responsibilities and performance expectations for the Advanced Registered Nurse position provides, in relevant part:

### Essential Job Responsibilities and Competencies:

1. Promotes positive customer relations dealings with patients, visitors, and other employees. Competency at this specific essential responsibility shall be demonstrated by:

\* \* \*

Treats all customer and co-workers with courtesy, dignity and respect; consistently displays courteous and respectful verbal and non-verbal communication with customers and co-workers.

(Exhibit 6, p. 4, Exhibit 7, p. 4)

39. In February 2001, Appellant was rated as "needing improvement" for this competency. The comments read:

Frequent problems observed/reported with Linda being uncommunicative or non-responsive when in charge.

(Exhibit 6, p. 4)

40. In August 2001, Appellant's rating for this competency was changed to "pass." The following comment was made:

Linda has displayed a positive improvement towards teamwork with staff.

(Exhibit 7, p. 4)

41. Another comment made in the August 2001 performance evaluation is:

Linda has been perceived as being negative at times but there has been a great deal of improvement observed by the staff that Linda is a positive influence for DHMC.

(*ibid.*)

42. Appellant received a verbal reprimand for excessive use of sick leave on February 5, 1999. (Exhibit 17) She received a written reprimand for excessive use of sick leave on February 9, 2001. (Exhibit 16) She received a written reprimand for willful neglect of duty on March 18, 2002. (Exhibit 15)

43. Appellant was provided with notice of the contemplation of disciplinary action on April 23, 2002. (Exhibit 3)

44. The pre-disciplinary meeting was held on April 30. Appellant, her sister, Tom Drury, Chief Nursing Officer, Frances Duran, Nursing Operation Manager, and Ms. Evans were present. (Exhibit 2, p. 2)

45. After Appellant had the opportunity to respond to the information contained in the notice of contemplation of discipline at the predisciplinary meeting, it was determined that Appellant had violated several provisions of the CSR, including §§16-50 A. 1), 7), and 20) and 16-51 A. 2), 4), 6), 10) and 11). She was suspended for forty hours effective May 13, 2002, through May 17, 2002. Notice of Suspension was served upon Appellant on May 7, 2002. (Exhibit 2)

46. Appellant filed her notice appeal with the Hearing Office on May 14, 2002.

## DISCUSSION AND CONCLUSIONS OF LAW

### *Applicable Rules and Statutes*

CSR Rule 15 is the Code of Conduct for employees in the Career Service. CSR §15-106, Retaliation Prohibited, provides:

Retaliation against employees for reporting unlawful harassment or discrimination or assisting the City in the investigation of any complaint is against the law and will not be permitted. Retaliation can include, but is not limited to, such acts as refusing to recommend an employee for a benefit for which he or she qualifies, spreading rumors about the employee, encouraging hostility from co-workers and escalating the harassment. Any employee engaging in retaliation may be subject to corrective action, up to and including dismissal.

CSR Rule 16 governs discipline. CSR §16-10 sets out the purpose of the Rule:

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.

The disciplinary action taken must be consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

CSR §16-20, Progressive Discipline, provides in relevant part:

1) In order of increasing severity, the disciplinary actions which an appointing authority or designee may take against an employee for violation of career service rules, the Charter of the City and County of Denver, or the Revised Municipal Code of the City and County of Denver include:

a) Verbal reprimand, which must be accompanied by a notation in the supervisor's file and the agency file on

the employee;

- b) Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority;
  - c) Suspension without pay, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority;
  - d) Involuntary demotion, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority; and
  - e) Dismissal, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority.
- 2) Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed.

CSR §16-50, Discipline and Termination, provides, in relevant part:

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.
- 7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work, which the employee is capable of performing.
- 20) Conduct not specifically identified herein may also be cause for dismissal.

CSR §16-51, Causes for Progressive Discipline, provides, in relevant part:

A. 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.
- 4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.
- 6) Careless in performance of duties and responsibilities.
- 10) Failure to comply with the instructions of any authorized supervisor.
- 11) Conduct not specifically identified herein may be cause for progressive discipline.

CSR §19-10 covers actions subject to appeal. It provides in relevant part:

§19-10 Actions Subject to Appeal

The following administrative actions relating to personnel matters shall be subject to appeal:

- 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 Ordinance relating to the Career Service, or the Personnel Rules.

## Analysis

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined by the Courts to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

Because this is an appeal of a disciplinary action (forty-hour suspension), the Hospital has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances.

Appellant has been charged with violating several provisions of CSR Rule 16. The first of these, and perhaps the most serious allegation, is she violated CSR §16-50-A. 1), "gross negligence or willful neglect of duty."

Because none of these terms is defined in the CSR, the Hearing Officer must look elsewhere for their definitions. They are terms well-defined in the law. Negligence does not require intent. It is commonly defined as the failure to use reasonable care or a failure to act in a reasonably prudent manner under the circumstances. *Lavine v. Clear Creek Skiing Corp.*, 557 F.2d730 (10<sup>th</sup> Cir. 1977); *Metropolitan Gas Repair Service, Inc. v. Kulik*, 621 P.2d 313 (Colo. 1980); *Rice v. Eriksen*, 476 P.2d 579 (Colo. App. 1970). Gross negligence involves a higher form of culpability than mere negligence. "Gross" in this context means flagrant or beyond all allowance, *Lee v. State Board of Dental Examiners*, 654 P.2d 839 (Colo. 1982), or showing an utter lack of responsibility. *People v. Blewitt*, 192 Colo. 483, 563 P.2d 1 (1977). Willful neglect of duty transcends any form of negligence and involves conscious or deliberate acts. See *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 125 (1976); *Drake v. Albeke*, 188 Colo. 14, 532 P.2d 225 (1975).

"Gross" has been defined as "immediately obvious" or "glaringly noticeable usually because of inexcusable badness or objectionableness."<sup>1</sup> *Black's* defines it as"

[G]reat; culpable. General absolute; not to be excused; flagrant; shameful; as a gross dereliction of duty; a gross injustice; gross carelessness.<sup>2</sup>

"Gross negligence" is defined by *Black's* as:

The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. "Gross

<sup>1</sup> *Miriam-Webster's Collegiate Dictionary*, 10<sup>th</sup> Ed., 1993

<sup>2</sup> *Black's Law Dictionary*, 4<sup>th</sup> Ed., 1951

negligence is substantially higher in magnitude than simple inadvertence, but falls short of intentional wrong." (Cite omitted)<sup>3</sup>

In other words, "gross negligence" does not require that the Hospital show that Appellant intentionally acted in a wrongful manner, just that she performed her work in a manner that was more than careless or inadvertent and that the failure to perform the work was obviously unreasonable or inappropriate.

On the other hand, "willful neglect" implies that the wrongful conduct was intentional or conscious, not merely negligent. "Willful" is generally defined as "obstinately and often perversely self-willed; done deliberately."<sup>4</sup>

*Black's* defines "willful" as:

Proceeding from a conscious motion of the will; voluntary. (Cite omitted)...Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary...A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. (Cite omitted.)<sup>5</sup>

Appellant was also charged with violating a related provision, CSR §16-51 A. 6), "carelessness in performance of duties and responsibilities." This provision is distinguishable from CSR §16-50 A. 1) in that it does not require either the reckless disregard of the consequences or the intentional performance failures that are necessary to establish either "gross negligence" or "willful neglect." It merely requires that the alleged conduct be heedless or unmindful.

The Hearing Officer has considered the testimony offered during the hearing. Based upon all the evidence, the Hearing Officer concludes that Appellant's misconduct, while rude and inappropriate, does not rise to the level of gross negligence or willful neglect of her duties necessary to establish a violation of CSR §16-50 A. 1). However, her treatment of Mr. Esquivel and his sister-in-law during her conversations with Mr. Esquivel was heedless and unmindful. The violation of CSR §16-51 A. 6) has been established by a preponderance of the evidence.

Appellant is charged with violating CSR §16-50 A. 7), failure to comply with the orders of her authorized supervisor and refusing to do assigned work which she is capable of performing. There is no evidence that Appellant failed to comply with the orders of her authorized supervisor (Ms. Evans) or refused to do work which she was capable of performing. Appellant followed Ms. Evans' instructions that she move Ms. Esquivel to a private room. That fact that she did not act with courtesy

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<sup>3</sup> *ibid.*

<sup>4</sup> *Miriam-Webster's, op cit.*

<sup>5</sup> *Black's, op cit.*

towards Mr. Esquivel and his family, thereby escalating the problem rather than diffusing it, is not the equivalent of failure to perform her job or refusing an order by her supervisor. The violation of CSR §16-50 A. 7) is dismissed.

Appellant is also charged with a violation of CSR §16-51 A. 10), failure to comply with the instructions of an authorized supervisor. Again, Appellant complied with Ms. Evans' instructions to provide a private room to Ms. Esquivel. The fact that she made her displeasure at this action known to Mr. Esquivel does not mean that she was not complying with instructions. This allegation is also dismissed.

Appellant is charged with violating CSR 16-51 A. 2), the failure to meet established standards of performance. This provision covers performance deficiencies that can be measured by either qualitative or quantitative standards, such as those one would find in a performance evaluation, in a classification description, or in an agency or division's published policy and procedures.<sup>6</sup>

The Hospital established that Appellant's conduct towards Mr. Esquivel and his family did not meet the established standards of performance as set out both in Appellant's performance evaluation document or in the Hospital's policies and procedures. Appellant's conduct towards the Esquivel family was, to put it simply, discourteous. This conduct violates the Hospital value statement that "We promise to treat patients, visitors, and each other with courtesy, dignity, and respect" (Exhibit 14, p. 4) and the performance standard that Appellant treat all customers with courtesy, dignity and respect in both verbal and non-verbal communications. (See, Exhibit 6, p. 4)

The same discourteous conduct that establishes the violation of CSR §16-51 A. 2) also establishes the violation of CSR §16-51 A. 4), failure to maintain a satisfactory working relationship with, among others, the public.

The violations under CSR §§16-50 A. 20) and 16-51 A. 11) are dismissed. These provisions are meant to include the rare instances of misconduct by an employee that require either termination or progressive discipline but the nature of which is not covered by an otherwise enumerated subsection of CSR §§16-50 A. or 16-51 A. In this case, Appellant's misconduct falls under specific provisions of CSR §16-51 A. The catchall provisions are dismissed.

The last issue before the Hearing Officer is the question of the level of discipline to be imposed for Appellant's violations of CSR §§16-51 A. 2, 4) and 6).

Appellant, through counsel, argued that Appellant's conduct was not rude or discourteous – that she was merely short or curt. The Hearing Officer finds that this is a distinction without a difference. It is abundantly clear that Appellant was, as Mr. Esquivel stated, either having a bad day or just plain rude. But even if Appellant

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<sup>6</sup> In this case, established performance standards might also have been covered by the provisions of the Nurse Practice Act, CRS §12-38-101, *et seq.*

was having a bad day, or that it was the end of the shift so she wanted to get work completed before she went home for the day, or Mr. Esquivel was already upset when she came into the room, none of these excuses justify her conduct. Appellant is an experienced nurse who should know how to act appropriately with distraught family members, including those who have not been able to locate their family member for six or more hours. She should know that not introducing herself or asking how she could help, speaking in an angry tone, having her hands on her hips, rolling her eyes and refusing to address an adult directly are inappropriate behaviors for any nurse, no less one designated as an "advanced R.N."

This minimization of her responsibility and shifting of the blame to others, including Mr. Esquivel, confirms that a reprimand is not appropriate discipline. No matter how upset Mr. Esquivel was, Appellant had a professional duty to ease the situation and make sure that Mr. Esquivel and his family were handled with care. Instead, she chose to handle them with a manner that was truly outrageous.

This is not the first time Appellant has been discourteous to others in the work environment. She received a "needs improvement" in this area in February 2001. She is unable to claim that she did not have any warning that her manner is sometimes inappropriate.

Appellant has a disciplinary history, including one verbal and two written reprimands. Progressive discipline is called for.

Given both her history and her minimization of her responsibility and attempt to blame others, including the understandably distraught husband, the Hearing Officer finds that the forty-hour suspension imposed by the Hospital is appropriate discipline for her misconduct on March 14, 2002.

### ORDER

Therefore, for the foregoing reasons, the Hearing Officer MODIFIES the disciplinary action as follows: the Hospital's determination that Appellant violated CSR §§16-51 A. 2), 4) and 6) is SUSTAINED; the Hospital's determination that Appellant violated CSR §§16-50 A. 1), 7) and 20) and 16-51 A. 10) and 11) is DISMISSED. The forty-hour suspension is SUSTAINED and the request to recover back pay and benefits is DENIED. This Appeal is DISMISSED with prejudice.

Dated this 15<sup>th</sup> day of November 2002.



Robin R. Rossenfeld  
Hearing Officer for the  
Career Service Board