

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

Appeal Nos. 158-02

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

MARVIN CHAMPION, Appellant,

v.

Agency: Department of General Services, Public Office Buildings Division, and the City and County of Denver, a municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, Marvin Champion shall be referred to as "Appellant." The Department of General Services, Public Office Buildings Division, shall be referred to as the "Department" or "POB." 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 January 9, and 10, 2003, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Charles P. Northrup, Esq. The Department and City were represented by Mindi L. Wright, Esq., Assistant City Attorney, with Dan Barbee 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 Department:

James Williamson, Dan Barbee, Thomas Migaki

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

Appellant, Nick Nuanes, Delores Bachand, Donald Carson, Sr., Sgt. Marek Rybkowski

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

Exhibits 1 – 30

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

Exhibits M, N, O

The following exhibits were admitted into evidence by stipulation:

Exhibits 1 – 30, M, N

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

None

NATURE OF APPEAL

Appellant is appealing his termination from the Department for alleged violations of CSR §§16-50 A. 1), 7), 13) and 20) and 16-51 A. 2), 6), 10) and 11). He is seeking reinstatement to his position, 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?

Whether Appellant violated CSR §§16-50 A. 1), 7), 13) and 20) and 16-51 A. 2), 6), 10) and 11)?

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

Was the discipline imposed upon Appellant a result of either retaliation or age discrimination?

PRELIMINARY MATTERS

The Department filed a *Motion in Limine* on January 7, 2003, in which it sought to exclude Appellant's witnesses and the introduction of certain of Appellant's proposed exhibits. The Department argued that the proposed testimony and exhibits were 1) not related to Appellant's dismissal; 2) impermissible character evidence; and 3) unduly prejudicial. Oral argument was held at the commencement of the hearing. After hearing argument, the Hearing Officer ruled that Appellant could present a limited number of witnesses who could testify as to their satisfaction, or lack thereto, with Appellant's work as it would be relevant to the issue of the appropriateness of the discipline imposed. The Hearing Officer indicated that she would not admit the letters from various "clients." They were hearsay and appeared to have been solicited by Appellant in preparation for this hearing since they were written after Appellant's termination. They were also cumulative because several of the letters were written by the persons who were included as proposed witnesses (and who, in fact, testified on Appellant's behalf).

FINDINGS OF FACT

1. During the relevant period, Appellant was employed by the Department as a Facilities Manager. He worked for the City for approximately 39 years.

2. Appellant was responsible for the Westside Cherry Creek Transfer Station, the entire Roslyn complex, including the Police and Fire Academies and garages, the Decatur facility, Arie P. Taylor Building, District 5 Police Station, Fire Stations and Headquarters, Park Avenue warehouse, the Animal Shelter, Osage Trash Station, and Central Services.

3. The CSA Public Office Buildings Facilities Manager classification provides, in part:

General Statement of Class Duties

Coordinates the services of Public Office Buildings (POB) staff and private vendors under contract with POB providing building operation and maintenance services, and conducting improvement projects for assigned facilities.

* * *

Essential Duties

Coordinates contracted maintenance, repair and remodeling services for a facility or a group of facilities.

Maintains liaison with building tenants to identify and resolve building maintenance issues.

Plans major improvement projects for assigned facilities including the preparation of designs, specifications and cost estimates.

Organizes and manages the implementation of funded capital projects through the development and preparation of plans, specifications, bids and the oversight of contractor's work.

Serves as a project manager for projects associated with assigned facilities required to be undertaken through POB or the Public Works Department in accordance with the City Charter.

Manages the funds allocated for projects.

Reviews, prioritizes, and approves or rejects agency requests for work to be performed in assigned facilities.

Coordinates work performed to ensure successful and timely completion of assigned work orders.

Consults with the Director and Assistant Director concerning program

developments for the improvement of building operating systems and conditions.

Coordinates ongoing building condition assessments of facilities and operating systems with trades supervisors and agency management.

(Exhibit 7)

4. Dan Barbee became Director of Public Office Buildings in September 2001. When he took over the position, he was charged by Thomas Migaki, Manager, Department of General Services, to serve customers, change the image of POB with the customers and citizens of Denver, and to manage funds appropriated to POB for maintenance and capital improvements. He is responsible for \$20 million for maintenance and \$70 million for capital improvements annually. He must make sure that there is an effective use of the money through long-range planning and needs assessment.

5. For Mr. Barbee, the Facilities Managers have a key role in meeting these goals. He needs them to know the buildings they are responsible for inside and out, to know what needs to be done to make them efficient.

6. Mr. Barbee met with each of the Facilities Managers one-on-one within his first week as Director. During these meetings, he went over the importance of customer service and his performance goals for the Department. He explained that the Facilities Managers were responsible for showing why each project the Facilities Manager was responsible for was progressing or be able to highlight why the project was not getting done. Mr. Barbee gave the example during his testimony that, if there were insufficient funds for the project, POB would need to speak with the client agency and work together to go before the City Budget Office to explain why the work was necessary to perform the service.

7. When Mr. Barbee first met with Appellant one-on-one, he got an impression from Appellant that he saw his customers as "enemies." According to Appellant, the customers were at fault, they did not know what they wanted, so it was just better to ignore them. At the first staff meeting Mr. Barbee held, Appellant stated that it wasn't that POB had a bad reputation, but that it was the customers were at fault and responsible for the bad reputation.

8. Appellant's Performance Enhancement Program Report ("PEPR") was done in November 2001. Mr. Barbee developed it with George Seaton, who had been acting director prior to Mr. Barbee's tenure. Mr. Barbee gave Appellant a "Below Expectations" evaluation for four out of six Priority 1 and three out of five Priority 2 responsibilities. Mr. Barbee testified that Mr. Seaton agreed that Appellant's performance was below expectations. However, as he had been observing Appellant for only a few months, Mr. Barbee decided to give Appellant a "Meets Expectations" overall rating. (See, Exhibits 6 and N)

9. The first of the six Priority 1 responsibilities for which Appellant received a "below expectations" was "meet with customers and submit reports of their needs and requests." (Exhibit 6) Mr. Barbee noted that Appellant did not take any initiative to find out if there were any customer concerns and he would not accomplish a customer request or follow up on it without repeated prodding. Appellant became angry when told he should provide status information to his customers. Mr. Barbee testified that the way to rectify this problem

was to be persistent in asking customers what they wanted and to be personally involved with them.

10. The Next Priority 1 responsibility for which Appellant was below expectations concerned inspections of assigned facilities and reporting on needed and existing services. Mr. Barbee was unable to ascertain whether Appellant made regular trips to all of his assigned facilities as Appellant was not providing regular reports, and those he submitted did not provide complete information. Mr. Barbee noted in the evaluation that:

It is questionable if Marvin ever visits many of his facilities. On many days I have observed Marvin in and around the City and County Building all day. The City and County Building is not assigned to Marvin. When he is spending nearly all of his time here, he can not (*sic*) be spending much time at his assigned facilities.

(Exhibit 6, p. 2)

11. The way to correct this deficiency, according to Mr. Barbee, is to go to each facility on a regular basis and look around to see what was working, what was not working, create a list of issues and a list of work orders.

12. Mr. Barbee testified that this information was necessary in order to prepare the budget for the facilities. Mr. Barbee testified that he had no idea of what work needed to be planned at Appellant's facilities.

13. Appellant was to propose, plan and manage major construction projects within assigned facilities. Mr. Barbee testified this was necessary because, even if facilities are properly maintained, things still need to be replaced. Facilities Managers are supposed to be proactive and meet with the building occupants to determine what construction would be needed and then be able to propose the changes to Budget. Appellant did not do this without several demands having been made to him to do so. He also did not track the progress of the projects, provide timelines, or demonstrate an understating of what completion deadlines are for or the impact if they are unachieved. Appellant's explanations were incomplete and left out pertinent information. (*See*, Exhibit 6, pp.2-3)

14. Similarly, Appellant did not meet expectations in managing approved projects to a timely completion, another Priority 1 responsibility. (Exhibit 6, p. 3)

15. Appellant had also not developed or implemented an annual maintenance program, evaluated contractor performance of maintenance services, or prepared any emergency evacuation plans, all Priority 2 responsibilities.

16. Mr. Barbee noted in the PEPR that Appellant did not open e-mails from a particular customer or otherwise follow-up with some of his customers. He also noted that Appellant was observed "nearly all day, every day" visiting with people he knows in and around the City and County Building, a location distant from the facilities Appellant was responsible for. (Exhibit 6, pp. 3-4)

17. Mr. Barbee wrote the following conclusions in the PEPR:

Marvin does understand and has the experience to know what needs to be done and how to accomplish any assigned responsibility. His job knowledge appears to be sound. His effectiveness can be questioned, for as stated above, he will not accomplish any tasks, large or small, unless forced to do so. However, even though he has the knowledge he does not use it to offer solutions or alternatives when presented with a problem. He will only do what is requested and then only when repeatedly forced to do so. This behavior has been observed on many occasions. When confronted with this behavior, Marvin responds that I, his supervisor, does not have respect for "seniority." In addition to everything outlined for the above categories, Marvin does not perform the expected functions of a Facilities Manager. As stated, he knows what to do, he knows how to do it, yet he does not do it. Overall, I've seen extremely low productivity. In some instances, there has been absolutely no progress on easily resolved issues. Some of these are long standing requests that go back as far as two years. To date he still has completed very few of those delinquent responsibilities brought to his attention.

(Exhibit 6, p. 4)

18. Mr. Barbee did not do a corrective action plan for Appellant after the completion of the PEPR.

19. Mr. Barbee testified that, typically, Appellant was the last person to find out when something was needed at a facility. Instead of making sure problems did not happen, he often did not know of a problem until the impact had occurred. Mr. Barbee described this as being a reactive manager, rather than a proactive manager.

20. Mr. Barbee sent a letter to Appellant on November 21, 2001, as a follow-up to an earlier conversation. Mr. Barbee suggested that he and Appellant meet with a mediator in order to improve their relationship. (Exhibit 21). At first Appellant did not agree to mediation, but he subsequently sent a note to Mr. Barbee accepting this offer (Exhibit O). Mr. Barbee did not see this letter until the time of the disciplinary meeting on this matter. Mediation never occurred.

21. In the November 21, 2001, letter, Mr. Barbee addressed several concerns he had with Appellant's conduct. He wrote:

We also had a discussion about the lack of customer updates. I have made it clear to you and you have agreed to provide your customers with meaningful status reports on their projects or requests. To date, the only time an update or status is issued is when requested by me. When an update is given, there generally is not enough information to understand the status of a project or request. You agreed that this was true. Therefore, from now on you will provide a status report on all projects or requests that you handle at least weekly. That written report or email will include expected project completion dates or current phase completion dates, potential problems or complications

that would or may interfere with completion of the project or request and whom is responsible for any actions or activities that must take place. A copy of all reports or emails must be sent to me. You agreed to this.

At the end of our meeting we also discussed the amount of time you spend at the sites you are responsible for. This was mentioned in connection with the quantity of time you spend in the City and County Building, which was noted as a facility not under your responsibility. The question was asked how much time needed to be spent (*sic*) at each site and what reports should be generated on a monthly basis for those sites. It would appear that the responsibilities for site visits and monthly reports are not being met. You stated that you spend time at all of your facilities. Therefore, you will visit all of your assigned facilities at least monthly. A status report for each facility should be included in your monthly report. In addition to the monthly report any request or issues generated by the visits must receive regular status reports as outlined in the above paragraph.

(Exhibit 9)

22. In January 2002, Mr. Barbee received an anonymous phone call informing him that Appellant was misusing City property. More specifically, Appellant was using a POB van to pick up a female every day on the corner of 17th and Welton at approximately 3:30 p.m. and then drive her to the parking lot at the Buell Theater. Mr. Barbee was advised that this had been going on for about a year and a half. Mr. Barbee investigated this information and confirmed the allegations. A private investigator was then hired to follow Appellant and monitor his daily activities. Appellant was under observation during the week of February 11, 2002. During that time, he was observed driving a POB van to locations other than his assigned facilities, performing household chores during his regularly scheduled work days, allowing an unauthorized male drive the POB van, and continuing to pick up the female at site on 17th Street. None of the deviations from his work assignments were ever noted on his van logs. Appellant was suspended for four weeks starting on Monday, April 1, 2002, for violations of CSR §§16-50 A. 1), 3), 13), 18) and 20) and 16-51 A. 1), 2), 5), 7) and 10). (Exhibit 4)

23. Mr. Barbee gave Appellant a memo detailing his specific expectations when Appellant returned to work on April 29, 2002. In addition to reminding Appellant of his work hours and that he was not to use a City vehicle for personal purposes, Mr. Barbee instructed Appellant that he was to inspect his assigned buildings at least once a week, that he was to respond to any complaint or request within twenty-four hours, that he was supposed to apply the principles of customer service with performing his duties and that every Monday he was to produce and submit daily activity reports with specific information as to what Appellant was doing all day and a project management report for the prior week, as well as customer reports for his customers with copies to Mr. Barbee. (Exhibit 10)

24. Mr. Barbee specified that the daily activity reports contain the following information, at a minimum:

1. a list of all ongoing building projects and status of each project;
2. a list of each building occupant (customers) requests and comments;
3. a description of and documentation from the weekly building inspections;

4. a list of each preventative maintenance status report for each building inspected.

(See, Exhibit 10, p. 2)

25. The project management report was to detail the status of all projects under Appellant's supervision. It was to contain pertinent information in relation to completion dates, budget expenditures, action item status reports and real or potential impacts. The customer report was to outline the status of any requests received from the customer during the week. (See, Exhibit 10, p. 2)

26. When Mr. Barbee gave Appellant the memo regarding his expectations, Mr. Barbee went over the information with Appellant line-by-line. According to Mr. Barbee, Appellant indicated that he understood what was needed.

27. Appellant testified that he understood what Mr. Barbee was asking of him. He stated that he believed that the purpose of the daily activity logs was to keep track of where he was going, but not of what he did.

28. Appellant submitted his first reports to Mr. Barbee on Tuesday, May 7. It was a day late and was handwritten. (Exhibit 14) Mr. Barbee noted in a memo dated May 7 that Appellant did not outline his daily activities, as directed. He provided a summary of his activities for the week. Mr. Barbee set out the daily report requirements again. Appellant did not provide a project management report that met the requirements previously outlined by Mr. Barbee, *i.e.*, there were no completion dates or budget expenditures and contained little information about action items status reports, real or potential impacts and related information. Appellant also did not provide Mr. Barbee with copies of his customer reports. (Exhibit 11).

29. Mr. Barbee went over the May 7 memo with Appellant line-by-line to make sure he understood what was required. According to Mr. Barbee, Appellant stated that he did. Appellant testified that Mr. Barbee clarified that he wanted the reports to be typed and that he was to separate his daily activities and the projects. He denied Mr. Barbee told him he had to account for all his time.

30. Appellant submitted weekly reports the next two weeks. (Exhibits 13 and 14) The daily activity reports were still deficient. He had not yet submitted a complete project management report and he did not provide copies of his customer reports to Mr. Barbee. After receiving the May 13 report, Mr. Barbee suspected that Appellant was not spending time at his facilities. Mr. Barbee monitored Appellant's activities the next week and noted that he was spending approximately seventy percent of his time hanging out with his friends at the City and County Building, where Appellant should have been spending only twenty to thirty percent of his time. As a result of these problems, Mr. Barbee issued a verbal warning to Appellant on May 23, 2003. (Exhibit 12) He also met with Appellant and reiterated that he expected. According to Mr. Barbee, Appellant was upset about receiving the verbal warning, but that he understood what was needed and did not offer any explanation of why he was not meeting expectations.

31. Problems with Appellant's reports continued. Information was missing in the

daily activity logs and project report and Appellant was not producing any customer reports. Mr. Barbee issued a written reprimand to Appellant on June 10, 2002, for violations of CSR §§16-50 A. 1), 7), and 20) and 16-51 A. (Exhibit 13) Because Appellant was not accounting for forty hours a week of his time, this is when, according to Appellant's best recollection, Mr. Barbee explained that he meant the daily activity log to be port-to-port.

32. Appellant continued to produce reports weekly. (Exhibits 15-30) While there was some improvement by the end of July, these reports lacked much of what Mr. Barbee was requesting. Information was not updated for weeks after due dates passed. Entire projects, including the Fire Station 24 hose tower repair, a project that had been ongoing for some time, were often not included in the reports. Timelines and schedules, budget information, and issue and impact items were not included. Appellant did not mention customer reports until his May 28 report, (Exhibit 17, p. 7), but there is no indication that the reports were sent to the customers.

33. None of the customers who testified on Appellant's behalf received a customer report from Appellant.

34. Mr. Barbee stated that he was still unable to tell if progress had been done on the projects Appellant was responsible for as the reports did not change week to week. For example, the Project Management Report submitted June 10, 2002, (Exhibit 19, p. 10) is the same as the report for June 17 (Exhibit 20, p. 4) and June 24 (Exhibit 21, p. 5) even though they reference events that should have changed/been updated over the course of the three weeks. The preventative maintenance reports are likewise deficient and repeated week after week.

35. In the July 8 report, the District 5 Police restroom remodel, which was originally budgeted for \$11,000, was increased to \$63,000 without providing any information why this increase occurred. (Exhibit 23, p. 1) Mr. Barbee stated that he later found out from a third party that issues arose with regards to the American Disabilities Act. However, this is the type of information he should have received from Appellant. As a result, POB had to "steal" money from other projects and close lower priority projects in order to pay for the remodel. Mr. Barbee stated that this should not have happened. While prices may normally rise 5-10%, this increase was the equivalent of more than the annual salary for one custodian.

36. Mr. Barbee stated that eighty percent of what he was asking for was not included in the reports.

37. There was a leak at the Animal Shelter roof on July 2, 2002. Water was dripping from a light fixture. Paula Lopez, the Shelter's secretary, made a call to POB at 1:36 p.m. Another call was made at 3:00 to inquire whether someone was going to respond to the emergency. The secretary at POB was unable to answer whether anyone was coming in. The secretary paged Appellant, who spoke to Ms. Lopez. At approximately 3:30 a plumber showed up at the Shelter. Ms. Lopez explained that it was not a plumbing problem, but that it was possibly a problem with the swamp cooler. The plumber placed a bucket under the leak, promised to come back and left. The plumber never came back. At 4:45, Ms. Lopez paged Appellant, leaving a message for him to call Mr. Kelley, Director of the Shelter. Mr. Kelly was there until 7:00 p.m. Appellant never returned the page. The next morning, Dolores Bachand,

Administrative Operations Supervisor at the Shelter, went into the dispatch room at 5:15 a.m. and found water dripping onto the floor, the bucket and the dispatch console. She could not let dispatchers work in the area due to safety concerns. Another call was placed to POB, where the Chief of Security told her that someone would be dispatched. Another plumber was sent over but, as it was not a plumbing problem, he left. At that time, Ms. Bachand e-mailed James Williamson, Assistant Director, POB, who was in charge that day as Mr. Barbee was out. Appellant finally arrived at 9:00 to address the problem. (Exhibit 5)

38. Mr. Williamson testified that he talked to Appellant on July 3, after an e-mail, but before the memo, from Ms. Bachand was received. He stated that he could tell from the flavor of the e-mail that she was upset. He stated that a Facilities Manager is responsible for what does or does not happen at a facility. Appellant should have gone directly out to the Shelter to check the emergency.

39. Nick Nuanes, Division Chief, Fire and Safety Division, testified that he was Appellant's client for eight years. He stated he saw Appellant on an "almost weekly" basis and Appellant was responsive to his requests. He had been disappointed with Appellant's responses when they first worked together and that issues were not being addressed as he would have wished, but, for the last year, he was satisfied. He never received a weekly customer report from Appellant and any information he received from Appellant was only face-to-face.

40. Ms. Bachand testified on Appellant's behalf. She stated that her purpose in writing to Mr. Williamson about the leak at the Animal Shelter was to complain about the process, but not to complain about Appellant. She also testified she received verbal communications from Appellant, she had "much contact" with him over the last year, seeing him "almost weekly," and he had been responsive. She never received written customer reports from Appellant.

41. Donald Carson, Sr., supervisor for Fleet Maintenance, testified he had worked with Appellant for five years, but had known him as a good friend for 15. Appellant had been responsive to his needs. He saw Appellant "often," but could not swear that it was weekly. He and Appellant talked about the projects, but he did not get written reports from Appellant.

42. Sgt. Marek Rybkowski, who is in charge of the Denver Police Department Firearms Training Facility, testified that he has found Appellant to be very responsive to his pages and requests. Appellant visited the facility regularly, which he clarified as being a couple of times a month, not weekly. He did not receive written reports from Appellant.

43. A predisciplinary meeting was held on August 21, 2002. Through his representative, Appellant stated that he did not know what was expected of him and that he was being held accountable for matters beyond his control.

44. Based upon the information developed at and presented at the predisciplinary meeting, the repeated attempts to get Appellant to improve his performance over the course of several months, and Appellant's disciplinary history, Mr. Barbee decided that the appropriate discipline was termination from employment. Official notification of termination was hand-delivered to Appellant on August 28, 2002.

45. Appellant filed his appeal with the Hearing Officer 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 §16-50, 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.
- 13) Unauthorized absence from work, including but not limited to: when the employee has requested permission to be absent and such request has been denied; leaving work before completion of scheduled shift without authorization; or taking unauthorized breaks.
- 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 wither qualitative or quantitative standards.
 - 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 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 (termination), the Department 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 he 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 terms well-defined in the law. Negligence does not require intent. It is commonly defined as the failure to use reasonable care or a failure to act in a reasonably prudent manner under the circumstances. *Lavine v. Clear Creek Skiing Corp.*, 557 F.2d730 (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."¹ *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.²

¹ *Miriam-Webster's Collegiate Dictionary*, 10th Ed., 1993

² *Black's Law Dictionary*, 4th Ed., 1951

"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

In other words, "gross negligence" does not require that POB show that Appellant intentionally acted in a wrongful manner, just that he performed his 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."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 Hearing Officer has considered the testimony offered during the hearing. Based upon all the evidence, the Hearing Officer concludes that POB proved by a preponderance of the evidence that Appellant's work performance was either gross negligence or willful neglect.

Appellant's performance failures are "glaringly obvious." He was not completing work and creating reports that, as a very experienced Facilities Manager, was within his competency.

Mr. Barbee met with Appellant in the fall of 2001 and went over his expectations. Appellant, while receiving an overall "meets expectations" from Mr. Barbee in his November PEPR, actually performed a majority of his Priority 1 and Priority 2 job responsibilities at the "below expectations" level. He was suspended in March 2002 for several things, including his failure to perform his job and visit the facilities assigned to him as required. He was given several opportunities to correct his performance when he returned from his four-week suspension on April 29, 2002. He was given a letter from Mr. Barbee outlining his expectations for his performance. He was given another letter on May 7 clarifying the expectations because he failed to comply with the April 29 directive. He was given a verbal warning on May 23, which again clarified Mr. Barbee's expectations. He was given a written reprimand on June 10 in another attempt to correct his deficiencies.

³ *ibid.*

⁴ *Miriam-Webster's, op cit.*

⁵ *Black's, op cit.*

Each of those times, Mr. Barbee went over his expectations with Appellant. Appellant stated that he thought he understood what Mr. Barbee wanted, yet he did not make any efforts to correct and improve his performance. It is clear to the Hearing Officer that his failures were intentional. The only other conclusion, that after 39 years, Appellant did not know how to perform his job, is not realistic. He 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 this provision does not require that the misconduct rise to the level of either grossness or willfulness. It is clear to the Hearing Officer that Appellant was not being merely careless in his performance. He was purposely performing at an inappropriate level and refusing to produce the documentation that Mr. Barbee required of him. Because Appellant's conduct unquestionably falls within the parameters of CSR §16-50 A. 1), the violation of CSR §16-51 A. 6) is dismissed.

Appellant is charged with violating CSR §16-50 A. 7), failure to comply with the orders of his authorized supervisor and refusing to do assigned work which he is capable of performing, and CSR §16-51 A. 10), failure to comply with the instructions of an authorized supervisor. The record is clear that Appellant refused to comply with Mr. Barbee's repeated instructions and perform work he was capable of performing as a very experienced Facilities Manager. The violation of CSR §16-51 A. 7) has been established. The violation of CSR §16-51 A. 10) is dismissed, however, as redundant.

The violation of CSR §16-50 A. 13) has not been proven by a preponderance of the evidence. It is clear that Appellant was not tracking all of his daily activities and was hanging around the City and County Building to meet with his friends rather than visit the facilities under his responsibility as required by Mr. Barbee. However, there is no proof that he was absent from his job without authorization during after he returned from his four-week suspension in April 2002.

Appellant failed to meet established standards of performance for a Facilities Manager. While his November 2001 PEPR is not at issue, it provides notice of the performance standards required for his job, as does the CSA job classification for Facilities Managers. It is clear that Appellant was not meeting those standards. During the relevant time, he was not meeting with customers and submitting reports of their needs. While he was inspecting facilities, it was not always, even according to his own witnesses, on a weekly basis. His reports of the needed services were never complete. His management of major construction projects was sporadic. Projects were not managed to a timely completion. He didn't organize and manage the implementation of funded capital projects appropriately. He wasn't managing all fiscal concerns and aspects of the projects. Appellant was not meeting the standards established for his job classification. The violation of CSR §16-51 A. 2) has been proven.

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

Appellant alleged age discrimination and retaliation in his Notice of Appeal. His counsel stated during closing argument that the age discrimination case was abandoned. The Hearing Officer has reviewed the record and finds that Appellant did not present any evidence of retaliation. The defenses are both dismissed.

The last question for the Hearing Officer is the appropriate level of discipline. The Hearing Officer has considered all the evidence presented, including the testimony from several clients who were satisfied with Appellant's work, Appellant's job history, and Appellant's own testimony. After reviewing all this information, the Hearing Officer concludes that Appellant's termination is appropriate.

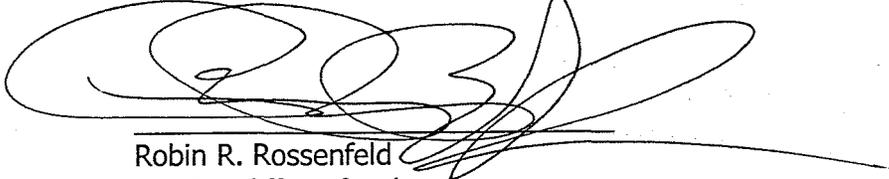
Appellant minimized his performance failures and refusal to do the work Mr. Barbee instructed him to do. It is clear that he felt he should be allowed to continue to work in the manner in which he had been performing his job for the past 39 years. He did not like the fact that Mr. Barbee expected him to make a greater effort to improve his performance and the reputation of POB as a responsible and responsive City agency. But, as the Department argued in its closing, it is irrelevant that Appellant did not like Mr. Barbee or did not agree with his goals for POB. Appellant was still obligated to do what Mr. Barbee asked him to do.

It is most troubling for the Hearing Officer that Appellant was given the opportunity after opportunity to correct his performance, yet he chose to ignore these additional chances. He was oblivious to the ramifications of his failures. There is no point to giving Appellant another chance to improve. He has shown that he has no desire to improve his performance to an acceptable level. His termination is appropriate.

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), and 16-51 A. 2) are AFFIRMED. The violations of CSR §§16-50 A. 13) and 20) and 16-51 A. 6), 7) and 11) are DISMISSED. Appellant's termination is UPHeld. The appeal is DISMISSED with prejudice.

Dated this 2nd day of April 2003.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board