

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

Appeal No. 239-00

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

MARJY WELLS, Appellant,

Agency: DENVER DEPARTMENT OF HUMAN SERVICES, AND THE CITY AND
COUNTY OF DENVER, a municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, Marjy Wells shall be referred to as "Appellant." The Department of Human Services shall be referred to as the "Department." The City and County of Denver shall be referred to as the "City". 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 January 12 and February 1, 2001, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Richards Sanchez, AFSCME, on January 12 and Cheryl Hutchinson, AFSCME, on February 1. Neils Loeschell, Esq., Assistant City Attorney, represented the Department and City, with Judy Lujan appearing as the 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 Department:

S. Lorraine Adams, Judy Lujan, Dr. Columbus Veasey, Jr., Erin Johnson,
Jude Liguori, Paul Sienkiewicz

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

Appellant, Connie Vigil, Shana Ritz, Larry Sinnett, Gina Gonzales, Judy Lujan

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

Exhibits 1, 2, 3, 4, 5, 6, 8 (page 10), 10, 11, 12

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, 3, 4, 5, 6, 10, 11,12

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 ten-day suspension for alleged violations of CSR §§16-50 A. 1) and 20) and 16-51 A. 2), 6) and 11) and is requesting return of the lost pay and benefits.

ISSUES ON APPEAL

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

Whether the Agency's action in suspending Appellant for ten days for the alleged violations of CSR §§16-50 A. 1) and 20) and 16-51 A. 2), 6) and 11) was arbitrary and capricious or otherwise contrary to rule or law?

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 has been employed by the Department of Human Services for approximately fifteen and a half years. She is classified as a Social Case Worker, which is an over-time exempt position. During the relevant period she was assigned to the Children's Protective Services Division.

2. When the Department became a part of the CSA system in 1999, Appellant was classified as a Social Case Worker while others in her division, some of whom were less senior in year of employment than she, were given the Senior Social Case Worker classification. Appellant was not happy about this and unsuccessfully attempted to be promoted or reallocated to Senior Social Case Worker status during the spring of 2000.

3. Appellant was the case worker responsible for Phillip D.¹ Phillip is a student assigned to the physically disabled program at Sabin Elementary School. He suffers from ADHD and spina bifida, which results in impaired mobility and bowel and urinary functions. For instance, Phillip requires catheterization every three hours. The problem is

¹ In the interest of privacy, all the children will be referred to by their first names and last initial's only.

compounded because Phillip is allergic to latex and requires non-latex catheters and gloves. Phillip lives with his grandmother as his legal guardian. Phillip's grandmother has had problems meeting Phillip's physical needs at school. Children's Hospital sends the necessary equipment to Phillip's home and his grandmother is supposed to send the equipment on to school, but she sometimes fails to do so. It takes about one month to get the supplies in, so they must be ordered in advance.

4. S. Lorraine Adams, the school nurse at Sabin, testified that she had problems getting the grandmother to cooperate and that Appellant was supposed to be a support person for ensuring Phillip's needs were handled. During the 1999-2000 school year, she left three telephone messages with Appellant about the problem. Those messages were not returned. Ms. Adams then sent Appellant a memo in order to get a response from her. (Exhibit 8, p. 10) There was at least one instance when Phillip's supplies did not arrive at the school in a timely manner, causing Phillip to become soiled. Ms. Adams blamed Appellant, at least in part, for this failure.

5. Since a new social worker was assigned to Phillip in September 2000, the school has not run out of supplies for him.

6. Phillip needed an evaluation for his emotional problems. The evaluation was to be done at Children's Hospital. Ms. Adams contacted Appellant at least three times over a one and a half year period to have her arrange for the test. Because Phillip was not properly evaluated for ADHD in a timely manner, he had to repeat the third grade.

7. Appellant testified that Phillip's case was actually closed during the relevant period and that she was handling the matter as a "favor." Phillip had been in foster care at one time and he was very difficult for the foster family to care for. He was very attached to his family. In November 1997 he was placed with his grandmother. She stated that the school was pressuring her to remove Phillip from his grandmother's care, but that the grandmother wanted to take care of him because she could provide emotion support and be nurturing towards him. Appellant admitted that the 1999 and 2000 school years had been difficult for Phillip and that the school personnel became more and more concerned about him. Because the grandmother had legal custody, the Department did not have legal authority to do anything. Appellant admitted that she could have reopened the case, but she felt that the grandmother would have given up completely on Phillip had she done so. Appellant testified that Ms. Adams had a release to go to Children's Hospital directly and get Phillip's supplies without her intervention. She testified that she discussed Phillip's ADHD problem with both Ms. Adams and Phillip's grandmother. According to Appellant, the grandmother was concerned about putting Phillip on medication (Ritalin) and was not cooperative about having him tested. It took two years of negotiating with the grandmother to get Phillip into a medical evaluation. She finally talked the grandmother into letting her take Phillip into Children's Hospital herself for his evaluation. The grandmother did not want Phillip on the Ritalin because he would hide in under his tongue and spit it out. Appellant testified that she tried to find other programs for Phillip that Medicaid would pay for, but that there weren't any available. She felt that Phillip's grandmother intimidated Ms. Adams so Ms. Adams asked Appellant to call her to remind her to send the diapers and non-latex gloves. Appellant brought the gloves and diapers to school herself. She explained that it was difficult to find the right sized diapers for Phillip. Appellant also testified that when the new school year started this past fall, she called Ms. Adams and decided to make weekly contact. One week later she was put on leave and was never able to follow through on that decision. Appellant admitted feeling frustrated. She claimed to

have kept Judy Lujan, her supervisor, advised of the case at every case review meeting even though this was a closed case. She also admitted that she discussed her ambivalence over removing Phillip from his grandmother's care with Ms. Lujan.

8. Ms. Lujan testified that she had talked to Appellant about the problems with Phillip's grandmother in April 2000 after the school conveyed its concerns to her. Ms. Lujan suggested that they work through Medicaid to have Children's Hospital send the supplies directly to the school. She also suggested Appellant purchase the supplies, using petty cash, and then be reimbursed. Appellant took this route in April. Ms. Lujan did not hear anything else about the Phillip matter until September 2000.

9. Erin Johnson, a child placement supervisor at Gateway, worked with Appellant on the Katrina F. and Andrew F. cases. Her first contact with Appellant was in November 1998. According to Ms. Johnson, Katrina, who is now eleven, suffers from spastic quadriplegic cerebral palsy. Katrina was placed into a "medical fragile" group home in December 1998. On December 2, at or about the time of the placement, Katrina's foster parents made a request for a special needs allowance for medical equipment, such as a three-wheeled bicycle, that Medicaid would not cover. Appellant told the foster parents she would look into it. Nothing appeared to be done for over a year. On February 29, 2000, Ms. Johnson left a message for Appellant in which she again requested she complete the paperwork for the special needs allowance. The matter was discussed again at a staffing on April 11, 2000. Ms. Johnson suggested that Appellant meet with Roberta Long-Twyman if she needed help with the paperwork. The matter was addressed again on July 18, 2000, at which time Appellant stated she needed a letter of medical necessity. The letter was faxed to Appellant on July 25, although it appears that Appellant did not receive it. Appellant told Ms. Johnson that she had not received the letter during the August 29 staffing. On September 6, 2000, Melanie Kennedy, Katrina's foster mother, faxed the letter to Appellant.

10. When the fax was received at the Department on September 6, 2000, Judy Lujan saw it and realized that there was an outstanding request for a special needs allowance for Katrina that had not been handled for almost two years. According to Ms. Lujan, her concern led to her initial investigation of Appellant's work, Appellant being placed on investigatory leave, and to Appellant's eventual discipline.

11. The special needs allowance has now been obtained for Katrina covering the period from September 2000 through the present. There is no procedure available to receive the special needs allowance prior to September 2000.

12. Appellant testified that she worked very closely with Ms. Johnson and the Kennedys with regard to Katrina. She testified that she did not recall Ms. Johnson bringing up the fact that Katrina did not receive a special needs allowance until May 2000. According to Appellant, Ms. Kennedy has eight special needs children in her home and that she knows how to get things for special needs children. She also testified that, after Ms. Johnson raised the issue in May 2000, Appellant agreed to talk with Ms. Long-Twyman how to obtain the funding. She testified that Ms. Kennedy told her that her daughter was getting married in June and that she wanted to put the matter "on the back burner" until after the wedding. Appellant stated she did not get the July 25 fax from Ms. Kennedy, so she does not know if it ever came in. During the August 29 staffing at the Kennedy home, Mr. Kennedy asked about the fax. She told him she had not received it. He promised to give her a copy before she left the meeting, but he forgot to do so. He then faxed it to the

office. Appellant had gone directly to a foster care review meeting after she met with the Kennedys so she forgot about the fax. On September 6, she received a call from Ms. Kennedy about the fax. Appellant went to the fax machine, but it was not there. Ms. Kennedy refaxed the letter. Appellant was doing the paperwork for the special needs funding request when Ms. Lujan came into her office and asked about request. Appellant accepted responsibility for the oversight on her part, but denied that it was an issue before July 2000. She felt that the Kennedys and Ms. Johnson were not that concerned about the special needs allowance and that it was only a very small part of the case, considering everything else she had to take care of.

13. Appellant stated that she "is only human and forgets things." She testified that she often tells people that, if she does not get to something immediately, they should call her and remind her to handle it and then she would.

14 Ms. Johnson also testified that she was concerned about the length of time it took Appellant to get an appropriate placement for Andrew F., Katrina's brother. She admitted that Appellant was eventually able to find a good placement for him.

15. Appellant admitted that she overlooked getting services authorized for Andrew F. She accepted partial responsibility for the problem, but also stated that the Department was responsible because it did not provide help for overworked social workers.

16. Judy Lujan was Appellant's supervisor from November 16, 1999 through September 2000 when Appellant was placed on investigatory leave. Ms. Lujan testified that Appellant was responsible for maintaining case files, court reports, attending hearings, working with families, working with the courts as the "guardian" for children under the Department's care. According to Ms. Lujan, Appellant had seventeen cases in November 1999. In January 2000, this number was reduced to fourteen cases; three cases were turned into "companion cases," which were assigned to another social worker. Ms. Lujan said that having two case workers carrying a case is unusual. Ms. Lujan testified that Appellant did not show up for or cancelled supervision meetings. Ms. Lujan admitted that she occasionally did the same thing. Ms. Lujan testified that, as supervisor, she has to have access to case files in case of an emergency. Appellant kept her files in a locked desk drawer. Ms. Lujan related an incident from December 1999 when Appellant was unavailable during an emergency and Ms. Lujan could not get to file because it was in the locked drawer. Because the file was unavailable, a child was unable to undergo heart surgery when originally scheduled. Ms. Lujan testified that Appellant's files were in great disarray and were not filed according to a set format. According to Ms. Lujan the particular format is taught to all social workers during their initial training and that, when the format is changed, the social workers are provided with new "mock files." Appellant's files were not in order and many of the required documentation, including face-to-face and ROC (report of contact) notes, were not included. These notes are used to track cases, provide synopses, and insure that meetings occur. Court orders need to be documented and tracked in the files so that the identity of the child's guardian can be ascertained in case of an emergency. The court orders were not properly maintained by Appellant. Ms. Lujan offered to help Appellant organize her files or give her the necessary clerical support to do the same. Appellant was taken off rotation (i.e., no new cases were assigned) and three of her cases were made companion cases with another case worker in January 2000 because Appellant was complaining of being overwhelmed and because of the condition of her files. Appellant was the only non-bilingual social worker in the unit. While five to six children per case are usual, Appellant's "child count" was less than those handles by other case workers in the

unit. In other words, she had fewer children per petition than those handles by other case workers. Ms. Lujan testified that she began to get complaints from attorneys, school professionals, therapists and day care centers that Appellant was not returning phone calls from them. Ms. Lujan testified that usually she only needs to tell a case worker "to take care of it" and it is done. Ms. Lujan spent time with Appellant, talking to her about how to handle the problems she was encountering. She spent time from November 1999 through April 2000 trying to work with Appellant on these performance issues. After April she started to document the instances as they occurred. Ms. Lujan wrote to her supervisor, Jude Ligouri, for feedback on how to deal with Appellant's performance issues.

17. The complaints from the outsiders against Appellant were unsolicited by Ms. Lujan.

18 Appellant's June 30, 2000, PEPR was below expectations. She was given ninety days to improve her performance deficiencies.

19. According to Ms. Lujan, Appellant was "disenchanted" with her job. She thought it was not fair that she was employed by the Department for fifteen years and was still only a Social Case Worker. Ms. Lujan told Appellant to take the Senior Social Case Worker test given by the CSA and apply for a promotion. Ms. Lujan testified that she gave Appellant advice on how to take the test. Sometime around April 2000 Appellant took and passed the test. Ms. Lujan testified that she told other supervisors that Appellant should be given the opportunity to interview for a promotion, but the other supervisors did not express an interest in interviewing her. Since no one else would interview Appellant, Ms. Lujan did the interview, along with Ms. Ligouri. According to Ms. Lujan, Appellant did not interview well and was not promoted.

20. When Appellant went out on investigatory leave, Ms. Lujan got a temp to help her organize and review Appellant's files. Ms. Lujan testified that some of Appellant's files could not be found at first. She noted that files should be locatable, kept in an unlocked cabinet or have the removal noted by some type of notation. "Desk cards," which provide basic information and are used when a file can't be located in an emergency, were not updated and accurate. Documents were in piles and not put into the files where they belonged. Ms. Lujan testified that, after she completes all the work needed to bring the files up-to-date, there will be only four active cases; the rest of the cases will closed or transferred because parental rights have been revoked. Ms. Lujan testified that it has taken her several months to review and clean up the files and that she was still in the process of closing files that needed to be closed at the time of this hearing.

21. Appellant admitted that she had a problem keeping her files in proper order, but she always had her files in "almost perfect" order when she had to go in for foster care review. Foster care reviews occur twice a year for each of the ten foster care cases she was handling. Appellant testified that, though Ms. Lujan offered to help her organize her files, she was not actually available. She stated that temps were not useful because the paperwork that had to be reorganized was very cumbersome to go through.

22. According to Appellant, her relationship with Ms. Lujan began to deteriorate in May 2000, which is when Appellant was not promoted to Senior Social Case Worker status. She stated that the interview for the promotion was more a formality than anything else because Ms. Lujan was aware of her ability to work independently, her knowledge of the job, and her ability to go into court on her own. Appellant expected the promotion and

admitted she was very hurt and angry when she did not receive it. In fact she filed a grievance against Ms. Lujan and Ms. Ligouri for not promoting her. After that, Ms. Lujan stopped complimenting her for the good things she did. Appellant also felt that Ms. Lujan was unduly influenced by Ms. Ligouri, who did not want her to have the Senior Social Case Worker title.

23. Appellant testified that she has a very difficult job that requires an immense amount of responsibility. She had to four or five parental right termination cases each year. These cases require working with the City Attorney, talking to witnesses, working with the family for at least a year prior to commencing the termination proceeding, then tracking them for a year and a half before their rights could be terminated, conducting supervised visits so she could testify at the proceedings, and working with the schools, therapists, and foster parents. She would often have to tear her files apart when preparing for a termination, which is the major reason her files were not in order when Ms. Lujan took them over. She also testified that the "missing" file was for a termination she was working on at the time she was put on investigatory leave.

24. Appellant testified that her problems were with a miniscule part of her job responsibility. According to her, her kids were her first priority. She did not feel she was shirking her responsibilities. She did the best she could. It was not hard to overlook a couple of things once in a while, but if she had more support rather than criticism that reduced her to tears, she would have been able to perform her job better.

25. Appellant was placed on investigatory leave on September 11, 2000. She was given a notice of contemplation of disciplinary action that cited her for violations of CSR §§16-50 A. 1), 7) and 20) and 16-51 A. 2), 4), 6), 10, and 11). At that time she was charged with several different matters, only some of which were testified to during the course of this hearing. See Exhibit 2.

26. On September 30, 2000, Appellant was sent another notice, this one rescheduling the disciplinary meeting and amending the original notice to include newly discovered deficiencies uncovered by Ms. Lujan as she reviewed Appellant's files. See Exhibit 3.

27. Dr. Columbus Veasey, Jr., the Director of the Department of Human Services, conducted the *Loudermill* hearing on October 13, 2000. Dr. Veasey conducts the *Loudermill* hearings when there is a possibility of termination. Dr. Veasey had no knowledge of the facts involved until the time of the *Loudermill* hearing. During the *Loudermill* hearing, Appellant admitted to four items cited in the predisciplinary letters and apologized for them. She admitted that her negligence could have harmed the children (Phillip D., Katrina F., and Andrew F.). She also admitted that her files had not been made complete and put into order, as required by Ms. Lujan after Appellant received her below expectations PEPR.

28. After reviewing the documentation and in consideration of Appellant's admissions and her long history with the Department, Dr. Veasey decided to impose a ten-day (eighty hour) suspension for the violations alleged. Dr. Veasey testified that he wanted to make it clear to this long-term employee that, if her performance did not improve, she faced termination. He considered the fact that she had received a below expectations PEPR, but he did not feel she should have been given ninety days to correct her performance deficiencies. For Dr. Veasey, the fact that she had been below expectations

and that she was not improving her job performance by early September was of grave concern to him. Her failures were all potentially dangerous problems; Appellant needed to take immediate, timely action, especially because children were involved. In addition to the suspension, Dr. Veasey transferred her to another unit to give her an opportunity to prove herself with other supervisors, so that there was no longer the excuse of a "personality conflict."

29. Dr. Veasey testified that his decision had nothing to do with Appellant's grievances arising from her request for promotion or reallocation.

30. The notification of disciplinary action was mailed to Appellant on October 23, 2000. She was found to have violated CSR §§16-50 A. 1) and 20) and 16-51 A. 2), 6), and 11). See Exhibit 4. Appellant filed her appeal of her discipline with the CSA Hearing Officer on October 31, 2000.

31. Larry Sinnett, a Program Administrator with the Family and Children's Division, represented Appellant as the AFSCME steward in one of her grievances and has worked with Appellant over the years. He testified that Appellant trained many of the other case workers in her unit and that they, including Ms. Lujan, were promoted over her even though she was more senior. He testified that he believed Ms. Lujan to be biased against Appellant although he admitted she supported Appellant during the one investigation he did of Appellant's work during the past year. He testified that Appellant was being punished for having the courage to stand up for herself. On the other hand, Mr. Sinnett testified that Dr. Veasey was not biased against Appellant nor was he part of any cabal or clique against which Appellant had to fight. According to him, it is almost impossible for a case worker to perform all the duties demanded of him or her. For the child protection case worker, almost all cases are court ordered/monitored, even if they are "voluntary" cases. The case workers have to work with parents placing expectations upon them, foster parents making demands, the State monitoring every case through foster care reviews. There is always a list of things that must be done and that are not yet done. There is a constant juggling act to get as much done as can be done within a sixty hour week.

32. Gina Gonzales, a Senior Social Case Worker, testified that she works forty to seventy hours per week, depending on the situation, and that she is not behind in her work, although she admitted that she may sometimes need to come in on weekends and is sometimes late with court reports or returning phone calls. She testified that she got one case from Appellant when she went out on investigatory leave that needed to be prepared for transfer to adoption and that there had been no documentation done for several months. She testified that the transfer was finally completed as of February 1, 2001, four and a half months after she received the file.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Regulations

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.
- 3) In those cases when the discipline deemed appropriate is suspension without pay of an overtime-exempt employee, the suspension shall be for at least a whole workweek or multiples of whole workweeks.

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.

- 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.
 - 6) Carelessness in performance of duties and responsibilities.
 - 11) conduct not specifically identified herein may be cause for progressive discipline.

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 (ten-day suspension), the Agency has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances.

The first provision with which Appellant has been charged with violating is CSR §16-50-A. 1). "Gross negligence or willful neglect of duty." Neither "willful" nor "gross" are defined in the CSA Rules.

Negligence is a 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 (10th 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."²

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

"Willful" is generally defined as "obstinately and often perversely self-willed; done deliberately."⁴

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.)⁵

The use of these terms in the CSR as a basis for discipline requires the employee to be purposely or willfully performing her duties at an intentionally substandard or inappropriate level. See *In the Matter of the Appeal of Dennis Fresquez*, CSA Appeal No. 154-00. That is the case here.

The credible evidence establishes that Appellant was willfully performing her duties at a substandard level when she failed to apply for special needs funding for Katrina F. within a reasonable period of time after becoming Katrina's case worker. The Hearing Officer believes that Ms. Johnson made the request of Appellant in December 1998 to obtain the funding and that Appellant failed to follow through because, by her own admission, she tends to forget things and needs to be reminded if she does not get to them within a few days. However, the Hearing Officer need not even make this determination on credibility in order to find that Appellant was grossly negligent with regard to her handling of the Katrina F. matter. Appellant is an experienced case worker, having worked for the Department for over fifteen and a half years. According to her, she knows her job well enough that she should be classified as a Senior Social Case Worker. She also claims she has trained many other case workers in the unit, including to Ms. Lujan. The Hearing Officer must, therefore, conclude that Appellant has sufficient experience to know of the existence of special needs funding for children such as Katrina and that she should have started the process when Katrina was assigned to her and not wait until eighteen months later, when she says Ms. Johnson first asked about it, to begin the paperwork. Under either scenario, Appellant has been grossly negligent or willfully neglecting her duty with regard to

² *Miriam-Webster's Collegiate Dictionary*, 10th Ed., 1993

³ *Black's Law Dictionary*, 4th Ed., 1951

⁴ *Miriam-Webster's*, *op cit.*

⁵ *Black's*, *op cit.*

the handling of the Katrina F. matter.

The evidence to support a finding of gross negligence or willful misconduct with regard to Phillip D. is much less clear. Ms. Adams testified Phillip needed a psychological examination for his emotional problems and that it took over a year and a half for the examination to be arranged, resulting in Phillip having to repeat a grade. Appellant testified that Phillip's grandmother was uncooperative about scheduling the examination and that it took all that time to negotiate the appointment with her. Because this was a "closed" case, Appellant did not have the legal authority to force Phillip's grandmother to take him in for the psychological examination. The Hearing Officer finds that both Ms. Adams and Appellant are equally credible about the situation and that the two stories are not internally inconsistent. Since the Department has the burden of proof in this matter, the Hearing Officer must conclude that it has failed to establish that Appellant was grossly negligent or willfully neglected her duty with regard to Phillip's psychological examination.

However, the Department has established by the preponderance of the evidence that Appellant willfully neglected her duty with regard to obtaining Phillip's diapers and non-latex gloves and catheters. Appellant testified that the Phillip D. case was actually closed and that she was assisting Ms. Adams with his grandmother as a favor. However, even if the case was closed, once Appellant agreed to serve as an intermediary with Phillip's grandmother, she had an obligation to perform that function in an appropriate manner. Ms. Adams credibly testified that she called Appellant at least three times to get the medical supplies and that Appellant did not return her phone calls. As a result of the supplies not being delivered to school, Phillip soiled himself. This is a harm to the child Appellant was supposed to be assisting. This failure on the part of Appellant constitutes willful neglect of her duties, a violation of CSR §16-50 A. 1).

While there was some conclusory testimony that Appellant was slow in getting suitable housing for Andrew F., insufficient evidence was produced during the hearing that Appellant was grossly negligent or willfully neglected her duties with regard to him. Therefore, the Hearing Officer is unable to find that Appellant violated CSR §16-50 A. 1) with regard to Andrew F.

Appellant was also charged with violating CSR §16-51-A. 6), carelessness in performance of duties and responsibilities. The evidence that supports the violation of CSR §16-51 A. 1) equally supports this allegation. This provision is sustained.

Appellant has also been charged with violating CSR §16-51 A. 2), the failure to meet established standards of performance. The requirements for this provision are not meant to be identical to the requirements for violations of CSR §16-50 A. 1). This provision covers performance deficiencies that can be measured upon either qualitative or quantitative standards, such as those one finds in a PEPR.

At the time Appellant was placed on investigatory leave, she was a little over a month into a ninety-day corrective action for her "below expectations" PEPR. It was known to Ms. Lujan and Ms. Ligouri that Appellant's work had been deficient during the previous year, even if they were not aware of the full extent of the problem. If Appellant's performance had not improved after ninety days from the corrective action, the Department could then have charged her with violating CSR §16-51 A. 2). The Department did not produce any evidence that the performance deficiencies it was relying on to make out this allegation arose after the corrective action was issued. The only evidence of conduct after

the corrective action was issued concerns the July 25 fax from Mr. Kennedy, but the Department produced insufficient evidence that Appellant had received and then ignored the fax. It is equally possible that there was a problem with the fax transmission or that the fax was never delivered to Appellant. Therefore, there is insufficient evidence of new types of performance deficiencies that arose after Appellant was placed on the ninety-day corrective action for her below expectations PEPR.

While Dr. Veasey testified that he found the fact that she was under this corrective action to be irrelevant since her performance had not improved yet, the Hearing Officer concludes differently. Appellant should have been given the full ninety days to improve her performance. Otherwise, the Department is, in effect, punishing Appellant twice for the same conduct, which is a violation of due process. Therefore, the conclusion that Appellant was not meeting performance standards in September 2000 was premature and must be dismissed.

The violations under the "catch-all provisions, CSR §§16-50 A. 20 and 16-51 A. 11, are dismissed. Appellant's misconduct is covered by a specific provision of CSR §§16-50 A. and 16-51 A. These catchall provisions, which exist for the rare instances when an employee engages in an activity that that CSA Board did not think of when listing specific misconduct that might constitute reasonable grounds for dismissal or progressive discipline but which might justify such action by an agency. That is not the issue here. The grounds for Appellant's discipline rest in a specifically defined provision of the CSR.

The last issue before the Hearing Officer is the appropriate discipline for Appellant's violations of the CSR. Dr. Veasey imposed a ten-day suspension for Appellant's misconduct. The Hearing Officer agrees this is appropriate.

Other than the corrective action for the below expectations PEPR, there was no evidence of a prior disciplinary history produced by the Department. The level of discipline imposed, therefore, is based upon the severity of the misconduct proven during the hearing.

Appellant's misconduct was severe. It could have endangered the lives of at least three children. It certainly affected their quality of life for one and a half to two years. The Department proved that Appellant violated CSR §§16-50 A. 1) and 16-51 A. 6) with regard to Phillip D. and Katrina F, the most serious of all the charges. The violation of CSR §16-50 A. 1) alone is sufficient to support discipline up through and including termination. The Hearing Officer, who has the power to affirm, modify or reverse the discipline imposed, cannot impose a more severe discipline upon the Appellant than the Department. To impose a more severe discipline, whether it is a longer suspension or termination, is not an option for the Hearing Officer, even if she believes a longer suspension would have been justified.

The Hearing Officer finds that suspension is appropriate in this instance. Appellant's failures with regard to Phillip D. and Katrina F. were long term, not just one instance. Every time she said she might have done something wrong in the handling of these matters, Appellant added a "but" - but someone else was at least as responsible as she, if not more so. Appellant's excuses that she was over-burdened or upset that she was not promoted or that she was only human and forgot things or that Phillip's case was closed and Ms. Adams was intimidated by Phillip's grandmother or that Ms. Johnson and Ms. Kennedy did not seem that concerned about Katrina' allowance (including the fact that

Ms. Kennedy told Appellant in May 2000 that, because her daughter was getting married in June that she should just wait until after the wedding) indicate to the Hearing Officer that Appellant just does not accept her responsibility for her failures, no matter how much she apologizes.

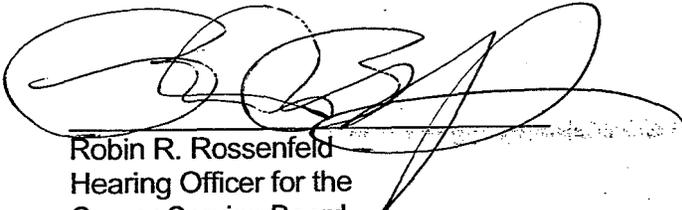
Appellant's other defense is that she is the victim of a cabal or clique, that she had more work than other case workers and not given respect from Ms. Lujan, whom Appellant claimed to have trained. The Hearing Officer finds no evidence that her discipline is the result of the so-called cabal. Larry Sinnett, who was Appellant's witness on this issue, admitted that Dr. Veasey, the appointing authority, was not a member of the cabal or biased against Appellant. Mr. Sinnett also testified that Ms. Lujan supported Appellant during the one investigation he did of Appellant's work during the past year. Gina Gonzales, another of Appellant's witnesses, testified that she often has to work up to seventy hours per week in order to keep up with her work. Ms. Lujan testified that Appellant had fewer cases and fewer children than other members of the unit and that she had been taken off rotation in January 2000 in order to give her chance to get her cases under control. While Ms. Sinnett's conclusion that it is almost impossible for a case worker to perform all the duties demanded of him or her might be true, there is no evidence that Appellant's work load was more onerous than that of the others in her unit.

Appellant is an overtime-exempt employee. Pursuant to CSR §16-20 3), suspensions for exempt employees must be for at least a whole workweek or in multiples of whole workweeks. Therefore, the Hearing Officer, having found that the evidence adduced at the hearing supports a suspension, is limited to finding that she be suspended to either five or ten days. Given the severity of the Appellant's misconduct, including the number of cases involved and the extended period of time involved, Appellant's ten-day suspension is more than supported by the evidence in the record.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer MODIFIES the disciplinary action as follows: the Department's determination that Appellant violated CSR §§16-50 A. 1) and 16-51 A. 6) is SUSTAINED; the Department's determination that Appellant violated CSR §§16-50 A. 20) and 16-51 A. 2) and 11) is DISMISSED. The ten-day suspension is SUSTAINED and the request to recover ten days back pay and benefits is DENIED.

Dated this 20th day of April 2001.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board