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

Appeal No. 179-02

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

PAT ANDER, Appellant,

v.

Agency: Denver Health and Hospital Authority.

INTRODUCTION

For purposes of these Findings and Order, Pat Ander shall be referred to as "Appellant." Denver Health and Hospital Authority as "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 December 11, 2002, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Stuart Barr, Esq. The Hospital was represented by Gary M. Jackson, Esq., with Dr. Ulysses G. Mann serving 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 Hospital:

Katherine A. Doll, Dr. Ulysses G. Mann, Susan Lee Holligan, Rachel Hannah Ruby, MSN, MPH (by deposition)

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

Robin Meadows, Mattie Louise Simon, RN, Appellant

Offers of proof were made by Appellant for the following witnesses:

Dr. Leila Lee, Diana Price, Tatiana Plotkin

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

Exhibits 1 - 6, 9 - 13

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

Exhibits A - H

The following exhibits were admitted into evidence by stipulation:

Exhibits 1 - 6, 9, 10, 13, A - H

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 five-day disciplinary suspension from the Hospital for alleged violations of CSR §§16-50 A. 1), 7) and 20) and 16-51 A. 2), 5), 6), 10) and 11). Appellant alleges harassment in violation of CSR §19-10 f). She is seeking the removal of the discipline from her file, along with back pay and all rights and benefits attendant thereto.

ISSUES ON APPEAL

Whether the Hearing Officer has subject matter jurisdiction over this appeal?

Did the Hospital comply with the notice requirements of CSR §16-30 by providing Appellant appropriate notice of contemplation of discipline prior to the pre-disciplinary meeting?

Whether Appellant violated CSR §§16-50 A. 1), 7) and 20) and 16-51 A. 2), 5), 6), 10) and 11)?

Did the Hospital engage in harassment of Appellant, in violation of CSR §19-10 f)?

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

PRELIMINARY MATTERS

None.

FINDINGS OF FACT

1. Appellant is employed by DHHA as a medical secretary in Community Health Services. Dr. Ulysses G. Mason, Director Community Health Services, is her official supervisor. Katherine A. Doll, Practice Manager, supervises Appellant on a day-to-day basis.

2. Rachel Ruby, MSN, MPH, and Susan Holliman were in charge of the Health Maintenance Clinic at Davis ("Clinic") during the relevant period. Ms. Ruby handled the Monday clinics and Ms. Holliman handled the Friday clinics.

3. As part of her responsibilities, Appellant was assigned to handle secretarial duties for the Health Maintenance Clinic.

4. Ms. Doll, Ms. Ruby and Ms. Holliman developed procedures for informing Clinic patients of their lab results so they could make follow-up appointments with their primary care providers, if necessary. Two form letters were created, one for normal lab results and another for abnormal lab results. When the results came in, Ms. Ruby or Ms. Holliman would select the appropriate letter and write in the patient's name, medical record number and date. They would then leave the letters for Appellant to complete. Appellant was to look up the patient by patient number in the computer in order to get an address, address the letter, photocopy it for the patient's file, and mail the letter on to patient. Ms. Ruby testified that, by July 2002, there were approximately fifty letters a month needing to be looked up, addressed, photocopied and sent out.

5. The patients needed to be provided with the lab result information in a prompt manner so they could contact the Hospital/primary care provider for additional testing. Early advisement of abnormal lab results is very important for patient after care. If patients are not informed of abnormal lab results, they run healthcare risks. Failure to inform a patient of lab results also puts the Hospital and the supervisory staff at risk for not advising patient when they are abnormal.

6. The Clinic issued three different letters. One was for "missed appointments." (Exhibit 13) One informed patients to make appointments with their primary care provider for a follow-up on the lab results (because of an abnormality). (Exhibit 11) The third informed the patient that all the test results were normal and that a follow-up visit would be needed in a year. (Exhibit 12)

7. Appellant was told about her responsibility to send out the letters in or around May 2001. Her responsibilities were outlined in the Clinic proposal. It states, in relevant part:

Follow-up:

- Pat Ander will send out letters to patients regarding test results, place a copy in the PCP's box and place the original in Medical Record.
- Pat Ander will send letters to patients that fail to show-up (*sic)* for their visit

(Exhibit 9, p. 2)

8. Appellant testified that she did not see the Clinic proposal until the instant hearing.

9. Ms. Doll testified that she spoke with Appellant prior to May 2001 about her responsibility to send the letters for the Clinic. She stated that Appellant told her "this will be a lot of extra work." Ms. Doll told her that she knew that, but she expected Appellant to do it.

10. Initially, Appellant sent out the letters without incident.

11. Appellant testified that she was told the letters were all "missed appointment" letters. She testified that she did not know what the Clinic did. She testified that she did not read the text of the letters until July 2002. She stated that she did not know that any of them were notifications of lab results. She only remembered that they were all entitled as coming from the Health Maintenance Clinic.

12. Appellant testified that she asked Ms. Doll whether she could stop sending missed appointment letters at some point in time. She did not state when this request was made. She stated that she thought it was unnecessary to send these letters since most of them were returned to the Hospital due to incorrect addresses. According to her, Ms. Doll agreed she could stop sending the missed appointment letters.

13. Ms. Doll denied telling Appellant that she could stop sending the lab result letters. She stated that she agreed that Appellant could stop the missed appointment letters.

14. Appellant did not know when she stopped sending out the letters, but she thought it was sometime in June 2002.

15. Robins Meadows, Health Care Partner II, and Mattie Louise Simon, Primary Care Registered Nurse, testified that they had conversations with Appellant during which Appellant told them that she no longer had to send the letters for the Clinic. According to both of these witnesses, Appellant was very happy about this and

indicated that it was removing a weight form her shoulders. Ms., Meadows did not recall the date of the conversation other than indicating it was in the "early part of summer 2002." Ms. Simon indicated the conversation was in July 2002.

16. Sometime prior to July 8, 2002, Ms. Holliman became aware that Appellant was no longer sending the lab result letters. Ms. Holliman went to Ms. Ruby and asked her if there had been a change in the procedures because Appellant had indicated that she was no longer sending the letters. Ms. Ruby said that there had been no change in the procedures and that she would talk to Appellant about it.

17. Ms. Ruby first went to Ms. Doll to see if the letters were being sent out. Ms. Doll indicated that she thought that was possible and that Ms. Ruby should talk to Appellant when she returned from vacation. On July 8, the Monday Appellant returned from vacation, Ms. Ruby talked to her. She testified that she did not remember what Appellant told her, but that she did not provide a "clear response." Appellant told her that she did not think it was important to send the letters because, the next time the patient came in for a visit, someone would look up the labs or that she thought that "someone else" would follow up on them. Ms. Ruby asked Appellant when she had stopped sending the letters. Appellant stated that she did not remember. She never told Ms. Ruby that she had been given instructions not to send the letters.

18. After she became aware that Appellant had stopped sending the lab result letters, Ms. Doll went back and reviewed approximately 50 files for each preceding month. She chose to review files for patients who came in for PAP smears, not for any of the other tests administered by the Clinic. Ms. Doll indicated that there were three cases in April 2002 and five cases in May 2002 in which the patients had abnormal PAP smear results and for which letters had not been sent.

19. Ms. Ruby notified Dr. Mason about the problem by e-mail on July 11, 2002. The e-mail reads:

> It came to my attention late last week that there a (*sic*) has been a breach in the follow-up of abnormal labs for the health maintenance clinic. The protocol was for Susan and I (*sic*) to complete the letter informing patients of their lab results, and give letters to Pat Anders (*sic)* whose job it was to make a copy for the chart, look up addresses and send the original to the patients. Pat stopped putting copies in the chart at some undetermined time in the past. When I asked her on Monday, July 8, 2002, why she stopped putting copies in the charts she gave me a muddled answer, (*sic)* when I asked her when she stopped putting letters in the chart she could not provide me with even an approximate date. Hence, there is absolutely no documentation that we did indeed try to contact patients regarding abnormal lab results. This creates a huge liability for Susan and I who have been working under the assumption that patients were being notified

> of their abnormal results and following-up with their primary care providers as directed. It is unfathomable to me why Pat would do this, particularly since each time I gave her a stack of letter I attached a sticky note which read, "please put copy in chart, and send to pts, thanks". I believe this is a case that needs to be reviewed by risk management, however, as I am leaving the system,[1] I will leave it in your hands for consideration.

(Exhibit 4)

20. Notice of Contemplation of Discipline was originally sent to Appellant by certified mail on August 9, 2002. (Exhibits 3 and A) It was not claimed. A new letter was issued on August 23 and hand-delivered to Appellant. (Exhibit B) In the second letter, the meeting was set for September 4. It was not held on that date because Appellant was on vacation. The meeting was rescheduled for September 12.

21. No new letter was sent changing the date. Dr. Mason testified that he told Appellant of the time and date change prior to September 12. He stated that he told her he wanted to set up the meeting as soon as possible after her return from vacation.

22. Appellant testified that she did not know of the rescheduled date. She stated that, when she happened to see Dr. Mason on September 12, he just asked her to come into his office.

23. No testimony was elicited from either Dr. Mason or Appellant that Appellant did not know that Dr. Mason was conducting the predisciplinary meeting when they met on September 12 or that Appellant asked for additional time for a representative to be with her or that, if such a request had been made, that it was denied by Dr. Mason.

24. During the predisciplinary meeting, Dr. Mason asked Appellant why she had stopped sending the letters. Appellant told him that Ms. Doll had instructed her that the letters weren't needed any more. Appellant did not offer any more information during the meeting.

25. After he consulted with Ms. Doll, who stated she never instructed Appellant to stop sending the lab result letters, and others, Dr. Mason decided to impose discipline upon Appellant for violations of CSR §§16-50 A. 1), 7) and 20) and 16-51 A. 2), 5), 6), 10) and 11). A letter dated September 23, 2002, notified Appellant notified that she was to be suspended from Monday, September 30 through Friday October 4. (Exhibit 2)

26. Appellant had been counseled in March 1999 for failure to perform assigned

[1] Ms. Ruby moved from Colorado shortly after this e-mail was sent.

tasks. A Written Reprimand was issued to Appellant in October 1998 for bringing an unauthorized animal (an iguana) to work. (Exhibits 2 and 6)

27. When asked who was harassing her, Appellant replied, "Dr. Mason." She then stated that no one else was harassing her. Later she testified that Ms. Doll was harassing her and that Ms. Doll was not a truthful person. She did not state how either Dr. Mason or Ms. Doll was harassing her or provide any other evidence to support these statements.

28. Dr. Mason denied harassing Appellant. He stated that he respects all his employees. Dr. Mason stated that he expects employees to do their work. He thought that some might construe his expressing this expectation, or his displeasure when work was not accomplished, as harassment. However, Dr. Mason denied every singling Appellant out to express his expectations or displeasure for the failure to meet them.

29. Appellant made an offer of proof that if called, Dr. Leila Lee, Director of Dermatology, Diana Price, ANP, Walk-in Clinic, and Tatiana Plotkin, Pharmacist, Anticoagulant Clinic, would all testify that Appellant followed their instructions and mailed their letters to their clients without incident.

30. The appeal was filed at the CSA Hearing Office in a timely manner.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Statutes

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 §16-30 lays out the requirements of the notice of contemplation of discipline. It provides:

A. When required

Before an employee with career status is suspended, involuntarily demoted or dismissed, the appointing authority or designee shall hold a pre-disciplinary meeting. A pre-disciplinary meeting is not required for verbal warning or written reprimands.

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;

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 pre-disciplinary meeting is not an adversarial meeting, testimony under oath or direct or cross examination of a witness shall not occur.

D. Employees must be given seven (7) calendar days notice of the pre-disciplinary meeting.

Seven (7) calendar days prior to the date the disciplinary meeting has been scheduled, the supervisor shall provide the employee with written notice of the pre-disciplinary meeting. The notice shall be given to the employee in person with a certificate of hand delivery, or if sent by first class U.S. mail, with a certificate of mailing to the employee's last known address. The seven (7) calendar days shall be calculated from the date shown on the certificate of mailing or certificate of hand delivery.

E. Notice of contemplation of disciplinary action and pre-disciplinary meeting.

The notice of contemplation of disciplinary action and pre-disciplinary meeting shall contain the following:

1) That disciplinary action is contemplated;

2) The specific conduct or omission committed by the employee which the agency believes is in violation of the career service personnel rules, the Charter of the City and County of Denver, the municipal code, or an Executive Order which has been adopted by the Career Service Board;

3) The purpose of the pre-disciplinary meeting as described in Section 16-30 (b) of this rule;

4) The date, time and location of the pre-disciplinary meeting;

5) That the employee is entitled to have a representative of his or her own choosing present at the meeting. It is not necessary for the representative to be an employee of the City and County of Denver.

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.

5) Failure to observe department regulations.

6) Carelessness in performance of duties and responsibilities.

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

11) Conduct not specifically identified herein may also 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 court 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 (five-day 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 is she violated CSR §16-50-A. 1), "gross negligence or willful neglect of duty.

Neither "gross negligence" nor willful neglect of duty" is defined in the CSR. The Hearing Officer must look elsewhere for their definitions. They are well-defined terms 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 (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] *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.[3]

"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)[4]

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."[5]

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.)[6]

The Hearing Officer has considered the testimony offered during the hearing. Based upon all the evidence, the Hearing Officer concludes that the Hospital proved by a preponderance of the evidence that Appellant's performance was constituted either gross negligence or willful neglect.

Appellant was assigned to send letters for the Health Clinic in May 2001. She

---

[2] *Miriam-Webster's Collegiate Dictionary*, 10th Ed., 1993
[3] *Black's Law Dictionary*, 4th Ed., 1951
[4] *ibid.*
[5] *Miriam-Webster's, op cit.*
[6] *Black's, op cit.*

stopped sending the letters at some unknown time - when asked about when she stopped sending the letters in the beginning of July 2002, Appellant was unable to answer the question directly, which raises the inference that she stopped sending the letters more than a few weeks before. In fact, the evidence shows that she failed to send at least three abnormal test results letters in April and five more in May 2002. While she received permission to stop sending the "missed appointment" letters in June, Appellant actually stopped sending any letters for the Clinic much earlier. This is despite the fact that she never had permission to stop sending the lab results, as evidenced by Ms. Ruby and Ms. Holligan continuing to leave the letters to be sent for her until early July.

Appellant's explanation that she thought they were all "missed appointment" letters because she never read the letters themselves (thereby having Ms. Doll's permission not to send any of them) is not credible. Appellant is a person with great curiosity. During several breaks in the hearing, Appellant came up to the Hearing Officer and/or her court reporter and asked questions about their education, choice of a clothes, and other personal matters. Her claim that she did not read the letters is not in conformity with her personality traits.

While the Hospital does not have to show which category (*i.e.*, gross negligence or willful neglect) the wrongful behavior fits, it appears to the Hearing Officer that Appellant's actions were willful misconduct. Appellant is an experienced secretary. There was proffered evidence that she sent letters for others, so she knew that it was part of her job. However, she clearly did not like sending the Clinic's letters, for whatever reason.

Her excuse seems to be the burden that these letters placed upon her. This is not a reasonable excuse. There were no more than fifty letters a month for her to look up, address and copy. This means that, at most, there were a dozen letters a week to do. While no one testified how long it took to look an address up in the computer, address the letter and photocopy it, it is reasonable to assume that this would not take more than five minutes per letter. That is one hour a week. Refusing to do this work because it is "burdensome" is not mere carelessness. It is willful misconduct. She violated CSR §16-50 A. 1).

Appellant was also charged with violating CSR §16-51 A. 6), carelessness in performance of duties and responsibilities. This provision differs from CSR §16-50 A. 1) in that violations under this provision do not require that the misconduct rise to the level of either grossness or willfulness. The Hearing Officer finds that Appellant was not just merely careless in performing her duties. She purposely stopped sending the lab result letters, even before she had permission to stop sending those for missed appointments. Therefore, the violation is dismissed.

Appellant is charged with violating CSR §16-50 A. 7), the failure to comply with the orders of her authorized supervisor, and CSR §16-51 A 10), failure to comply with the instructions of an authorized supervisor. In order for these provisions to be distinct, the

former provision concerns instructions from an employees own supervisor in the institutional structure of an agency while the latter deals with instruction from any other supervisor.

The record is clear that Appellant did not comply with the instructions of Ms. Ruby and Ms. Holligan, who were not her supervisors but who ran the Clinic and, as such, had authority to give Appellant direction about the sending of the letters. The question is whether this means they were "supervisors" under the Rule. A supervisor is one who supervises another. "Supervise" is defined as "to oversee, direct or manage."[7] By this definition, Ms. Ruby and Ms. Holligan were not actually supervisors. Therefore, there was no violation of CSR §16-51 A. 10).

However, Appellant did not comply with the instructions of her day-to-day supervisor, Ms. Doll, or her formal supervisor, Dr. Mason, to complete the work given to her by Ms. Ruby and Ms. Holligan, work she is more than capable of doing. Therefore, the violations of CSR §16-50 A. 7) was established by a preponderance of the evidence.

There was no evidence presented that Appellant failed to meet established standards of performance or to observe a departmental regulation. These allegations seem to be based upon the PAP Smear Management Guidelines for Denver Health (Exhibit 5) and her failure to follow those guidelines. Appellant denied ever seeing these guidelines prior to the instant hearing, even though they may have been attached to the first notice of contemplation of discipline. However, as there was no evidence to show Appellant actually saw the first notice of contemplation of discipline or that she was otherwise provided with a copy of the guidelines, or even knew of them before this hearing, Appellant cannot be held responsible for violating the guidelines. The violations of CSR §§16-51 2) and 5) are dismissed.

The violations under CSR §§16-50 A. 20) and 16-51 A. 11) are dismissed. The Hospital produced evidence that established violations of specific provisions of CSR §16-50 A. The "catchall" provisions are dismissed.

Appellant has two defenses to this matter. The first is that the Hospital did not comply with CSR §16-30 and provide appropriate notice of the contemplation of discipline. The other is that the discipline was harassing. Both of these defenses fail.

Appellant claims that she was not properly notified of the predisciplinary meeting as required by the Rules. She claims that the only reason she knew of the meeting was she walked by Dr. Mason's office and he asked her to come in. Even if the Hearing Officer were to find this story credible, such "notice" was, at most, harmless error that did not prejudice Appellant's due process rights.

---

[7] *Webster's New World Dictionary, 2d College Edition,* 1984

Procedural due process requires that a party be given notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Patterson v. Cronin,* 650 P.2d 451 (Colo. 1982). Its essence is fundamental fairness. *Mountain States Telephone and Telegraph v. Department of Labor,* 84 Colo. 334, 520 P.2d 586 (1974), *Nicholas v. North Colorado Medical Center, Inc.*, 12 P.3d 280 (Co. App. 1999). Due process requires that an appointing authority meet with the employee if considering disciplinary action in order to present information to the employee and to give the employee an opportunity to admit or refute the information. *Department of Health v. Donahue*, 690 P.2d 243 (Co. 1984); *Bourie v. Department of Higher Education*, 929 P.2d 18 (Co. App. 1996). A substantial right must be prejudiced to require reversal. *Mattingly v. Charnes*, 700 P.2d 927 (Co. App. 1985).

CSR §16-30 provides the procedures for notification of contemplation of discipline and the predisciplinary meeting. The Hospital complied with this Rule. It first tried to provide Appellant written notice of the contemplation of discipline and the notice of meeting by a letter dated August 9, 2002. (Exhibit 3) Appellant never picked up this letter, which had been sent by certified mail. (*See,* Exhibit A) Another letter was hand-delivered to Appellant on August 23. (Exhibit B) Therefore, there is no doubt Appellant received notice of the alleged violations and their factual bases.

The predisciplinary meeting was scheduled for September 4, more than seven days later (*see, CSR §16-30 D*). The only problem was that Appellant was scheduled for vacation on that day. The meeting needed to be rescheduled for Appellant's convenience. While it might have been preferable to notify Appellant of the new meeting time and date in writing (either by another letter or e-mail), the Rule does not require this be done.

Appellant appeared at Dr. Mason's office at the rescheduled date and time, demonstrating she had constructive notice of the meeting. Appellant claims that she just happened by the office and was just "called in." The Hearing Officer does not believe this assertion, as it is not supported by the credible evidence. There was no testimony from whether Dr. Mason or Appellant herself that she was unprepared or unwilling to discuss the allegations against her at that time. There was also no request to reschedule it one more time so that Appellant could prepare or have a representative present. The Hearing Officer must draw the conclusion that Appellant knew of the meeting, knew of the allegations against her and was prepared to go forward with Dr. Mason. It is only as an afterthought to the notice of discipline itself that she complains about the hearing date.

Appellant was given meaningful and fair notice of the meeting. The fact that she did not like the result does not mean that Dr. Mason did not give her appropriate due process. There was no violation of CSR §16-30 requiring a reversal and remand for Dr. Mason to conduct the predisciplinary meeting again.

Furthermore, if it were error not to send another written notice of the hearing date,

the error was harmless. Appellant was given a full due process hearing in front to the Hearing Officer. Counsel represented her at that time. It was a full opportunity to address the all the evidence against her and present her defenses and facts to be considered in mitigation.

Appellant alleges harassment under CSR §19-10 f).[8] In order to bring an action under CSR §19-10 f), Appellant first had to raise the matter either with the Hospital or with the Career Service Employee Relations section for investigation and resolution, pursuant to CSR §15-100, *et. seq.* If, and only if, such investigation does not end a manner agreeable to Appellant could she bring an independent harassment claim under this provision to the Hearing Officer. *See, In the Matter of Martha Douglas*, CSA Appeal No. 317-01. There is no evidence in the record that Appellant raised the harassment issue to the Hospital or to the CSA for investigation and/or attempted resolution of this claim. As Appellant has not complied with the condition precedent, the Hearing Officer does not have subject matter jurisdiction to consider a harassment claim under CSR §19-10 f).

Even though Appellant cannot raise an independent claim of harassment under CSR §19-10 f), she is still entitled to raise it as an affirmative defense to be considered in mitigation of the discipline imposed. As an affirmative defense, Appellant bears the burden of proof that the discipline was imposed in order to harass her. The Hearing Officer has reviewed the record before her. There is no credible evidence in the record that demonstrates that the discipline was imposed as a result of harassment. Appellant' "evidence" consists of a single unsubstantiated statement she made that Dr. Mann was harassing her and another one that Ms. Doll had harassed her in April and May 2002. Her mere allegations, without anything more offered in support, are insufficient to meet the burden of proof. The harassment claim is dismissed.

The last question for the Hearing Officer is the appropriate level of discipline. The Hearing Officer had the opportunity to observe Appellant during the hearing. She also listened carefully as to how Appellant presented her version of the facts and her explanations for why she stopped sending the lab result letters. The Hearing Officer finds that Appellant was not credible in her explanations. It is clear that Appellant stopped sending all the letters at least two months before she was given permission not to send the missed appointment letters. As noted above, the Hearing Officer does not believe that Appellant did not know that she was sending three different letters out. The Hearing Officer concludes that Appellant knew there were three different letters and, because she found it to be "burdensome" to look up, address, photocopy and file no more than fifty letters a month, decided that it was unnecessary to send patients who did not miss their appointments notice of their lab results. While it is troubling that she chose not to send out the negative results letters, it is even more problematic that she did not send the positive lab results on to those patients for their immediate follow-up. Appellant's apparent lack of concern for the patients' health is not diminished by her attitude that someone else, like

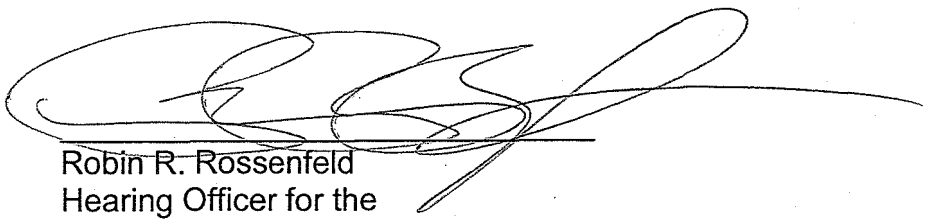
[8] Appellant miscites this provision in her closing argument as CSR "10-10 f)."

the primary care professional, would do a follow-up, so her sending the letters was unnecessary. This disregard for the health risks to others is sufficient to support the imposition of a five-day suspension. The discipline is upheld.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer MODIFIES the disciplinary action as follows: The violations of CSR §§16-50 A. 1) and 7) are AFFIRMED. The violations of CSR §§16-50 A. 20) and 16-51 A. 2), 5), 6), 10) and 11) are DISMISSED. Appellant's one-week suspension is UPHELD. The appeal is DISMISSED with prejudice.

Dated this 26th day of March 2003.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board