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

Appeal Nos. 33-08 and 34-08

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

GREG SAWYER and BECKY SPROUL,

Appellants/Petitioners,

vs.

DENVER HEALTH AND HOSPITAL AUTHORITY, and the City and County of Denver, a municipal corporation,

Agency/Respondent.

This matter is before the Career Service Board on Appellants' Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Decision of the Hearing Officer, dated January 27, 2009, on the grounds outlined below.

I. FACTUAL BACKGROUND

Appellants are paramedics who were terminated from their employment with Denver Health and Hospital Authority (Denver Health) and appealed their termination to the career service hearings office.

In late 2005, Denver Health decided to stop providing paramedic coverage for special events at the Colorado Convention Center (CCC), Pepsi Center, and other Denver venues, due to problems with customer service, staffing and the extensive amount of overtime pay required to service special events. Appellants saw an opportunity to fill the void created by the Denver Health cutbacks. They decided to form a new company called Elite Medical Specialists (EMS) to provide paramedic services in special event venues that Denver Health did not wish to cover. Appellants invested money in the new company and, through the date of the career service hearing, continued to perform services for EMS as managing partners. Each performed various business activities on behalf of the company, including performing paramedic services themselves, soliciting other paramedics to work for EMS, scheduling work assignments

for special events, soliciting new business clients, and signing contract on behalf of EMS.

In January 2006, Chief Operating Officer Stephanie Thomas was advised about Appellants' new business venture. Ms. Thomas expressed concern that Appellants' activities for EMS could become a conflict of interest at some point in the future when Denver Health re-entered the special events market. Despite these concerns, Denver Health did not prohibit Appellants from starting their business venture.

Several months later, EMS entered into a one year contract with CCC. During the same time period, Appellants and DH continued to meet and discuss EMS activities. After Ms. Thomas found out about the CCC contract, she sent Appellants a letter stating that their activities were in conflict with their duties to Denver Health. At first, Ms. Thomas ordered Appellants to sever their ties with EMS if they wanted to remain Denver Health employees. However, after additional meetings and communications with Appellants, Ms. Thomas ordered Appellants to terminate the CCC contract at the end of the contract year – February 28, 2007 – and to not seek any further contracts in the city and county of Denver without prior approval from her or Dr. Gabow. The EMS-CCC contract renewed automatically in February 2007; Appellants took no steps to terminate the contract as Ms. Thomas had ordered. In addition, Appellants continued to solicit paramedic services contracts in the city and county of Denver without their employer's approval.

In January 2008, Denver Health was awarded a contract with CCC to provide paramedic coverage during the Democratic National Convention (DNC). During the bidding process for this contract, Denver Health learned that Appellants had not ended their one-year contract with CCC as Thomas had ordered. Although Denver Health was awarded the DNC contract, it was required to work cooperatively with EMS in providing paramedic coverage, including a requirement that Denver Health use only EMS personnel in scheduling coverage during the DNC. In addition, Denver Health was forced to share its pricing and scheduling information with Appellants as representatives of EMS – information they were not entitled to receive as Denver Health employees. The following month, Denver Health started the career service pre-disciplinary process and, following a pre-disciplinary meeting, Appellants were terminated from employment on April 14, 2008.

II. FINDINGS

The Hearing Officer sustained three categories of rule violations against Appellants: 1) CSR 16-60 J. (failing to comply with the lawful orders of an authorized supervisor); 2) CSR 16-60 L. (failing to observe agency regulations); and CSR 16-60 Y. (conduct which violated the career service rules, city charter, the Denver Revised Municipal Code (DRMC), executive orders or any other applicable legal authority).

As a starting point, we believe it would be helpful to clarify the legal standard required for an appeal to the Board. Contrary to Appellants' assertion, the Agency does not bear the burden of proof on appeal. While the Agency was required to prove alleged rule violations by a preponderance of the evidence before the Hearing Officer, on appeal, Appellants bear the burden of demonstrating that the Hearing Officer's decision should be reversed, based upon one of the grounds enumerated in CSR 19-61. With this in mind, we note that Appellants present no legal arguments regarding the Hearing Officer's findings on CSR 16-60 J. (failure to comply with the lawful orders of an authorized supervisor) and therefore they have waived Board review of this rule violation.

Instead, Appellants try to draw a distinction between employment and ownership of a business for purposes of CSR 16-60 L. and CSR 16-60 Y. As we understand Appellant's argument, they believe they were terminated not because of any outside employment activities[1], but because of their ownership of EMS. This distinction, however, is both artificial and unconvincing in the context of this case. Based on the evidence in the record, Appellants were not simply passive owners whose only involvement was the investment of money in a limited liability corporation. They were also employed by and managing officers of the corporation, performing a variety of business activities on its behalf, including the solicitation of paramedics (some of whom were employed by Denver Health) to work for EMS, scheduling paramedics to perform contract services which, at times, conflicted with their schedules at Denver Health, performing paramedic duties themselves for EMS, soliciting new business clients, and signing contracts on behalf of the corporation. Appellants' outside activities fell squarely within the prohibitions of DHHA policy 4-112 5.g., CSR 15-51 and DRMC § 2-63, which required Denver Health's approval to engage in outside employment and/or business activities, and prohibited them from engaging in outside activities that created an actual or potential conflict of interest with their employer.

Next, Appellants contend that because Denver Health is a government agency, it cannot have a profit motive, and absent such a motive, a conflict of interest could not exist between EMS and Denver Health. This argument, however, taken to its logical conclusion, would mean that the absence of a profit motive would preclude government agencies from maintaining and enforcing any conflict of interest policies, contrary to the express provisions of CSR 15-51 and DRMC § 2-63, and contrary to any legal authority. The record demonstrates that an actual conflict of interest developed with the DNC contract, where Denver Health was required to work cooperatively with EMS and to share pricing information with Appellants as representatives of EMS. Additionally, Appellants' hiring of Denver Health paramedics to work for EMS is also contrary to Denver Health's interests as an employer. Denver Health had legitimate concerns that in scheduling conflicts its paramedics would be encouraged to call in sick in order to

[1] Apparently, Denver Health was fairly liberal in allowing its paramedics to "moonlight" by taking outside employment with private paramedic companies without obtaining Denver Health approval.

work for EMS, and that too many hours worked by its paramedics could impair Denver Health's 911 patient care.

Finally, Appellants contend that because Denver Health has not returned to the special events market and does not have specific plans to do so in the foreseeable future, any potential conflict of interest in the future is speculative. This argument, however, misses the mark: the record demonstrates that Appellant's activities on behalf of EMS prior to the date of the hearing created actual and potential conflicts of interests at a time when Denver Health was not seeking its own special events contracts. Thus, Denver Health's intent to reenter the market in the future is not relevant to the conflict of interest inquiry.

III. ORDER

IT IS THERFORE ORDERED that the Hearing Officer's Decision of January 27, 2009, is **AFFIRMED.**

SO ORDERED by the Board on August 20, 2009, and documented this 10th day of September, 2009.

BY THE BOARD:

Luis Toro, Co-Chair

Board Members Concurring:

Tom Bonner
Felicity O'Herron
Patti Klinge

Board Member Nita Henry dissents from the Board's decision on the grounds that Denver Health was aware of Appellants' intention to create EMS but took no steps to prohibit them from engaging in outside business activities, and therefore, gave Appellants permission to compete in the special events market.