

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

Appeal No. 155-02

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

TERRILEE CASTANEDA, Appellant,

Agency: Department of Revenue, Treasury Division, and the City and County of Denver, a municipal corporation.

Hearing in this matter was held before Michael S. Gallegos, Hearing Officer, on April 2, 2003, in the Career Service Hearings Office, 201 West Colfax, 1st Floor, Denver, Colorado 80202. Appellant, Terrilee Castaneda, appeared in person and was represented by Jeffrey Mentor, Esq. The Agency was represented by Assistant City Attorney, Robert Wolf. Steven Hutt, Treasurer, was the Agency's advisory witness at hearing.

Within this Order, the Hearing Officer refers to Terrilee Castaneda as "Appellant"; the Department of Revenue, Treasury Division as "the Agency"; Steven Hutt as the "Appointing Authority" or the Agency's "Director" and the Career Service Rules as "Career Service Rules" or "CSR". The Career Service Rules are cited by section number and are those currently in effect unless otherwise indicated.

For the reasons set forth below, the Agency's action(s) in the discipline and dismissal of Appellant is **AFFIRMED**.

ISSUE

Whether there is cause to discipline Appellant and, if so, whether the discipline imposed is reasonably related to the seriousness of the offense(s) for which discipline was imposed.

BURDEN OF PROOF

The burden of proof is upon the Agency to show, by a preponderance of the evidence, that there is cause to discipline Appellant and that the discipline

imposed is reasonably related to the seriousness of the offense(s) for which discipline was imposed.

PRELIMINARY MATTERS

By Order dated January 23, 2003, Appellant's More Particular Statement and allegations of harassment, discrimination, hostile work environment and retaliation were struck as issues in this proceeding.

The Agency's Exhibit 1 is the Appeal to Hearing Officer form which is a part of the Hearing file in this matter. The Agency's Exhibits 2 and 3 were accepted into evidence, over Appellant's Hearsay objections, because they are the dismissal letter and the notice of a pre-disciplinary meeting as required by Career Service Rules. That is, they are documents kept in the ordinary course of business and, therefore, are exceptions to the Hearsay Rule. The Agency's Exhibits 4 through 10 and 12 were accepted into evidence without objection. The Agency's Exhibit 11 was untimely offered for discovery and, therefore, was not accepted as evidence in this matter. The Agency's Exhibit 13 was not accepted as evidence because it is "double hearsay" and, therefore, unreliable.

Appellant's Exhibit B was not accepted into evidence as irrelevant to the issues in this matter. Appellant's Exhibit C was accepted into evidence over the Agency's Hearsay objection, as past recollection recorded. Appellant's Exhibits D and E were accepted into evidence without objection.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Hearing Officer finds the following to be fact:

1. Appellant was hired by the Agency on October 16, 2000. She worked as an Administrative Support Assistant (ASA) III, in the "operations" section of the Agency's "Taxpayer Service Unit". Appellant was 1 of 8 staff persons assigned to handle front-line customer service. More specifically, Appellant's job was to answer taxpayer requests for information, by phone or in person. Appellant's section received 50 to 100 calls per day requesting taxpayer information. The length of phone requests varied greatly depending upon the type and amount of information requested. Appellant's supervisors were Beverly Hissett (Hissett) and, Hissett's supervisor, Deanna Bukacek (Bukacek).

2. Initially Appellant was bored in the Taxpayer Service Unit. She recommended that cross-training for staff members begin at 3 months on the job rather than the usual 6 months. Appellant felt overqualified for her job. She was taking classes and wanted to be an auditor at the Agency.

3. On December 13, 2000, Appellant received a Verbal Reprimand for "doing school work and other non-work activities during your scheduled work day." Appellant claims that she was reading a work-related book and complained about the Verbal Reprimand up the "chain of command" to the Director. In early 2001, the Director met with Appellant and her supervisors, Hissett and Bukacek. Appellant's supervisors indicated willingness to work with Appellant who was still on probation at that time. However, the Verbal Reprimand was not removed from Appellant's personnel file.

4. As part of her job duties, Appellant had access to the internet. She received a copy of the Agency's computer and internet use policies and procedures and signed an information systems user agreement on December 17, 2001. Appellant also received a Memorandum regarding Unit Procedural Requirements, distributed to staff on July 18, 2002. (See Exhibit 3, attachments.)

5. The Agency's computer and internet use policies and procedures do not prohibit personal use of the internet. However, if a staff member left their workstation, the computer had to be left up-and-running so that any other staff member could access necessary programs to answer taxpayer questions from that workstation.

6. Appellant regularly left the computer at her workstation locked. No other staff member could use the computer at Appellant's workstation when it was locked. Appellant's supervisor, Hissett, chose not to address this issue with Appellant because Appellant often responded to Hissett in a confrontational manner. Hissett did not want to initiate a confrontation with Appellant.

7. Hissett's requests for information from Appellant were often met with confrontational responses from Appellant. Appellant perceived such exchanges as hostile. She complained to Bukacek that she was being harassed by Hissett. Bukacek believed that Appellant and Hissett had a personality conflict. In an attempt to address continuing issues between Appellant and Hissett, they engaged in informal mediation. Informal mediation, with Bukacek acting as mediator, was often successful but always short lived.

8. Hissett had a good working relationship with most of the "operations" section employees and her supervisors. However, at least two Agency employees felt that Hissett was often harassing in her tone and manner.

9. Appellant felt that she couldn't do anything to Hissett's satisfaction. Appellant thought of Hissett as hostile, rude and unprofessional. During her first year in the Taxpayer Services Unit, Appellant requested a transfer whenever a lateral-transfer position was posted.

10. Appellant also requested mediation with a mediator from Career Service Authority (CSA) rather than a mediator from within the Agency. Hissett declined to participate in mediation with an outside mediator because her supervisor, Bukacek, denied Appellant's request for outside mediation.

11. Appellant's first year evaluation, also known as a Performance Enhancement Program Report (PEPR), was "Meets Expectations" and was received by Appellant in April 2002, approximately 6 months after her one-year hiring anniversary.

12. In July 2002, Appellant again asked to meet with the Director. Appellant complained to the Director that her supervisor, Hissett, was being unfair and was picking on her (Appellant). Appellant reported to the Director that it was a "hostile work environment". The Director advised Appellant that they needed to "move beyond slogans".

13. In an attempt to investigate Appellant's allegations of a hostile work environment, the Director interviewed 7 of Appellant's co-workers. Most of Appellant's co-workers alleged that Appellant wasn't doing her share of the work. They accused Appellant of logging off the telephone, so she wouldn't have to answer taxpayer questions by phone, telling taxpayers that she couldn't help them or physically turning her back on taxpayer walk-in questions. This, they said, was demoralizing to Appellant's co-workers. However, whenever a co-worker or supervisor attempted to talk to Appellant about their concerns, Appellant would not listen. She refused to engage in a dialogue regarding co-worker concerns.

14. Appellant did log off the telephones more than her co-workers, in part, because her desk was closest to the entrance and she often got more in-person requests than her co-workers.

15. In July 2002, the Agency received a written complaint from a taxpayer, L. Pham. Hissett asked Appellant about the Pham request for information. Appellant initially said she didn't remember such a call, then, later, denied making the statements attributed to her in the complaint.

16. During a 2 month period, Hissett received 3 complaints about Appellant from taxpayers. Other members of Appellant's section averaged 3 taxpayer complaints over a 12 month period.

17. The Agency investigated Appellant's use of the internet from December 10, 2001 through July 19, 2002. A printout of computer/internet "hits" shows that Appellant may have visited the LasVegas.com website as much as 27 times. The printout does not show how long Appellant stayed at each website.

18. It is the opinion of the Director that an employee cannot be "on the internet" and have the computer work screen up (displayed) at the same time. However, Appellant credibly testified, and it is found to be fact, that a screen (or internet webpage) can be minimized while working in another screen or "window".

19. The Agency investigated Appellant's use of E-mail and discovered approximately 25 E-mails sent or forwarded by Appellant between March 15, 2002 and July 10, 2002 all of which are personal in nature in that most had personal notes attached to jokes, pictures, trivia, etc. Some of the E-mails were sexually explicit and at least one contained a racial stereotype. (See Exhibits 2 and 9.)

20. At hearing, Appellant argued that she did not use E-mails any more often than her co-workers and that other staff members read magazines or novels while at their desks. E-mails containing jokes or pictures of a sexual nature were often printed by other members of the "operations" section.

21. Appellant was the unit representative to the Agency's Dress-code Committee. On one occasion, Appellant left for a Dress-code Committee meeting without advising her supervisor or co-workers. She was away from her desk for approximately 45 minutes which resulted in her co-workers taking a larger share of requests than Appellant on a "very busy" day.

22. Appellant would often refer in-person requests to other staff even though she was not taking a phone inquiry at the time. Appellant was heard to tell a taxpayer that she couldn't help him because she was "going on break". A co-worker described Appellant as "determined to go on break" even if taxpayers were waiting.

23. Co-workers reported that Appellant often responded with a "sharp" tone or hostile attitude when a co-worker asked for assistance or wanted to talk to Appellant about a concern. Appellant often "glared" at co-workers and at least two co-workers were not inclined to help Appellant, if she needed assistance, because of her negative attitude. Co-workers also described Appellant as "argumentative", "defensive", "resentful" and "offensive".

24. At hearing, Appellant's demeanor was one of intellectual arrogance and self-righteous defensiveness. At times, Appellant appeared to be glaring at witnesses or others in the hearing room. However, it is the opinion of the Hearing Officer that such appearance is not a conscious effort on Appellant's part. Rather, it is a look of determination.

25. Appellant's pre-disciplinary meeting was held on August 19, 2002. She was represented by Toby Lopez, AFSCME. The Director conducted the pre-disciplinary meeting. Bukacek and Assistant City Attorney Wolf were also

present. At the pre-disciplinary meeting, Appellant requested mediation with the Director. The Director replied that the time for mediation is prior to a pre-disciplinary meeting and denied her request.

26. The Director considered Appellant's past disciplinary history including the December 13, 2000 Verbal Reprimand for "doing school work and other non-work activities during your scheduled work day." The Director did not compare Appellant's use of E-mail with that of other Agency employees. He did compare Appellant's use of the internet with that of other Agency employees.

27. The Director considered progressive discipline in the form of a verbal reprimand, written reprimand or suspension/leave without pay until a transfer opportunity became available. However, due to the nature and degree of Appellant's personal use of E-mails and the internet, Appellant's continuing willful neglect of duty and her failure to comply with her supervisor's orders, the Director determined that dismissal was appropriate. The Director decided against transfer because he felt that the problem lay with Appellant and not her supervisor. Therefore, he did not want to transfer a problem employee to another, perhaps unsuspecting supervisor.

28. Both Hissett and the Director credibly testified that progressive discipline was not a viable solution, in this case, because Appellant was never willing to accept suggestions, criticism or any action calculated to improve or change her job performance.

29. Appellant was dismissed from employment with the Agency for 1) willful neglect of duty/logging off the phone so she wouldn't have to take phone questions, 2) theft, destruction, or gross neglect in the use of City and County property/personal use of E-mail and the internet, 3) Dishonesty/violation of the information systems user agreement signed on December 17, 2001 and 4) refusing to comply with the orders of an authorized supervisor/failure to comply with the Memorandum regarding Unit Procedural Requirements.

30. At hearing, Appellant took credit for the concept of "cross-training" at the Agency when, in fact, it was the Director's concept and was instituted prior to the time Appellant was hired by the Agency. At hearing Appellant stated, "I know everything was fine with my work" and complained that Hissett "never said 'thank you'". She complained about her co-workers, blamed co-workers and supervisors for problems in the workplace, tried to take credit for other people's ideas and generally presented as a "workplace bully".

31. A "workplace bully" is someone who creates or manipulates an abusive working environment by repeatedly mistreating co-workers, subordinates and/or, as in this case, supervisors by use of non-civility, intimidation and insecurity. It is a form of harassment, also known as "status-blind harassment", "generalized workplace abuse" and "emotional workplace aggression".

Workplace bullying is counterproductive to the accomplishment of workplace goals such as team work, efficiency and customer service. (See *The Phenomenon of "Workplace Bullying"*, 88 Geo. L.J. 475, David Yamada, Associate Professor of Law specializing in labor and employment issues, Suffolk University Law School, Boston, Mass.)

DISCUSSION

1. **Authority of the Hearing Officer:** The City Charter and Career Service Rules require the Hearing Officer to determine the facts, by *de novo* hearing, in "[a]ny action of an appointing authority resulting in dismissal, suspension, involuntary demotion...which results in alleged violation of the Career Service Charter Provisions or Ordinance relating to the Career Service, or the Personnel Rules." (City Charter C5.25 (4) and CSR 19-10 b.) A *de novo* hearing is one in which the Hearing Officer makes independent findings of fact, credibility assessments and resolves factual disputes. (See *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. App.1975).)

2. **Cause for discipline:** Career Service Rules provide, in pertinent part: "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." (See CSR 16-10.) In this case, the preponderance of the evidence presented at hearing shows that Appellant engaged in 1) willful neglect of duty/logging off the phone so she wouldn't have to take phone questions, 2) theft, destruction, or gross neglect in the use of City and County property/personal use of E-mail and the internet, 3) Dishonesty/violation of the information systems user agreement signed on December 17, 2001 and 4) refusing to comply with the orders of an authorized supervisor/failure to comply with the Memorandum regarding Unit Procedural Requirements, respectively, violations of Career Service Rule 16-50 A (1), (2), (3) and (7), Causes for dismissal.

Appellant argues that even if she engaged in personal use of the internet and E-mails, she did so no more often than her co-workers, progressive discipline was not employed and the severity of discipline is not reasonably related to the seriousness of the offense. However, Career Service Rules do not provide for comparative discipline and, by rule, Appellant's willful neglect, violation of the information systems user agreement and refusal to comply with the orders of an authorized supervisor are grounds for dismissal without progressive discipline.

The Hearing Officer concludes that the discipline imposed, dismissal, is reasonably related to the seriousness of Appellant's work place offenses. Not only did Appellant abuse any leeway that may have existed in the Operations

Section for personal use of the internet and E-mails, Appellant did not accept constructive criticism or even inquiries regarding her work or work duties. She refused to engage in dialogue regarding co-workers' concerns and any gains made through mediation with her supervisor were short-lived. The undersigned Hearing Officer concludes that Appellant was a "workplace bully" who, at times, even intimidated her supervisors. Progressive discipline has little, if any, effect in a situation such as Appellant's where the employee is so unwilling to accept responsibility for their own acts, blames co-workers and supervisors for workplace problems and consistently reacts with hostility or defensiveness.

Further, the Hearing Officer disagrees with the Director that "hostile work environment" is a mere "slogan". Rather, it is a serious issue, not to be taken lightly. In this case, while Hissett was not necessarily free from blame for escalating the hostility that Appellant often exhibited, it is clear that Appellant was, in large part, the cause of a hostile, intimidating work environment. Therefore, for the reasons stated above, the Hearing Officer concludes that the duration, nature and hostility of Appellant's acts are reasonable grounds for dismissal. That is, the severity of discipline imposed in this matter is reasonably related to the seriousness of the offenses for which discipline was imposed.


CONCLUSIONS OF LAW

1. The Hearing Officer has the authority to make and issue Findings and Order in this matter. CSR 19-10 d).
2. The Agency has met its burden to show that there is cause for discipline in this matter and that the severity of discipline imposed is reasonably related to the seriousness of the offenses proven.

ORDER

Therefore, for the reasons stated above, the Agency's action(s) in the discipline and dismissal of Appellant is **AFFIRMED**.

Dated this 1st day of July 2003


Michael S. Gallegos
Hearing Officer for the
Career Service Board