FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

CHERYL M. CURTIS, Appellant,

Agency: DENVER HEALTH AND HOSPITAL AUTHORITY.

INTRODUCTION

This matter comes before the Career Service Board on appeal by Cheryl M. Curtis filed May 22, 2002. Appellant challenges the Denver Health and Hospital Authority's decision to suspend her for one week without pay for various alleged rule violations.

For purposes of this Decision, Ms. Curtis shall hereinafter be referred to as "Appellant." The Denver Health and Hospital Authority shall be referred to as "Denver Health" or "the Agency." The rules of the Career Service shall be referenced as "CSR" with a corresponding numerical citation.

Denver Health bases its action against Appellant on two grounds. First is Appellant's role in an interaction between a physician and a sergeant, during which Appellant alleged the physician said the sergeant was "a liar." The second ground is Appellant's role in a series of inappropriate e-mails that were discovered by the Agency.

A hearing in this matter was held before Personnel Hearing Officer Joanna Lee Kaye ("hearing officer") on November 7 and 8, 2002 at the Career Service Authority Offices. The Agency was represented by Brent Thomas Johnson, Esq., with the Agency's Director of Nursing, LaVonna Walker, present for the entirety of the proceedings as advisory representative for the Agency. Appellant was present and was represented by Ms. Cheryl Hutchinson of the American Federation of State, County and Municipal Employees.

The Agency called the following witnesses: Ms. Walker, Support Services Clerk Michelle Ruvalcaba, Nursing Program Manager Kathy Boyd-Giboney, Peter Crum, M.D., Denver Sheriff Department Sergeant Mary Herrera, and Nurse Operations Manager Bonnie Guzman.
Appellant testified on her own behalf, and called Dr. Crum, Sgt. Herrera, Ms. Guzman, Ms. Walker, Ward Clerk Bertha Jones, Shari Loyd, R.N., Payroll Technician Angela Peace, and Medical Records Supervisor Teresa Iranfar.

The parties stipulated to the admission of Agency Exhibits 1 through 14, 17 and 18, and Appellant’s Exhibits F, G, H, and K. Exhibits C and E were admitted during the hearing without objection. Exhibit L was admitted over the Agency’s objection that it was offered on the first day of the hearing, on the basis that it was a Denver Health policy memorandum presenting no harm to the Agency’s case.

No additional exhibits were offered or admitted.

PRELIMINARY MATTERS

1. The Hearing Officer’s Jurisdiction

The hearing officer finds she has jurisdiction to hear this case as a suspension pursuant to CSR Rule 19-10 b), as follows in relevant part:

Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

...b) Actions of appointing authority: Any action of an appointing authority resulting in... suspension... which results in an alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

Jurisdiction over Appellant’s suspension was not disputed by either party to this case.

2. Appellant’s allegations of retaliation.

Appellant initially alleged the Agency was retaliating against her for filing an EEOC claim in federal court. However, she failed to proffer any testimony, evidence, or arguments tending to suggest that any of the Agency’s actions were taken against her as a result of an EEOC claim. This allegation has therefore been dismissed as abandoned.

3. Burden of proof

The City Charter, C5.25(4) and CSR 2-104(b)(4) require the hearing officer to determine the facts of the case “de novo.” This means that she is mandated to make independent determinations
In civil administrative proceedings such as this one, the level of proof required for a party to prove its case is a preponderance of the evidence. See, 13-25-127, C.R.S (2001). In other words, to be meritorious, the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

It has previously been established that the Agency responsible for disciplining a Career Service employee affirmatively bears the burden of establishing, by a preponderance of the evidence, that it had just cause for the disciplinary action. See, In the Matter of the Appeal of Vernon Brunzetti, Appeal No. 160-00 (Hearing Officer Bruce A. Plotkin, 12/8/00). The severity of discipline must also be reasonably related to the nature of the offense in question. See, In the Matter of Leamon Taplan, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99).

ISSUES

1. Whether the Agency has shown by a preponderance of the evidence that Appellant engaged in the alleged acts.

2. If so, whether the acts constitute violations of CSR rules, giving the Agency just cause to discipline Appellant.

3. If so, whether Appellant’s one-week suspension without pay is reasonably related to the seriousness of the offenses in question.

FINDINGS OF FACT

1. The Denver Health “Correctional Care Unit” provides medical services at three correctional facilities in Denver: an emergency room at the Pre-Arraignment Detention Facility (“PADF” or “City Jail”), an infirmary at the Denver County Jail (“County infirmary”), and a locked forensic unit known as “Ward 18” on Denver Health Medical Center’s main campus.

2. It is necessary for Denver Health to coordinate with the Denver Sheriff’s Department in the medical care of inmates. While the Sheriff’s Department perceives the inmates as prisoners, Denver Health perceives them as patients. Therefore, there is an ongoing degree of tension between the two entities which requires the supervisors on both sides to facilitate and nurture positive interactions between the two.

3. When an inmate is pregnant and within two weeks of the delivery date, the policy at the correctional facilities is that the inmate is sent to Ward 18 for observation. This is to avoid a stigma to the child of being born in jail. However, there is another policy when an inmate is a fugitive from another county. In such cases the correctional facility must seek advance authorization from that county concerning payment of medical expenses before the inmate is
sent to Ward 18. At times after regular working hours, it is difficult to contact the appropriate county authority to authorize the move.

4. Appellant has worked in the Correctional Care Unit for approximately ten years. In March of 1999, Appellant was promoted to the position of Nursing Clinical Coordinator for Correctional Care, and occupied this position at all relevant times. She supervises the nursing staff, assures the quality of inmate care, and responds to inmate grievances filed with the Denver Sheriff’s Office, which grievances are forwarded to Appellant for review. As is the current Denver Health practice for employees in supervisory positions, Appellant has been rotated among the various facilities to become acquainted with operations at all three facilities. In addition to supervising the nursing staff, she also serves as an on-call supervisor for clerical staff and health care technicians at the various facilities in the absence of other direct supervisors.

5. Dr. Peter Crum has been a physician for Denver Health for approximately nine years. He has periodically worked at the Denver Health facilities at both PADF and the County Jail. He has been involved with transfers of inmates from other counties numerous times and is very familiar with the procedure. He has been told by county employees many times after hours that the individual responsible for authorizing the transfer is not there and will not be available until the following morning.

6. Sergeant Mary Herrera has been with the Denver Sheriff’s Department since 1971. She was stationed at PADF during the relevant timeframes. She has engaged in many transfers of inmates in need of medical care.

7. Dr. Crum testified to the following series of events that occurred on or around April 9, 2002. He became aware that a pregnant inmate within two weeks of her delivery date was being detained at the City Jail. The inmate was on a fugitive hold from Arapahoe County. Therefore, Dr. Crum determined that he needed county authorization to transfer the inmate to Ward 18. However, to Dr. Crum’s recollection, it was after hours when he received this information. Also to Dr. Crum’s recollection, the inmate was not symptomatic. He therefore determined that her transfer should wait until the following morning. Dr. Crum does not specifically recall speaking with Arapahoe County, but to his recollection, authorization was required before the transfer could occur, and the county could not be reached during this incident.

8. Dr. Crum testified that he spoke with Sgt. Herrera on the phone during this incident. During his conversation with Sgt. Herrera, he got the impression that she was unfamiliar with the protocol for contacting counties before transferring inmates on a fugitive hold. He recalls explaining the difference between daytime and nighttime procedures to her. During his conversation with Sgt. Herrera, Dr. Crum recalls saying something to the effect that “In all of my nine years we’ve never done it like that.” Dr. Crum could not recall the alternative procedure Sgt. Herrera was suggesting. He did not authorize the inmate’s transfer to Ward 18. He does not recall Sgt. Herrera saying anything one way or the other about teletyping the county. He does recall calling Dr. Sanders and verifying that his understanding of the procedure was correct.
9. Dr. Crum testified he believed Appellant was caring for the inmate during the incident on April 9, 2002. He spoke with Appellant during this incident and recalls telling Appellant essentially the same information about transfer protocol when the inmate is from another county. At some point, Appellant told him that Sgt. Herrera said he authorized transfer of the inmate. He testified he did not call Sgt. Herrera a “liar” or say she was “lying.” However, Dr. Crum did not testify concerning how he responded to this statement, and neither party asked Dr. Crum how he responded to this statement during his testimony.

10. Sgt. Herrera described the incident on April 9, 2002 as follows. She was stationed at PADF that evening. At approximately 4:00 p.m. Appellant came to Sgt. Herrera and told her there was a problem with a pregnant inmate. Appellant informed Sgt. Herrera that the inmate “should be sent to the hospital,” but that Dr. Crum would not authorize the inmate’s transfer. Sgt. Herrera testified that the Sheriff’s Department procedure “doesn’t deal with” the issue of a medical transfer of an inmate on a fugitive hold from another county. She testified that she did not know at the time of this incident that the inmate’s transfer to Ward 18 required Dr. Crum’s authorization.

11. Appellant then left Sgt. Herrera’s office and returned to the infirmary. Sgt. Herrera believed Appellant left to prepare the paperwork for the inmate’s transfer to the hospital. Sgt. Herrera then walked to the infirmary, where she found Appellant on the telephone with Dr. Crum. Appellant handed Sgt. Herrera the phone, and Sgt. Herrera explained their transfer procedure to Dr. Crum. She testified that Dr. Crum asked her to call the county, and she explained that they do not call but teletype the counties. Dr. Crum then said something to the effect that he’d been there nine years and the procedure she was explaining was not the correct procedure. Sgt. Herrera “told him it was and ended the conversation.” (See, Exhibit 8.)

12. Sgt. Herrera returned to her office and requested a teletype to Arapahoe County. When she returned to the infirmary, Appellant again told her that Dr. Crum would not authorize the inmate’s transfer. Sgt. Herrera testified she did not tell Appellant that Dr. Crum had authorized the inmate’s transfer. However, Sgt. Herrera told Appellant that the inmate was “going to go.” Appellant responded something to the effect that the Sheriff’s Department would have to authorize it because Dr. Crum would not. Sgt. Herrera reiterated that they were sending the inmate to the hospital. (See, Exhibit 8.)

13. Shortly thereafter, the inmate bonded out of jail. Sgt. Herrera then encountered the inmate at the finance office, where she learned the inmate was “having pains” of uncertain etiology in her abdomen. Sgt. Herrera then arranged to transport the inmate to Rose Medical Center as a courtesy.

14. Sgt. Herrera testified that the following day she ran into Appellant in the Officer’s Mess Hall during lunch. Appellant walked up to her and asked her how it went with the pregnant inmate. Sgt. Herrera told Appellant the inmate bonded out. Sgt. Herrera testified that during the conversation, Appellant said something to the effect that “Dr. Crum called you a liar.” Sgt. Herrera asked why he said this, and Appellant elaborated that it was about the telephone discussion concerning the transfer procedure. Sgt. Herrera asked Appellant something to the effect of, “He actually called me a liar?” to which Appellant responded “He said you were lying.”
15. Appellant testified to the incident on April 9, 2002 as follows. She became aware of the inmate who was in her 38th week of pregnancy. Appellant knew of the policy to avoid births occurring while in jail. She called Dr. Crum and told him about the inmate. Dr. Crum wanted more details relevant to the inmate’s incarceration and bond options, so Appellant went to Sgt. Herrera’s office to gather the information Dr. Crum requested. She returned to the infirmary, telephoned the doctor and relayed this information. The doctor told Appellant that the inmate should be held until Arapahoe County could be contacted. Appellant was still on the phone when Sgt. Herrera walked into the office. Appellant handed the phone to Sgt. Herrera so she could handle it rather than Appellant relaying information back and forth between them. Sgt. Herrera spoke with the doctor at that time, and then hung up. Appellant asked Sgt. Herrera if Dr. Crum released the inmate for transfer to Ward 18. Herrera said that she had. As a result of this, Appellant began preparing the transfer paperwork for the inmate.

16. A while later, Dr. Crum called Appellant back to check on the status of the inmate. Appellant thought this was strange since he had already authorized her transfer. Appellant said something to the effect of, “You said to send her to the hospital.” Dr. Crum asked Appellant who told her this. Appellant said “Sgt. Herrera did.” Dr. Crum said something to the effect that “You tell Sgt. Herrera that I said she is a liar.” Appellant asked Dr. Crum, “Do you really want me to tell her that?” To which Dr. Crum responded, “Yes.” Appellant thought this was unprofessional, and felt caught in the middle between Dr. Crum and Sgt. Herrera. Appellant felt the patient should have been the main concern.

17. The next day, Appellant saw Sgt. Herrera in the Officer’s Mess, and asked her how the situation with the pregnant inmate turned out. During the conversation, Appellant said something like, “You know Mary, Dr. Crum said he did not authorize the patient to the hospital like you said.” Sgt. Herrera asked Appellant something to the effect of, “Is he calling me a liar?” Appellant responded, “He said you were lying about it.” Appellant testified that she would never directly relay the accusation that someone is a “liar” as this is clearly unprofessional behavior, and that she did not do so in this case. Appellant testified that the relationship between Denver Health and the Sheriff’s Department is already difficult enough without “adding fuel to the fire.”

18. Sgt. Herrera became upset by this allegation and filed a complaint against Dr. Crum with her Division Chief, William Smith (Exhibit 8). Sgt. Herrera did not file a complaint against Appellant. Denver Health did not receive a copy of the complaint until over two weeks later, on April 25, 2002.

19. Dr. Crum testified he learned of this complaint later (presumably some time in the month of April) when Undersheriff Fred Oliva presented it to him and asked if he had any response to the complaint. He testified he did not know Sgt. Herrera at the time, did not have any response or follow up on this complaint, and essentially figured it would work itself out.

20. Dr. Crum and Sgt. Herrera both testified that they did not feel there were any negative lingering feelings toward one another, and did not perceive any lingering negative effects on interactions between the two agencies.
21. Denver Health implemented its e-mail system in or around the mid 1990’s. It also created an e-mail policy which appears under Principle #4-118 of the Denver Health Principles and Practices (Exhibit 10) (hereinafter “PP #4-118”). The e-mail policy basically states that the e-mail system is to be used for business purposes only and any other use is not considered appropriate, that e-mails generated in the system are not confidential and are subject to the Open Records Act, and that e-mails may be accessed by Denver Health management officials at any time.

22. PP #4-118 has no Effective Date. Appellant testified that she did not see PP #4-118 until she received it as part of the disciplinary paperwork relevant to this case. It is unclear whether Denver Health ever circulated this e-mail policy.

23. Nursing Program Manager Kathy Boyd-Giboney was hired in November of 2001. She became Appellant’s supervisor at that time. Ms. Boyd-Giboney testified that she had no knowledge of training on PP #4-118.

24. Nurse Operations Manager Bonnie Guzman (Ms. Boyd-Giboney’s supervisor) testified that there was never any specific training on the use of the e-mail system until after the events giving rise to this appeal, at which time the issue was staffed and PP #4-118 was distributed.

25. Director of Nursing La Vonna Walker testified that while the Denver Health Principles and Practices are generally given to employees upon their hire, she was not clear when PP #4-118 was generated in relation to the implementation of the e-mail system. She testified that employees were “oriented” when they began using e-mail, but gave no details of such “orientation.”

26. Support Services Clerk Michelle Ruvalcaba testified that she had not seen PP #4-118 until meetings that occurred as a result of the events of the present case.

27. Bertha Jones was hired by Denver Health about two years before the hearing in this case. She testified that she was never trained on the e-mail policy, and did not know about PP #4-118 until she was recently suspended for violating it.

28. Shari Loyd came to Ward 18 approximately one and a half years prior to the hearing in this case, and began using e-mail at that time. She testified the first time she recalls having seen PP #4-118 was “probably earlier this year.”

29. At some uncertain time, Deputy CIO Gregg Veltri created a memorandum on Denver Health letterhead welcoming employees to the e-mail system (Exhibit L). This memo basically reiterates that e-mail is to be used for business-related purposes, and that all e-mails are subject to discovery by management. This policy statement was a little more specific in that it states “incidental and occasional” personal use, while permitted, is subject to the same discovery by management as all types of e-mail, and that the e-mail system is not to be used

---

1 The hearing officer recognizes that Exhibit L appears to permit some personal use as opposed to Exhibit 10. However, she finds this distinction irrelevant since none of the witnesses could definitively testify that they’d seen either document until after the incidents at issue in this case.
to relay disparaging information about others, such as ethnic or racial slurs. Once again, it is not clear whether Denver Health ever distributed this e-mail to the employees. The memo is not dated. None of the witnesses testified seeing this document before the events in this case.

30. Payroll Technician Angela Peace testified that she recalls having to sign "something" when she first began using the e-mail system, but was unclear in her testimony whether this was Exhibit 10, or Exhibit L, or either of these documents.

31. Medical Records Supervisor Teresa Iranfar testified that she may have been shown PP# 4-118 (Exhibit 10) when she started, but is not certain. She testified she was never trained on e-mail usage.

32. Upon Appellant’s promotion to Nursing Clinical Coordinator in 1999, she was assigned to the County infirmary. While she was at the County infirmary, Appellant directly supervised Ms. Iranfar. Appellant testified that she directly supervised Ms. Iranfar until November of 2001, when Ms. Boyd-Giboney was hired. Appellant continued to serve as an “on-call” supervisor for Ms. Iranfar at the relevant times whenever Ms. Boyd-Giboney and Ms. Guzman were unavailable.

33. Ms. Iranfar testified she considered Appellant to be in her direct supervisory chain until the summer of 2002 after the incidents in this case, when she was told to report directly to Ms. Boyd-Giboney. However, before then, Ms. Iranfar considered Ms. Boyd-Giboney and Ms. Guzman also to be in her chain of command.

34. Appellant and Ms. Iranfar are friends. They socialize outside work hours, and make personal telephone calls to one another.

35. In March of 2002, Appellant was reassigned from the County infirmary to the PADF facility. Appellant and Ms. Iranfar continued to communicate thereafter by telephone and e-mail.

36. At the relevant times, the individuals who worked at the County infirmary with Ms. Iranfar included Dr. Sanders, her secretary Nancy Cardona, Angela Peace (formerly Angela Maiden), and Michelle Ruvalcaba. Ms. Ruvalcaba and Ms. Iranfar shared an office at the relevant times. Ms. Cardona occasionally used Ms. Iranfar’s computer, since it was the only one capable of generating patient charts.

37. It is apparent from the evidence that working relations between Ms. Iranfar the other staff at the County infirmary were not very good, and that Ms. Iranfar felt a degree of isolation from some of her co-workers. She confided to Appellant concerning her feelings about them on several occasions by telephone and e-mail after Appellant was assigned to the PADF facility.

38. On April 11, 2002, Appellant e-mailed Ms. Iranfar (Exhibit 9, p. 3) requesting a patient chart out of archives. Ms. Iranfar responded on whom to ask for the chart. She included in her response a comment about Ms. Peace taking the day off because of mouth pain. Ms. Iranfar then stated in the e-mail: “I told her to stop putting things in there that don’t belong.” At the hearing in this case, Appellant testified that she did not take this comment as an oblique reference to oral sex, but that she could understand how others might. Ms. Iranfar testified at
the hearing that she meant nothing sexual by this comment. She testified she was referring to the fact that she had observed staff members sharing tongue depressors to stir their coffee on several occasions, and that she had repeatedly admonished the staff that they were risking the spread of infection by doing this.

39. On April 11, 2002 Appellant replied to Ms. Iranfar's response (Exhibit 9, p. 3), stating, "You are so crazy. I laughed through your entire note." The remainder of Appellant's e-mail focuses on the process of interviewing individuals for a payroll clerk vacancy.

40. At the end of Ms. Iranfar's April 11, 2002 e-mail she refers to Appellant as "fatty." Ms. Iranfar testified that all the women on the staff felt they had weight issues, that they spent much time freely speaking about it with one another, and in essence, that this topic was considered neither taboo nor offensive since it was a problem they all shared.

41. Ms. Iranfar further repeatedly refers to Appellant as "ugly" at the beginning of her e-mails (see, Exhibit 9, pp. 2, 3, and 6). It is apparent from the context that this term is meant affectionately and is not intended as an insult. It is further apparent from Appellant's responses that she found this humorous and not offensive.

42. On April 12, 2002 Ms. Iranfar sent another e-mail to Appellant (Exhibit 9, p. 2) reporting she had interviewed a young woman for an opening, but that Ms. Ruvalcaba and Ms. Peace expressed their disapproval. Ms. Iranfar's e-mail states, in relevant part: "The girls don't like her of course because she is Mexican and chunky like them. Michelle says she won't get along with her, they are already assuming they won't get along with her. They feel they should have a say so who we hire, I said I don't think so. They want me to hire a guy so they can make moves on him...Michelle actually said there will be problems."

43. Ms. Iranfar testified that Ms. Ruvalcaba said something to Ms. Iranfar to the effect that she should not hire the applicant because she was "fat and chunky like us" and that they already had enough "Mexican women" on the staff. Ms. Iranfar asserted she was just relaying Ms. Ruvalcaba's own comment to Appellant. She testified that she did not intend the comment as a racial slur, and that being of a very diverse racial background herself, she is not the type of person who would do as much. Ms. Iranfar testified that Ms. Ruvalcaba did tell her there would be trouble if she hired the applicant. Ms. Iranfar testified that she sought to consult with Ms. Boyd-Giboney and Ms. Guzman about Ms. Ruvalca's comments, but that neither was at the County infirmary at that time. This is why she e-mailed Appellant. Ms. Iranfar testified that Ms. Ruvalcaba also said something to the effect that "We need some men around here, something to look at" during their conversation.

44. Appellant responded to Ms. Iranfar's April 12, 2002 e-mail as follows (Exhibit 9, p. 2): "You can tell them I said, though I appreciate their input, the decision is not up to them. If Michelle (Ruvalcaba) has that attitude, I would let her know that the only problem (and discipline) will most likely occur with her, not the new lady. This is not an issue of competition. It is an issue of getting the work done..."
45. Both Appellant and Ms. Iranfar testified that they had a telephone conversation after Ms. Iranfar's e-mail on April 12, 2002, during which Appellant admonished Ms. Iranfar that this was not a professional way to communicate using the e-mail system.

46. On April 17, 2002, Ms. Iranfar sent Appellant an e-mail (Exhibit 9, p. 4), relaying a conversation with Ms. Peace in which Ms. Iranfar stated, "that's what you get for assuming, you make an ass out of yourself... I said you are the fool for listening to them and not coming to me first. Then I turned my back and started to work. I'm through with them all. Even Nancy had a tude and is trying to talk today too. I say the Hell with them all. I'm done with them." Appellant did not reply to this e-mail.

47. On April 21 or 22, 2002, while Ms. Ruvalcaba and Ms. Iranfar were working together in their office Ms. Ruvalcaba observed Ms. Peace come into their office and say "hi" to Ms. Iranfar. Ms. Iranfar responded in a way that Ms. Ruvalcaba found to be unfriendly. A day or so later in Ms. Ruvalcaba's recollection, she overheard a telephone conversation during which she believed Ms. Iranfar was gossiping about the exchange with Ms. Peace to Appellant. Later that same day, Ms. Iranfar left early with a toothache, and Ms. Ruvalcaba noted that Ms. Iranfar had not logged off her computer. Ms. Ruvalcaba waited for a few minutes to make sure Ms. Iranfar had left, then called Ms. Cardona and told her that Ms. Iranfar had left her screen up and that she had been gossiping about her e-mails concerning the staff earlier that day. Ms. Cardona came to the office and pulled up Appellant's e-mails. At some point during this process, Ms. Peace (who shares an office with Ms. Cardona) also came to Mr. Ruvalcaba's office. Ms. Cardona retrieved and copied Ms. Iranfar's e-mails and Appellant's responses of April 11, 12, and 17 (Exhibit 9, pp. 3, 2, and 4, consecutively). Ms. Ruvalcaba testified they only looked for e-mails to Appellant, because the reason they were looking at the e-mails was Ms. Iranfar's telephone call to Appellant earlier that day.

48. Ms. Ruvalcaba testified she did not make the comment that appears in the April 12 e-mail about the applicant being "Mexican and chunky." Ms. Ruvalcaba noted that Appellant "laughed" in her response. Ms. Ruvalcaba testified she was upset by untrue comments in the e-mails, and that such comments would be made by a supervisor. Ms. Ruvalcaba testified that she understood the comment about Ms. Peace putting things in her mouth to be referencing oral sex, and believed the other two women inferred the same. Ms. Ruvalcaba testified that Ms. Peace cried when they read the e-mails.

49. Ms. Peace testified that the e-mail of April 11 (Exhibit 9, p. 3) upset her because she believed Ms. Iranfar meant something sexual by the comment about putting things in her mouth. She testified that the e-mail of April 25 (in which Appellant suggests the use of code names)

---

3 While there is some dispute about the date of this incident, there is a fax legend on pages 3 and 4 of Exhibit 9 that indicates the pages were faxed on April 24, 2002. Since the evidence tends to suggest that the pages were faxed the day after they were found, the hearing officer concludes that they were found on April 23, 2002.

3 Employees are assigned passwords to get into the computer system. Denver Health computers have a security screen that automatically logs out the user after a few minutes, after which the user must re-enter their password.

4 Ms. Iranfar was the supervisor of the clerical staff at the County infirmary at this time.
bothered her a little. Ms. Peace testified that the other e-mails did not bother her that much and that she did not cry when she read the e-mails. Ms. Peace could not recall what day they retrieved the e-mails, but recalled it happened around 1:00 p.m.

50. Neither Ms. Peace nor Ms. Ruvalcaba testified either way about whether Ms. Iranfar had ever suggested they quit using a shared tongue depressor to stir their coffee.

51. Ms. Ruvalcaba, Ms. Peace and Ms. Cardona decided they wanted to talk to a supervisor about the e-mails. They arranged to have lunch the following day with Ms. Boyd-Giboney.

52. Ms. Boyd-Giboney (Appellant’s immediate supervisor) testified that sometime around April 24, 2002 Ms. Ruvalcaba, Ms. Peace and Ms. Cardona took her to lunch. Toward the end of the lunch, they presented her with some e-mails, and they appeared upset about the e-mails. Ms. Boyd-Giboney glanced through them, and decided to approach someone higher up in the office. They took the e-mails to Dr. Sanders’ office, where she reviewed them more carefully. Ms. Boyd-Giboney testified that she was shocked and surprised by these e-mails. They called Ms. Guzman (Ms. Boyd-Giboney’s supervisor) on the speaker phone and informed her of the e-mails. She told Ms. Guzman about how distraught the three reporting staff members appeared over the e-mails. Ms. Boyd-Giboney then faxed the e-mails to Ms. Guzman. Ms. Boyd-Giboney could not recall specifically which e-mails were included in the ones she saw originally.

53. On or around April 25, 2002, the Agency became aware of the complaint letter submitted by Sgt. Herrera, when Undersheriff Oliva contacted Director of Nursing LaVonna Walker, and was reportedly upset about the complaint.

54. Meanwhile, on April 25, 2002 Ms. Iranfar sent Appellant another e-mail (Exhibit 9, p. 1) in which she describes Dr. Sanders watching her while she was talking on the phone earlier that morning. Ms. Iranfar states (referring to Dr. Sanders), “I don’t trust her at all. I know she don’t like me….The girls aren’t talking to me unless they have to and I love it. I won’t play (their) games, not this girl….I have a hot date on Saturday, I will try to control myself: ha ha...”

55. Appellant responded to Ms. Iranfar’s e-mail on April 25, 2002 (Exhibit 9, p. 1) stating as follows in relevant part: “When you e-mail me, which I enjoy reading from you, try not to use last names. Maybe we can compose some codes like ‘the girls,’ or the ‘good doc,’ etc….“ She testified her suggestion to use code names was a poor choice, but it was intended to avoid the inappropriate use of individuals’ names.

56. On April 26, 2002 Ms. Iranfar sent Appellant an e-mail (Exhibit 9, p. 5) stating as follows in relevant part: “We had a discussion, myself, the girls and bag of rock and I guess she was

---

5 Ms. Peace recalled seeing the e-mail of April 25. Since it is apparent that this incident happened on April 23, it is unclear when Ms. Peace saw the e-mail of April 25, and the hearing officer suspects that her recollection of having seen it on this occasion is not accurate.

6 Ms. Cardona did not testify.
concerned with us being on the phone a lot, that’s what dr. jekel was talking to her about yesterday, she saw me on a personal call and told on me and the girls backed her up…”

57. Appellant responded to Ms. Iranfar’s April 26 email (Exhibit 9, p. 5) as follows in relevant part: “I told you. Dr. Jekel has way too much time on her hands…”

58. Appellant testified she understood both herself and Ms. Iranfar to be referring to Dr. Sanders when they used the term “Dr. Jekel.”

59. Ms. Iranfar replied to Appellant’s response on April 26 (Exhibit 9, p. 5) as follows in relevant part: “HEY DR J IS A TRIP SHE NEEDS TO WORRY ABOUT HER OWN EMPLOYEE CHEATING ON HER TIME SHEET AND SMOKING DRUGS BEFORE WORK. I AM PISSED AT THE GIRLS THEY ARE REALLY TRYING TO GET SOMETHING ON ME…”

60. On or around April 26, 2002 Chief Nursing Officer Tom Drury further investigated Appellant’s use of the e-mail system. The further research revealed the e-mails of April 25 and 26 (Exhibit 9, pp. 1 and 5), in addition to the following three personal e-mails since November of 2002:

a) A widely circulated e-mail from outside the office with a short, comical message about love, received by Appellant on November 5, 2001, and forwarded by Appellant to Ms. Cardona on November 30 (Exhibit 9, p. 9). The content of this e-mail is humorous, but not inappropriate.

b) A one-paragraph e-mail to Appellant from an old friend outside the office dated December 19, 2002, and a one-paragraph response from Appellant dated December 20 (Exhibit 9, p. 8). The content of this message is appropriate, but personal and not work-related.

c) A fairly lengthy inspirational e-mail dated March 14, 2002 about a dying patient, circulated inside the office, whose recipients included Appellant, Ms. Ruvalcaba, Ms. Cardona, and Ms. Iranfar, forwarded by Appellant to her old friend on March 15 (Exhibit 9, pp. 10-13). The content of this e-mail is appropriate, and while it did not directly originate from work sources and had a strongly religious tone, it perhaps could be considered by some in a health care work setting as relevant to work morale.

61. The Agency prepared a Contemplation of Disciplinary Action letter and sent it to Appellant on April 26, 2002 (Exhibit 7). The Contemplation letter sets forth allegations concerning Appellant’s statement that Dr. Crum called Sgt. Herrera a “liar.” Sgt. Herrera’s complaint was not attached to the Contemplation letter. The Contemplation letter also sets forth allegations concerning Appellant’s inappropriate use of the e-mail system. The Contemplation letter references the statement “Mexican and chunky like them” but does not clarify who made this statement. The Contemplation letter did not have any of the e-mails in

---

7 Appellant also received an e-mail from Ms. Cardona on December 18, 2002, that originated from Benefits Administrator Jen Godwin with an unrevealed icon attached (Exhibit 9, pp. 14-15). While the substance of the original message is not included in the exhibit, this e-mail appears to be business-related and the hearing officer has disregarded it.
question attached and did not reference the dates of the objectionable e-mails. The Contemplation letter set a predisciplinary meeting for May 3, 2002.

62. Appellant became extremely distraught when she received this letter. She approached her doctor, who placed her on medical leave beginning May 1, 2002 for a two-week period for depression. The doctor wanted Appellant to take medication for the depression, but Appellant was reluctant and resisted taking the medication.

63. Appellant applied for FMLA relief soon after being placed on leave. This request went to the benefits department and the Agency was not aware that Appellant had applied for FMLA until much later, when the request was processed and retroactively authorized in or around June of 2002.

64. On May 2, 2002 Appellant’s representative contacted Denver Health and informed them that Appellant had been placed on medical leave and the predisciplinary meeting would need to be postponed. Mr. Drury informed Appellant’s representative that Appellant would need to provide medical documentation indicating she could not be in attendance at the meeting, or else she would be required to attend.

65. Appellant spoke with Director of Nursing, LaVonna Walker, about being on leave during the time the predisciplinary meeting was scheduled to occur. Ms. Walker told Appellant her presence was not necessary for a predisciplinary meeting, and that the meeting could be conducted by telephone.

66. On May 2, 2002, Dr. Robert Leder issued a medical leave slip in which he prohibited both in-person and telephone contact between anyone at Denver Health and Appellant until such contact was cleared by his office in two weeks (Exhibit 6).

67. On May 2, 2002 Appellant sent Ms. Walker a letter indicating that the predisciplinary meeting would need to be postponed until her doctor cleared her for return to work (Exhibit 5). She attached a copy of the medical leave slip (Exhibit 6).

68. On May 6, 2002 the Agency sent Appellant a letter (Exhibit 4) directing her to respond in writing to the allegations in the predisciplinary letter, since she was prohibited from in-person or telephone contact with the Agency. Appellant’s written response was due no later than May 13, 2002.

69. Appellant prepared and submitted her written response on May 9, 2002 while still on medical leave (Exhibit 3). She states in her written response that she provided it “under protest” and “under duress.” She testified she responded to the written request because she believed she did not have a choice in the matter. Therefore, the predisciplinary process was executed in writing and there was never a predisciplinary meeting in this case.8 Appellant testified that

8 At no time during the appeal process did Appellant specifically challenge the fact that the predisciplinary process had been achieved in writing. Nor did she argue during the hearing that she had not been afforded sufficient due process. The hearing officer is unaware of any precedent that states the predisciplinary process cannot be conducted in writing. Therefore, this issue is considered abandoned and the hearing officer does not address it here.
she had ascertained which e-mails the Agency was apparently referring to by the time she prepared her written response.

70. Ms. Guzman and Ms. Walker testified that following the predisciplinary communications, they elected to suspend Appellant for one week.9 They considered several factors in determining the severity of the discipline. Among these were Appellant’s involvement in the incident between Dr. Crum and Sgt. Herrera, Appellant’s improper use of the e-mail system, the degree of distress this caused Appellant’s fellow employees, and Appellant’s “extensive” history of four disciplinary actions since June of 2001.

71. On May 20, 2002 Ms. Guzman prepared and sent Appellant a “Notice of Suspension” (Exhibit 2). This letter informed Appellant that the Agency had determined to issue her a one-week suspension without pay from May 21 through 28, 2002.


73. Ms. Guzman was not aware at the time she made the decision to suspend Appellant that Appellant had called Ms. Iranfar following the April 12, 2002 e-mail about her inappropriate use of the e-mail system. Ms. Walker did not testify either way to her knowledge concerning this event.

74. Ms. Boyd-Giboney testified that she has a good working relationship with Appellant. She testified she believes Appellant works to create a positive working environment.

75. Ms. Boyd-Giboney testified that after the incidents giving rise to this case, she retrieved a copy of PP #4-118 (Exhibit 10) and put it in the staff book located in the County infirmary. The staff subsequently discussed this regulation at a staff meeting.

DISCUSSION

1. Rules the Agency alleges Appellant violated.

The Agency posits that Appellant's conduct constitutes violations of the following CSR rules (see, Exhibit 2):

Section 16-50 Discipline and Termination

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.

9 Mr. Drury participated in this decision, but no longer works for Denver Health and did not testify during the hearing.
1) Gross negligence of willful neglect of duty.

...10) Discrimination or harassment of any employee or officer of the City and County of Denver because of race, color, religion, national origin, sex, age, political affiliation, sexual orientation or disability. This includes making derogatory statements about a protected class regardless of whether the comments are made directly to a member of the protected class.

...20) Conduct not specifically identified herein may also be cause for dismissal.

Section 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline:

...2) Failure to meet established standards of performance including either qualitative or quantitative standards.

...4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.

5) Failure to observe departmental regulations (Principle #4-118 of the Denver Health Principles and Practices, set forth below).

6) Carelessness in performance of duties and responsibilities.

7) Unauthorized operation or use of any equipment of the City and County.

...11) Conduct not specifically identified herein may also be cause for progressive discipline.

* * *

PP #4-118 (see, Exhibit 10) reads as follows in relevant part:

Subject: Electronic Mail (E-Mail)

Practice:

1. The use of computing networking resources at Denver Health is a privilege, and, like any other privilege, carries with it the responsibility for making use of these resources in an efficient, ethical, and legal manner. The system shall be used in a manner consistent with the instructional, research, and administrative objectives of Denver Health. All activities inconsistent with these objectives are considered inappropriate and may jeopardize continued use by an employee of computing and network resources. Denver Health reserves the right to examine any user's stored information at any time, but in particular when investigating cases of computing abuse...
addition...corrective/disciplinary action may be taken when appropriate.

2. Like all of the hardware and software that comprise Denver Health's computer network, the E-Mail system is the property of Denver Health and, as such, may be monitored by Denver Health.

3. ...While certain records may be confidential or privileged, employees should have no expectation of privacy in either sending or receiving information by E-Mail. All computer files, including E-Mail, are the property of Denver Health, regardless of their physical location or the form in which they are maintained...

4. Executive Staff, computer network administrators designated by Executive Staff, and the supervisors of subordinate employees, have access to all E-Mail files and communications of an employee...

...6 Any employee who uses the E-Mail system shall be responsible for maintaining professional standards of communication with the knowledge that any records may be accessible to the public under the public records law.

7. Any employee who uses the E-Mail system shall be aware that his or her communications may be monitored by a designated Denver Health administrator or supervisor.

8. It is the responsibility of all managers and supervisors to educate employees about this principle...

2. Analysis of the evidence.


   The Agency’s disciplinary letter (Exhibit 2) leaves the reader with the impression that Appellant basically approached Sgt. Herrera and told her that Dr. Crum had called her a liar. After reviewing all the testimony and written statements of the parties to this event, the hearing officer finds the Agency’s brief description of this event misleading.

   The hearing officer is charged with the task of weighing the credibility of witnesses and resolving factual disputes. The hearing officer found Appellant’s detailed testimony in explanation of this incident, and her general demeanor during that testimony, to be highly credible and persuasive. Upon further examination, Appellant’s version of events is further corroborated by the general testimony of both Sgt. Herrera and Dr. Crum. Based on all the evidence to this incident, the hearing officer now finds the following more likely than not occurred.

   Appellant called Dr. Crum to inform him she had a pregnant inmate within two weeks of delivery, who was also on a fugitive hold from another county. At some point during the communications concerning the inmate, Dr. Crum concluded the inmate was not symptomatic, but it is not clear when this happened. It was late enough in the day for Dr. Crum to have concluded
that the county could not be reached for transfer authorization. He therefore asked for more
information on the inmate's bond options, and additional information necessary for him to establish
whether he should expedite her transfer, or whether it should wait until morning.

Appellant went to the Sheriff's office to gather that information. While there, she spoke to
Sgt. Herrera about the case, which is how Sgt. Herrera got involved. Appellant told Sgt. Herrera
that Dr. Crum was reluctant to authorize the pregnant inmate's transfer. Sgt. Herrera told Appellant
they could transfer the inmate under the Sheriff Department's emergency transfer protocol, which
Sgt. Herrera believed at the time did not require the doctor's authorization.

When Appellant left Sgt. Herrera's office and returned to her station, Sgt. Herrera believed
it was to prepare the inmate's transfer under the Sheriff's protocol based on what Sgt. Herrera had
just told Appellant. (See, Exhibit 8.) Actually, Appellant returned to call Dr. Crum back and relay
the information he had requested, and perhaps to clarify his authorization requirement. Sgt.
Herrera, who probably followed Appellant to her station in preparation to receive the inmate for
transfer, appeared while Appellant was still on the phone with Dr. Crum, who had just told her the
inmate should remain there until the following morning when they could reach the county. Rather
than serve as a go-between, Appellant handed the phone over to Sgt. Herrera to let them sort it out
among themselves.

It is clear that Sgt. Herrera and Dr. Crum then had a disagreement as to the appropriate
protocol concerning the inmate's transfer. Sgt. Herrera, having engaged in emergency transfers in
the past, had it in her mind that the inmate could be transferred without the doctor's authorization,
under the Sheriff Department's protocol concerning emergency transfers. Dr. Crum, with the
understanding in his mind that the inmate was not in emergent status, used this as the determining
factor on whether to authorize her immediate transfer, or wait until morning. This is why he said
"In all my nine years we've never done it like that." The two never got past this missing piece of
information, upon which Dr. Crum's determination of authorization apparently turned. By her own
accounts of this event, Sgt. Herrera did not know that the doctor's authorization was required in the
inmate's case. She insisted to Dr. Crum that the inmate's transfer to the hospital could happen, and
then "ended the conversation." (See, Exhibit 8.)

It is clear from all accounts that after Sgt. Herrera had spoken on the phone with Dr. Crum,
she emphatically told Appellant that the inmate was being transferred. Sgt. Herrera's comments
gave Appellant the clear impression that Dr. Crum had authorized the transfer. This is why
Appellant began preparing the authorization paperwork, and it is why she was surprised when Dr.
Crum called back a while later to check the status of the inmate, for whom he had presumably
already authorized the transfer. The hearing officer finds these details in Appellant's account of her
actions that evening significant, corroborative evidence of her belief, based on what Sgt. Herrera
had told her, that Dr. Crum had authorized the transfer.

Then, when Dr. Crum called back asking about the inmate's status, Appellant innocently
expressed this belief to him. Dr. Crum did testify that Appellant told him Sgt. Herrera said he had
authorized the inmate's transfer. But Dr. Crum's testimony is curiously silent as to his response to
this assertion. Appellant's testimony is the only evidence on this particular part of the conversation.
Appellant testified that when she told Dr. Crum he had already authorized the inmate's transfer, Dr.
Crum asked her, “Who told you that?” Appellant responded, “Sgt. Herrera did.” Appellant then heard Dr. Crum tell her to tell Sgt. Herrera she was a liar.

The hearing officer concludes it is more likely than not that Dr. Crum did respond in some way to Appellant’s apparent challenge, and that the response was not particularly favorable where Sgt. Herrera was concerned. The hearing officer finds Appellant’s very clear, detailed recollection of the events of that evening more persuasive than Dr. Crum’s vague, incomplete memories of those events. Furthermore, no motivation has been shown, or even suggested, to explain why she would fabricate that Dr. Crum told her to tell Sgt. Herrera she was a “liar.” It is likely that Dr. Crum, already somewhat ruffled by Sgt. Herrera’s earlier insistence to the contrary of his knowledge of protocol, became irritated at the suggestion that he had misled her. He told Appellant (using some terminology) that what Sgt. Herrera had told Appellant was not correct and that Appellant could tell Sgt. Herrera as much.

Based on all these considerations, the hearing officer concludes it is more likely than not that Dr. Crum said something leaving Appellant with a clear impression that Sgt. Herrera had lied about his alleged authorization, and that Appellant should tell Sgt. Herrera this.

Meanwhile, the next day, Appellant saw Sgt. Herrera during lunch. Not yet knowing the fate of the pregnant inmate, asked Sgt. Herrera how things turned out the night before. Appellant’s initial inquiry about the inmate’s fate was apparently innocent and motivated out of concern and interest for how the situation worked out. Still in her mind, however, was the disparity between what she understood Sgt. Herrera to have told her (that Dr. Crum had authorized the patient’s transfer) and Dr. Crum’s assertion that he had not. Appellant more likely than not did not appreciate getting caught in the middle like she had been, and brought up this disparity during the conversation. Notably, Appellant addressed Sgt. Herrera on a first-name basis, suggesting a level of comfort that might lead Appellant to believe she could talk about this with Sgt. Herrera on a less formal, more personal level.

Appellant admits noting during the discussion that Dr. Crum told her that, contrary to what Appellant had understood Sgt. Herrera to have told her, he had not authorized the transfer. The hearing officer finds it was not unreasonable for a person in Appellant’s situation to inquire into the disparity. Appellant’s inquiry was what led to Sgt. Herrera’s next question. Sgt. Herrera, likely still perturbed that the doctor had been insisting something contrary to her understanding of protocol, was ruffled by Dr. Crum’s suggestion that she had deliberately misled Appellant. She challenged Appellant’s apparent accusation, by asking Appellant, “Is he calling me a liar?” As a matter of fact, to Appellant’s understanding, this is exactly what Dr. Crum had said. While Appellant may or may not have originally intended to relay this statement by Dr. Crum, there she was, presented with the question point blank, and as a matter of fact, the doctor had said something to that effect. This series of events led Appellant to respond, in her mind, honestly to the question. Mindful, however, of the tension between the two agencies, Appellant attempted what she thought was a softening of Dr. Crum’s message, to eliminate the word “liar.” She replied, “He said you were lying.” Appellant thought the distinction in phraseology significant, but it was not as significant to Sgt. Herrera. All Sgt. Herrera heard was an affirmative response to her question, “Is he calling me a liar?”
Sgt. Herrera recalls Appellant offering up the statement “He called you a liar.” While Sgt. Herrera no doubt recalls it that way, the hearing officer suspects that Sgt. Herrera’s anger over the revelation that followed clouded her memory somewhat. The thing she most clearly recalls is that she found this incident insulting. However, for the reasons set forth here, the hearing officer finds Appellant’s version of events more likely and more persuasive.

The hearing officer concludes that what initially appeared to the Agency as a bald-faced, unfounded accusation by Appellant, was really the culmination of a very human series of events, which led Appellant to make a poor judgment call in relaying a message that should not have been relayed. The circumstances of this incident mitigate its severity significantly. Appellant was, in fact, caught in the middle of a dispute over the proper procedure between Dr. Crum and Sgt. Herrera, which became magnified by her own misunderstanding of both Sgt. Herrera’s and Dr. Crum’s intentions.

On the other hand, while Appellant did not deliberately insult Sgt. Herrera, she admits she engaged in poor judgment. When dealing in diplomacy, honesty is not always the best policy. By Appellant’s own admission, the relationship between the Sheriff’s Department and Denver Health can be strained. The doctor’s “order,” as Appellant understood it, was unprofessional and unnecessary to the performance of her regular duties. As a supervisor, she should have exercised discretion and should not have relayed the doctor’s accusation, even though it may have been accurate. Therefore, Appellant’s actions are a violation of CSR 16-51 A 4), prohibiting the failure to maintain satisfactory relationships with other city and county employees, as well as CSR 16-51 A 6), prohibiting carelessness in the performance of her duties and responsibilities. The hearing officer therefore concludes that these charges are supported by a preponderance of the evidence.

b. Allegation of improper use of the e-mail system.

i. CSR 16-51 A. 2): “Failure to meet established standards of performance,”
CSR 16-51 A. 5): “Failure to observe departmental regulations,”
CSR 16-51 A. 7): “Unauthorized operation or use of any ... equipment of the City and County.”

The Agency posits that Appellant’s inappropriate use of the e-mail system comprises violations of these regulations. The hearing officer disagrees.

None of the supervisors could testify that there had been any e-mail use training ever held, or that PP #4-118 had been distributed before the events of this case. Almost to the person, the witnesses testified they never received any type of training or orientation concerning permitted and prohibited use of the e-mail system, and that they had never seen PP #4-118 until it was brought to their attention as a result of this case. The evidence therefore suggests that there were no “established standards.” On the contrary, ignorance of the Agency’s e-mail regulation was apparently pervasive.

Appellant should not be held responsible for her failure to meet established performance standards, or for violation of departmental regulations, where the Agency has not shown it ever took any clear steps to inform its employees of the existence of those standards and regulations.
Furthermore, in the absence of any such training to the contrary, the occasional personal use revealed by the Agency’s further investigation was not clearly unreasonable.\(^{10}\)

Even assuming ignorance of departmental regulations is not an excuse, Appellant was the *recipient* of e-mails containing the material that was presumably in violation of departmental regulations, not their author. For these same reasons, the Agency has not shown Appellant’s use of the e-mail system was “unauthorized.”

The hearing officer concludes that the Agency has not shown Appellant has violated either CSR 16-51 A. 2), CSR 16-51 A. 5) or CSR 16-51 A. 7) by a preponderance of the evidence.

**ii. CSR 16-51 A. 4): “Failure to maintain satisfactory working relationships with co-workers,” and CSR 16-51 A. 6): “Carelessness in performance of duties and responsibilities.”**

On the other hand, although her ignorance of the e-mail policies is perhaps excusable, Ms. Iranfar’s emails do contain inappropriate language and unfavorable gossip. As a supervisor Appellant is responsible for exercising common-sense supervisory judgment and providing an example of leadership for others. Her failure to do so constitutes a failure perform her *de-facto* duties as a supervisor. Her ignorance of the policies notwithstanding, Appellant should have known better than to allow Ms. Iranfar to continue engaging in inappropriate communications, despite the form in which they were relayed. Appellant therefore failed to exercise good leadership judgment. The Agency has shown Appellant’s inaction was in violation of CSR 16-51 A. 6), “Carelessness in performance of duties and responsibilities.”

Appellant’s failure to take some decisive action to stop Ms. Iranfar from continuing to engage in negative commentary about others, and her suggestion of using codes to avoid “offending” other people, further constitute implicit encouragement of Ms. Iranfar’s inappropriate personal commentary. As defined in Black’s Law Dictionary, 5\(^{th}\) Edition (1979):

> “Accomplice”....One is liable as an accomplice to the crime of another if he gave assistance or encouragement or failed to perform a legal duty to prevent it with the intent thereby to promote or facilitate the commission of the crime.

(Emphasis added.) The hearing officer therefore finds that as a supervisor, Appellant was complicit in Ms. Iranfar’s violation of CSR 16-51 A. 4), “failure to maintain satisfactory working relationships with co-workers.”

However, the hearing officer finds Appellant’s intent to participate in such violations is minimally established only by her suggestion of the use of codes. It is clear she never expected publication of the offending comments in question, and again, she did not make them. Her ancillary role in the offences at issue significantly mitigates the severity of these offenses.

---

\(^{10}\) For this reason, the hearing officer has disregarded the additional e-mails of November 14, 2001, December 20, 2001, and March 15, 2002.
iii. CSR 16-50 A. 10): "Discrimination or harassment of any employee or officer of the City and County of Denver because of race... (or) national origin..."

The only presumably racial comment in evidence is that made by Ms. Iranfar to Appellant in her e-mail of April 12, 2002 (Exhibit 9, 2). The hearing officer is not persuaded that any action by Appellant constitutes a violation of CSR 16-50 A. 10) for several reasons.

First, while there tends to be a presumption against such references to race or nationality, it is not clear from the evidence that Ms. Iranfar meant this comment as a slur. The hearing officer found credible Ms. Iranfar’s testimony, that she was actually relaying comments by Ms. Ruvalcaba who is herself an Hispanic female of a fairly large build. In addition, it is clear from Appellant’s response to this e-mail, as well as her testimony, that she also interpreted the information as though it were intended to inform her, as a supervisor, of problem comments by Ms. Ruvalcaba.

Furthermore, unlike Appellant’s response to some of Ms. Iranfar’s other objectionable e-mails, nothing in Appellant’s response to this particular e-mail can be interpreted as implicitly encouraging Ms. Iranfar’s use of the e-mail system on this occasion. On the contrary, Appellant’s response to this e-mail was appropriate on this occasion. First, she admonished Ms. Iranfar in her response that Ms. Ruvalcaba might be facing disciplinary action if her unacceptable behavior were to continue. In other words, Appellant’s response clearly suggests that she also believed Ms. Iranfar was reiterating something Ms. Ruvalcaba said. It is further clear that Appellant did not feel the manner in which Ms. Iranfar relayed the information was appropriate, as evidenced by Ms. Iranfar’s verification that Appellant called her and told her the e-mail was not appropriate. Finally, Appellant correctly and credibly testified that her main concern was that Ms. Ruvalcaba was apparently encouraging Ms. Iranfar to engage in an act of discrimination against the applicant.

Moreover, the fact that Appellant did not generate or publish this message, but instead was its recipient, is significant when considering the discrimination and harassment charges against Appellant. The hearing officer is mindful that the 16-50 A. 10) “includes making derogatory statements about a protected class regardless of whether the comments are made directly to a member of the protected class.” However, not making the statement “directly to a member of the protected class” is quite different than receiving the offending statement from another, particularly when it is in a form reasonably expected to remain confidential. An individual who is merely observing statements made by others, who does not publish such statements to others, does not engage in harassment or discrimination. See, In the Matter of Steve Smith, Appeal No. 265-00 (Decision entered 5/4/01). The Agency has shown no such publication by Appellant here. She was merely the recipient of a statement by another employee over the email system. The consequent offense to others occurred only after the e-mail was retrieved from another employee’s machine under apparently prohibited circumstances. Its publication was clearly neither intended nor anticipated by Appellant.

Finally, the party uttering the offensive statement may (or may not) intend a member of the protected class to indirectly receive the discriminatory or harassing message. While the offending party’s behavior might be in violation of the rule either way, clearly the intended damage is significantly different, and that intent should be taken into consideration by the supervisor in determining what sort of action to take. Appellant’s understanding that the statement was intended
by the sender neither to be discriminatory nor to be published must be considered when judging the actions Appellant took as a supervisor to correct the offending behavior.

For all these reasons, the hearing officer concludes that Appellant was not responsible for any harassing or discriminatory effect resulting from the statement. Appellant's actions were therefore not in violation of CSR 16-50 A. 10. On the contrary, she took appropriate actions with regard to this incident, which were intended to prevent others from engaging in such a violation. This charge must therefore be dismissed.

c. Allegation of “gross negligence or willful neglect of duties” in violation of CSR 16-50 A. 1).

The Agency’s most serious charge against Appellant is “gross negligence or willful neglect of duties” in violation of CSR 16-50 A. 1). It is not clear whether this allegation is related to Appellant’s role in the interactions with Dr. Crum and Sgt. Herrera, or her use of the e-mail system. However, for the following reasons, the hearing officer finds neither incident justifies a finding of “gross negligence” of “willful neglect of duties.”

“Negligence” is commonly defined as the failure to use reasonable care or failure to act in a reasonably prudent manner under the circumstances. Lavine v. Clear Creek Skiing Corp., 557 F.2d 730 (10th Cir. 1977); Metropolitan Gas Repair Service, Inc. v. Kulik, 621 P.2d 313 (Colo. 1980). “Gross negligence” suggests a higher level of culpability than mere negligence. Use of the term 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. 438, 563 P.2d 1 (1977) (emphasis added). Black’s Law Dictionary, 5th Edition (1979) defines “gross negligence” as:

The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting a legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care... Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional wrong...

“Willful neglect,” on the other hand, implies that the wrongful conduct is a blatantly intentional or conscious violation. Black’s defines it as follows:

The intentional disregard of a plain or manifest duty... Willful neglect suggests intentional, conscious, or known negligence – a knowing or intentional mistake. Puget Sound Painters v. State, 45 Wash.2d 819, 278 P.2d 302, 303.

As concerns Appellant’s role in the incident involving Dr. Crum and Sgt. Herrera, it is clear to the hearing officer that Appellant was caught in the middle of a dispute about protocol between

---

11While this is a separate issue from Appellant’s supervisory responsibilities to take some remedial action when she became aware that another employee was making such statements, the hearing officer finds Appellant did take an appropriate supervisory action by calling Ms. Iranfar and telling her this was not an appropriate use of the e-mail system.
Dr. Crum and Sgt. Herrera. While her decision to relay her understanding of Dr. Crum’s message to Sgt. Herrera was a poor one, once again the hearing officer cannot find the severity of this action rises to a level that is so extreme as to constitute either “gross negligence” or “willful neglect” as required above.

As concerns Appellant’s involvement in the e-mail activity, the hearing officer once again finds critical the fact that Appellant, for the most part, was not herself directly engaging in the offending behavior. She was not the initial offending party, but rather a recipient of inappropriate e-mails from another. She even spoke to Ms. Iranfar on one occasion concerning the inappropriate nature of one of the offensive e-mails. Appellant’s most objectionable action was her implied encouragement of Ms. Iranfar’s inappropriate behavior when she suggested they use “codes” to avoid documenting gossip about other specific people.

Understandably, it did not occur to Appellant that the e-mails would ever be seen by others. Furthermore, since Appellant was not mindful of the e-mail policies at the time of these interactions, she did not intentionally act in violation of those e-mail policies. While the result might have been different if Appellant had been Ms. Iranfar’s direct supervisor, under all the circumstances in this case, the hearing officer concludes that Appellant’s actions cannot be characterized as “flagrant beyond all allowance” or showing an “utter lack of responsibility,” and do not rise to the level of blatantly intentional disregard.

For these reasons, the hearing officer concludes that the totality of evidence does not support either an allegation of “gross negligence” or of “willful neglect of duty.” The charge of a violation of CSR 16-50 A. 1) must therefore be dismissed.


In determining the appropriateness of a given disciplinary action, the test is whether the degree of discipline is "reasonably related" to the seriousness of the offense. See, Leamon Taplan, above. It is a well-established principle of employment law that in determining whether the discipline is reasonably related, it must be “within the range of reasonable alternatives available to a reasonable, prudent agency administrator.” See, In the Matter of William Armbruster, Appeal No. 377-01 (decision entered 3/22/02), citing Adkins v. Div. of Youth Services, 720 P.2d 626 (Colo. App. 1986). However, in determining whether the discipline is within the range of reasonable alternatives, the discipline may be found excessive where it is based substantially on charges or factual considerations that are not supported by a preponderance of the evidence. See, e.g., William Armbruster, above; In the Matter of the Appeal of Dolores Gallegos, Appeal No. 27-01 (entered 3/21/01).

CSR Rule 16, governing disciplinary actions, states as follows in relevant part:

16-10 Purpose

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 shall take into
consideration the employee’s past record. The appointing authority or designee shall impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance...

Section 16-20 Progressive Discipline

... 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...

(Emphasis added.) Thus, while the Career Service Authority operates under the scheme of a progressive discipline system, an employee’s past record, whether it be for better or worse, is only one factor to be considered in a determination of the appropriate level of discipline.

In this case, Ms. Guzman testified that in determining the severity of discipline in this case, the Agency was “following the path of progressive discipline.” Ms. Guzman’s testimony suggests that she felt the severity of the discipline was justified in part by the existence of Appellant’s prior “extensive” disciplinary history. That disciplinary history is as follows.

- Appellant received a verbal warning on June 6, 2001 for nine instances of absence in a rolling one-year period (Exhibit 17).
- She received a written reprimand for alleged “falsification” of her timesheet on June 21, 2001 (Exhibit 12), which offense is again related to leave use.\(^{12}\) (Appellant was unable to get to work due to a heavy amount of snow. The Agency expected Appellant to deduct lost time from her annual leave, which she did not do.)
- She received a written reprimand on July 25, 2001 (Exhibit 14) for refusing to comply with the instructions of a supervisor, which was apparently, once again, related to an absence she took without seeking authorization in the manner she had been instructed to.
- Finally, on January 28, 2002 Appellant received a five-day suspension (Exhibit 11) for appearing at an office party on a day she had called in sick. While the suspension cited several alleged violations of the Career Service Rules, Appellant’s appearance at the party was the only recitation of facts. Once again, the only facts are related to abuse of sick leave.

As CSR 16-20 (above) suggests, considering prior progressive disciplinary actions is not always “practicable” in determining the severity of discipline in the present case. The hearing officer is disinclined to consider past incidents of discipline as “progressive” where the nature of the prior alleged infractions bears no relationship to the present violation. See, William Armbruster, above. This is not to suggest that an employee can arbitrarily wander her way through the vast multitude of rules governing the Career Service personnel system, from one

\(^{12}\) The date of June 2, 2001 is a typographical error.
violation to another, without the authorities and the Hearings Office holding the employee accountable for ongoing, flagrant disregard for that system.

But that is not what has happened here. Reviewing the complaints against Appellant in May, June and July of 2001, it is clear that they all directly relate to her attendance under the new Denver Health regulations, which permit only six incidents of absence a year and are strictly enforced. (See, e.g., Exhibit 17.) Furthermore, contrary to the Agency’s assertions, those disciplinary actions appear to have corrected Appellant’s attendance problems, since with the exception of going to a party on one occasion, she has had no charges suggesting continued problems with leave use in well over a year.13

The factual substance of the present charges largely comprises Appellant’s failure to exercise sound supervisory judgment. The evidence does not tend to establish that these charges bear any relationship whatsoever to attendance issues. Therefore, while the hearing officer takes note that Appellant had a series of violations in a relatively short time last year, their gravity in the current disciplinary action is greatly mitigated by their distinct nature from the current charges. For these reasons, the hearing officer is not inclined to give Appellant’s disciplinary history much weight in determining the severity of discipline in the present case, and concludes it was an error for the Agency to do so.

It is clear from the testimony of Ms. Guzman and Ms. Walker that in determining the severity of the discipline, they also placed substantial weight on several considerations that are not supported by a preponderance of the evidence. First, they accepted Sgt. Herrera’s characterization of Appellant’s role in the dispute with Dr. Crum, as set forth in Sgt. Herrera’s complaint (Exhibit 8). Second, it is clear from the language in the disciplinary letter (Exhibit 2) that the Agency considered Appellant equally culpable for the e-mail language Ms. Iranfar used, as evidenced by the inclusion of charges of harassment and discrimination. However, the preponderance of the evidence in this case does not show that Appellant deliberately, proactively engaged in these actions as they were characterized in the disciplinary letters.

Furthermore, Ms. Guzman and Ms. Walker both testified that they took into consideration the level of distress the e-mails apparently caused to the employees. It was clear to the hearing officer through the testimony of those other employees that they were primarily distraught about the negative comments by Ms. Iranfar. The offending comments were not made by Appellant. While Appellant had a supervisory duty to redress Ms. Iranfar’s inappropriate comments, her role was one step removed from the offensive behavior in question. The hearing officer concludes it is unreasonable to take such an analysis one step further, and hold Appellant accountable for other peoples’ reactions to another person’s statements, especially where they were clearly intended to be confidential, where their unanticipated publication was surreptitiously achieved by the offended parties themselves, and where there is some question as to the discriminatory nature of the comments at issue.

13 Appellant’s appearance at the office party is related to leave abuse, but does not tend to suggest that Appellant has continued to have attendance problems. With the exception of this offense, the passage of time suggests that Appellant’s general attendance habits have been improved. Therefore, the particular behavior complained of in these disciplinary actions has been corrected.
Finally, the hearing officer has concluded that the most serious allegations against Appellant, “Gross negligence” and “harassment and discrimination” have not been shown by a preponderance of the evidence. Thus, the Agency has not proven the most serious allegations it has relied on to justify a one-week suspension. Rather, it is clear that Appellant’s most serious offences are a small handful of lapses in supervisory judgment that, when taken as a whole in light of a preponderance of the evidence, are much less serious than the Agency’s original understanding of the events in question, as represented by its characterization of those events in the disciplinary letter, as well as the nature of the charges in that letter. The hearing officer concludes that Appellant’s lapses in judgment should be sufficiently corrected by a written reprimand.

**CONCLUSIONS OF LAW**

1. The Agency has demonstrated by a preponderance of evidence that Appellant engaged in
   a) Failure to maintain satisfactory relationships with co-workers in violation of CSR 16-51 A. 4);
   b) Carelessness in the performance of duties and responsibilities in violation of CSR 16-51 A. 6).

2. The Agency has failed to demonstrate by a preponderance of the evidence that Appellant engaged in:
   a) Gross negligence or willful neglect of duty in violation of CSR 16-50 A. 7);
   b) Discrimination or harassment in violation of CSR 16-50 A. 10);
   c) Failure to meet established standards of performance in violation of CSR 16-51 A. 2);
   d) Failure to observe departmental regulations in violation of CSR 16-51 A. 5);
   e) Unauthorized use of City equipment in violation of CSR 16-50 A. 7);
   f) Unspecified violations in CSR 16-50 A. 20) and 16-51 A. 11).

3. The Agency has demonstrated just cause for disciplining Appellant by a preponderance of the evidence.

4. In light of the totality of evidence in this case, the Agency’s decision to issue Appellant a one-week suspension was based on several factual allegations that were not proven, and several serious alleged rule violations that have not been shown. It is further clear that the Agency inappropriately took unrelated past disciplinary actions into consideration in its determination of the severity of discipline. The hearing officer finds substantial deficiencies in the Agency’s arguments concerning the severity of the discipline. For these reasons, she concludes that it is not reasonably related to the seriousness of the offenses that have been proven. Therefore, a modification of the severity of the discipline is justified and appropriate.

**DECISION AND ORDER**

Based on the Findings and Conclusions set forth above, the Agency’s decision to issue discipline Appellant shall be MODIFIED as follows:
The letter documenting the one-week suspension should be removed from all files and replaced with a written reprimand, in which the following modifications have been made:

a) The description of the incident involving Dr. Crum and Sgt. Herrera shall be modified to reflect the conclusions set forth in this decision (specifically to eliminate the word "liar");

b) Any references to the e-mail activity must be specific as to the dates of the e-mails in question and the exact nature of Appellant’s role, specifically clarifying which statements were actually made by Appellant and which were made by someone else, to which Appellant failed to respond appropriately as a supervisor.

c) References to CSR violations which have not been shown by a preponderance of the evidence, as set forth above under paragraph 2 of Conclusions of Law, shall be stricken from the written reprimand.

Appellant shall receive one week’s back-pay, and shall have restored any benefits to which she would otherwise have been entitled, as soon as is practicable for the entities responsible for generating Appellant’s payroll.

This case is hereby DISMISSED.

Dated this 2nd day of December, 2002.

Joanna Lee Kaye
Hearing Officer for the
Career Service Board