

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

Appeal No. 29-06

DECISION

IN THE MATTER OF THE APPEAL OF:

MARY CHAVEZ,
Appellant,

vs.

DENVER DEPARTMENT OF HUMAN SERVICES
and the City and County of Denver, a municipal corporation,
Agency.

The hearing in this appeal was held on July 7, 2006 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Teresa A. Zoltanski, Esq. The Agency was represented by Assistant City Attorney Dianne Briscoe. Having considered the evidence and arguments of the parties, the following findings of fact, conclusions of law and order are entered herein.

I. INTRODUCTION

Appellant Mary Chavez is an Administrative Support Assistant IV (ASA IV) for the Department of Human Services (Agency). Appellant appeals a five-day suspension imposed on May 1, 2006. Agency's Exhibits 1 – 4, 7, pages 6 – 10, and Exhibits 8 – 9 were admitted into evidence. Appellant's Exhibit A was also admitted.

The issues presented herein are as follows:

- 1) Did the Agency establish that Appellant violated the cited section of the Career Service Rules (CSR),
- 2) Was a five-day suspension justified under the CSR's disciplinary rules?

II. FINDINGS OF FACT

The Agency suspended Appellant for two asserted incidents: 1) on March 2, 2006, Appellant told a co-worker about an event that occurred in a confidential meeting, and 2) on March 20, 2006, Appellant permitted an unauthorized co-worker to use her

computer and security access to view information in the secured CBMS database, in violation of the CBMS User Agreement. The letter of suspension noted two previous disciplinary actions: a March 1, 2006 verbal reprimand for failure to meet performance standards, and a written reprimand for discrimination on November 10, 2005. The disciplinary letter also noted that Appellant admitted both incidents at the predisciplinary meeting. Division Director Juanita Sanchez concluded that Appellant's actions on March 2nd violated a directive to maintain confidentiality regarding the meeting, and that her March 20th actions violated the CBMS security policy she signed on Sept. 2, 2004. In view of the nature of the violations and previous discipline, a five-day suspension was imposed. [Exh. 1.] Appellant filed this appeal on May 8, 2006.

It is undisputed that Appellant was notified on March 14, 2006 that discipline was contemplated against her based only on the March 2nd incident. That notice was superceded by the March 29th letter after two employees informed her supervisor that they had observed another employee using Appellant's CBMS access on March 20th. [Exh. 2.] Both the March 29th predisciplinary letter and the May 1st disciplinary letter cite the Career Service rules in existence before their amendment effective March 15, 2006. [Exhs. 1, 2.]

At the hearing, Appellant testified that on March 1, 2006, she met with Senior Agency Personnel Analyst Tamara Tyler, former Operating Section Manager Christine Pacetti and co-worker Theresa Cisneros because she was not getting along with Ms. Cisneros. At the meeting, their relationship was discussed, and both were instructed that they had to get along. They were informed that they were not to discuss the contents of the meeting or the issues. Both said they understood. When she thought the meeting was at an end, Appellant asked if she could leave, and was told she could. Ms. Cisneros then stated she wanted to shake Appellant's hand. Appellant refused. The next day, Appellant commented to another co-worker named Dennis, "Do you believe she wanted to shake my hand?" Appellant recalled being told that the meeting was confidential, but she did not believe she was being ordered not to discuss what occurred after the meeting broke up, including the hand-shaking incident. Appellant testified she did not believe she got paid to get along with Ms. Cisneros. She stated their relationship is still strained because Ms. Cisneros watches Appellant and reports her to her supervisor if Appellant is on the phone too long or for other issues, including the March 20th incident.

Appellant also testified that Denver Health employee Samantha Nuanez asked her if she could use her computer access to the Colorado Benefits Management System (CBMS) database containing human services case records. Appellant agreed, having forgotten that she was told at a February staff meeting that Samantha's access to the database had been removed. Appellant admitted her own access to the database is governed by the CBMS User Agreement, which states that a user shall not "knowingly permit unauthorized access by others to [CBMS] records." [Exh. 9.] Ms. Nuanez used Appellant's access on March 20th for about two minutes to change a client's address and transfer the case to Arapahoe County, signing her own (Ms. Nuanez') name.

Appellant stated that employees constantly help each other in order to get the work done, although they don't sit at each other's computers to do so. Appellant recalled that Ms. Cisneros had given Dennis her password on one occasion, but she did not report it since she had not herself witnessed the incident. Appellant believes other employees have violated the CBMS agreement, but that she was punished because Ms. Cisneros watches her in order to report any misconduct to the supervisor, Martha Calderon.

Ms. Cisneros reported both the March 2nd and 20th incidents to Ms. Calderon. [Exhs. 7, pp. 6 – 7.] Ms. Calderon testified that Appellant and Ms. Cisneros had been engaged in conflict for six to eight months when the March 1st meeting was called to attempt to improve their relationship. Ms. Calderon stated that Ms. Pacetti instructed them to keep the meeting confidential, told them she had every confidence they could work together, and gave them tips on how to improve their communication. After the meeting, Ms. Calderon noticed that conflict between the two seemed to lessen as measured by a decrease in complaints.

Ms. Tyler testified she explained the Career Service rule requiring that they maintain satisfactory work relationship, and that the meeting was confidential. She gave them tips on how to get along. Both indicated they understood. Ms. Cisneros told Appellant she just wanted to shake her hand, and Appellant replied that she did not want to. Ms. Tyler informed her that was okay.

Division Director Juanita Sanchez testified that she decided to impose a five-day suspension based upon the seriousness of the rules violated, in consideration of the discipline imposed for similar incidents. Ms. Sanchez testified she reviewed Appellant's personnel file and considered Appellant's longevity with the department and her good performance of her job responsibilities in determining the appropriate penalty.

III. ANALYSIS

In this de novo hearing on the appropriateness of the five-day suspension, the Agency has the burden to show by a preponderance of the evidence that Appellant violated the disciplinary rules as alleged, and that the discipline was within the range of discipline that can be imposed under these circumstances. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.); In re Gustern, CSA 128-02, 20 (12/23/02).

A. Effect of Amendment of Rules

The Agency claims that Appellant violated the rules cited in the disciplinary letter, despite the amendment of the rules which occurred between the two incidents of misconduct. The Agency argues that the amendment simply re-numbered the disciplinary rules. Appellant counters that the old rules have been repealed by the March 15th amendment of Rule 16, and therefore Appellant should not be found to have violated any current disciplinary rule by virtue of the March 20th incident.

On February 28, 2006, the Career Service Board adopted an amendment to Rule 16, to be effective March 15, 2006. The amendment is a comprehensive revision of the rule which maintains the principles of progressive discipline. The thirty-one subsections within former sections 16-50 and 16-51 identifying reasons for discipline were largely repeated or combined into twenty-six subsections from A to Z within new Rule 16-60. When considered as a whole, it is clear that the intent of this amendment was to overhaul and modernize the disciplinary rules for the convenience of the user. It is evident that the re-enactment of Rule 16 was not intended as a repeal of the former rules. "Effect of simultaneous repeal and re-enactment of all, or part, of legislative act", 77 Am.Jur.2d 336 (2004), citing Golden Valley County v. Lundin, 203 N.W. 317 (N.D. 1925).

Fairness compels that the rule in effect at the time of the conduct in question should be applied to determine whether a violation has occurred. Therefore, the former rules are applicable to the March 2nd incident, and the amended rules may apply to the conduct which took place on March 20th

B. March 2, 2006: Statements Regarding Confidential Meeting

i. CSR § 16-50 A. 1), Gross negligence or willful neglect of duty

The Agency contends that Appellant was grossly negligent or willfully neglected her duties by her March 2nd statements to a co-worker that she refused to shake Ms. Cisneros' hand at their confidential meeting. Agency witness Calderon was not able to affirm that the action was performed with an intent to hurt anyone, and admitted the information was not obtained from official records. The testimony as a whole does not support a finding that the action was willful or grossly negligent, even though taken in a spirit inconsistent with both the order of confidentiality and the intent of the meeting to resolve the co-workers' continuing conflicts. The evidence indicates that Appellant was engaging in gossip at her co-worker's expense. That alone is not sufficient to establish a violation of this rule.

ii. CSR § 16-50 A. 7), Refusal to comply with orders or do assigned work

Appellant admitted that Ms. Tyler or Ms. Pacetti instructed her to keep the contents of the meeting confidential. The evidence indicated that the meeting was sensitive in nature, as it concerned the ongoing ill will between Appellant and Ms. Cisneros. Appellant ignored this order by her comments to a co-worker the day after the meeting. However, I find that Appellant's conduct did not demonstrate the required willfulness to prove a violation of this rule. Rather, the evidence indicates that Appellant made one critical observation about Ms. Cisneros to her co-worker that she believed concerned an after-meeting event. The comment made the co-worker uncomfortable because it invited him to take sides in the ongoing conflict, but the preponderance of the evidence does not indicate Appellant's comment was intended as a refusal to obey the order of confidentiality.

iii. CSR § 16-50 A. 16), Divulging confidential information from official records to unauthorized individuals

The Agency presented no evidence that the information disclosed by Appellant was contained in an official record, and therefore this violation has not been proven as to the March 2nd incident.

iv. CSR § 16-51 A. 4), Failure to maintain satisfactory working relationships

Appellant admitted that she does not get along with Ms. Cisneros, but claims she is not paid to do so. Appellant described their relationship as stressful and harassing. Appellant believes Ms. Cisneros purposely passes her desk numerous times if Appellant is on the phone "too long" so that Ms. Cisneros can report that conduct to their supervisor. Ms. Calderon, Ms. Tyler and Ms. Sanchez all testified that the problems between Appellant and Ms. Cisneros were disruptive to the work of the unit. The employee to whom Appellant made the remark told Ms. Calderon that Appellant "always wants to talk about what's going on with her and Theresa and it is very hard for him to get away . . . 'I just want this all to come to an end'", Ms. Calderon quotes him as saying. [Exh. 5.] The evidence is clear that Appellant has failed to maintain a satisfactory relationship with her co-worker, in violation of this rule.

v. CSR § 16-51 A. 6), Carelessness in the performance of duties.

Since the Agency did not present any evidence that Appellant failed to perform an assigned duty by virtue of her comment to her co-worker, I find that the Agency did not establish that Appellant's March 2nd conduct was careless in violation of the rule. In re Martinez, CSA 19-05, 6 (6/27/05.)

vi. CSR § 16-51 A. 10), Failure to comply with instructions

Finally, the Agency claims Appellant failed to comply with her supervisor's instructions. Appellant admitted that she was instructed to treat the meeting and the issues confidential. Her explanation that the meeting had formally ended before the incident in question is not credible. While the Agency did not prove Appellant intentionally revealed confidential information, it did establish that Appellant's intentional actions failed to comply with instructions she remembered receiving. The Agency therefore proved Appellant violated this rule.

C. March 20, 2006: Unauthorized Co-worker Access to Database

Appellant admitted at hearing that she permitted Ms. Nuanez to use her security code to access the CBMS database, in violation of the CBMS User Agreement. Appellant stated she had forgotten Ms. Nuanez' access privileges were removed, and that she was merely assisting a fellow employee to get necessary work done in

permitting the access. The following rules issued effective March 15, 2006 are comparable to the rule violations cited in the May 1st disciplinary letter, and therefore gave the Appellant notice of prohibited workplace conduct.

i. CRS § 16-60 A. Neglect of Duty

The rules in effect as of the date of the CBMS incident include "neglect of duty." The undisputed evidence indicates that Appellant acted as she did in an effort to assist other employees in efficiently performing the work of the unit. Appellant did not neglect her duties by allowing Ms. Nuanez to access the database. The Agency thus failed to prove a violation of this rule.

ii. CRS § 16-60 J. Failing to comply with orders

Appellant admits she signed the security agreement that prohibited her from knowingly permitting unauthorized access to the database, and that she allowed a co-worker whose access privileges had been removed to use her access to the database. The user agreement was a term and condition of Appellant's work, and Appellant was ordered to restrict Ms. Nuanez' access to CBMS. The Agency therefore proved that Appellant violated this rule.

iii. CRS § 16-60 W. Divulging Confidential or Otherwise Sensitive Information

This rule prohibits the disclosure of confidential or sensitive information. Although Appellant's actions could have indirectly resulted in such a disclosure to Ms. Nuanez, the undisputed evidence is that Ms. Nuanez made two simple changes to a client record. There is no evidence that Appellant divulged inappropriate information.

iv. CRS § 16-60 O. Failure to Maintain Satisfactory Working Relationships

The Agency did not submit any evidence showing that in permitting access to Ms. Nuanez, Appellant negatively affected any working relationships. Therefore, the Agency did not establish this violation.

v. CRS § 16-60 B. Carelessness in Performance of Duties

One month before this incident, Appellant was informed that Ms. Nuanez' access had been removed. An ordinarily careful employee would have made a mental or written note of this information, and would not have shared her password or codes with any employee unless sure of their right of access. The Agency proved that Appellant was careless in her duty to maintain the security of the database.

D. Appropriateness of Penalty

The Agency proved that Appellant's actions violated the rules regarding work relationships, compliance with instructions and orders, and carelessness. The final issue is whether the Agency's imposition of a five-day suspension was in conformity with the Career Service Rules regarding progressive discipline. CSR §§ 16-10, 16-20.

The Agency proved that Appellant had received a verbal reprimand the day before the first incident for failure to meet performance standards, and a written reprimand for discrimination four months before that. [Exhs. 3, 4.] This incident was the culmination of a series of conflicts between Appellant and Ms. Cisneros over a period of six to eight months. The emails tell the story: a co-worker found it hard to get away from Appellant's rehashing problems with Ms. Cisneros. Supervisors and managers reacted to continued reports of conflict with the words, "Here we go again." [Exh. 5, pp. 1, 2.] Appellant testified that their relationship remains strained, and she believes Ms. Cisneros is closely observing her in order to report any misdeeds. Nonetheless, Appellant testified that she does not believe it is her job to get along with Ms. Cisneros.

It is clear from the evidence that Appellant's actions contributed to the conflict that was having an adverse effect on the work and morale of the office. The five day suspension was a reasonable attempt to obtain Appellant's compliance with its rules regarding working relationships and compliance with the security agreement.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer AFFIRMS the Agency action dated May 1, 2006.

Dated this 17th day of August, 2006.



Hearing Officer for the
Career Service Board