

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

Appeal No. 46-06

DECISION

IN THE MATTER OF THE APPEAL OF:

MARTIN DAVIS,
Appellant,

vs.

DENVER HEALTH AND HOSPITAL AUTHORITY,
and the City and County of Denver, a municipal corporation,
Agency.

The hearing in this appeal was commenced on Oct. 25, 2006, and completed on April 26, 2007 before Hearing Officer Valerie McNaughton. Appellant was present and was represented by Nora V. Kelly, Esq. The Agency was represented by Meghan Pound, Esq. Having considered the evidence and arguments of the parties, the following findings of fact and conclusions of law are entered herein.

I. INTRODUCTION

Appellant Martin Davis was a Registered Nurse with Denver Health and Hospital Authority of the City and County of Denver (Agency or Denver Health) who was dismissed on July 7, 2006. Agency Exhibits 1 - 2, 6 - 9, and 13, and Appellant Exhibits A - N and R were admitted into evidence. Appellant filed this timely appeal of his dismissal which alleged that the discipline was not progressive in nature and was too severe under the circumstances.

II. ISSUES

The issues in this appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules, and

2) Did the Agency establish that termination was within the range of penalties that could be imposed by a reasonable administrator in compliance with the Career Service disciplinary rules?

III. FINDINGS OF FACT

The Agency is a public health care institution administered by the City and County of Denver. Appellant has been employed as a charge nurse at the Agency's main hospital, Denver Health Medical Center, for ten years. Charge nurses oversee the care of patients, supervise nurses, and administer narcotics for licensed practical nurses (LPNs) on their assigned floor at the hospital. Agency policy requires that charge nurses verify the receipt of controlled drugs loaded into the automated dispenser, known as the Pyxis Medstation. [Exh. 6.1.] At the time of his dismissal, Appellant was assigned to the high acute care unit, and oversaw thirty-two hospital beds, four RNs and three LPNs. On July 7, 2006, Appellant was terminated for diverting the narcotic Dilaudid (generic name: hydromorphone).

At the beginning of the evening shift on May 22, 2006, Appellant informed RN Merri Martin that he would administer pain medication to a patient assigned to her. Ms. Martin thought that was unusual because they had not yet had the opportunity to assess the patient's level of pain. A half hour later, the patient informed Ms. Martin that she was in agony despite the medication administered by Appellant, which brought the patient no relief. Ms. Martin was obligated to wait another two hours before she could administer the next dosage, and the patient then reported pain relief. Ms. Martin observed that Appellant was acting strangely. She saw him go through the utility room and into the staff bathroom. When he emerged, he had needles in the pocket of his scrubs, and said, "you ready to go?", a comment that made no sense in the context of the evening's work. Ms. Martin reported to Nurse Manager Sheila Mucklow at the end of the shift that she believed Appellant gave himself her patient's pain medication.

As a result of this report and a report from Christie Star about Appellant's mood swings and odd behavior around the administration of narcotics, Ms. Mucklow asked Pharmacy Dispensing Supervisor Linda Jefferies to review Appellant's Pyxis withdrawals for the past year. The investigation revealed a pattern of unusual wasting, and inconsistencies between patient charts and Pyxis records. It concluded that Appellant "diverted Hydromorphone at least once during every shift that he had worked over the last 14 months." The records showed that the following methods of diversion were used: (1) Appellant obtained Dilaudid in a Carpujet syringe from Pyxis, and recorded the contents of a regular syringe as wasted within minutes thereafter, and (2) he obtained Dilaudid from the machine but did not administer it to the patient, as demonstrated by nurses' notes that the patient was unavailable, not in need of pain medication, or was given other pain medication at about the same time. Appellant was not the nurse assigned to the patient in 12 out of the 16 incidents of suspected diversion. The

investigation showed that Appellant diverted at least 57 doses consisting of 102 mg of Dilaudid from August 2005 to May 2006. [Exh. 1; testimony of Linda Jefferies.]

The investigation also led to suspicions that other RNs were diverting narcotics. Ms. Jefferies was therefore asked to run specific Pyxis reports targeting six other employees. As a result, two of those employees were allowed to resign, two were disciplined and entered into stipulations for treatment pursuant to departmental policy, and two were given short suspensions. Employee Nos. 1 and 2 admitted to diverting drugs for personal use. Because there was no evidence of patient harm in either case, both were offered a Stipulation and Agreement for Treatment under Executive Order 94, § IV.B. Employee No. 1 chose to resign, and Employee No. 2 entered into the Stipulation.

The investigation concluded that the evidence was insufficient to show that the four remaining employees diverted drugs. Employee No. 3 was disciplined for a positive drug test, entered into a Stipulation, and agreed to participate in the Colorado Board of Nursing's Colorado Nurse Health Program (CNHP) diversion program. Employee No. 4 was given a three-day suspension for poor charting. Employee No. 5 was suspended for one day for unintentional removal of a controlled substance. Employee No. 6 voluntarily resigned after admitting to the use of marijuana. [Exhs. J-2; R.]

On May 23, 2006, Ms. Mucklow informed Appellant he was suspected of diverting narcotics. Appellant denied diverting, and asked why Ms. Mucklow would believe that of him. At the conclusion of that meeting, Ms. Mucklow placed Appellant on investigatory leave. Appellant testified he believed it was then apparent that his use of narcotics was going to come out, and so he arranged to meet with the CNHP diversion program in order to avoid revocation of his license to practice as a registered nurse. He also requested a private meeting with Ms. Mucklow, which was scheduled for May 31st.

Appellant testified that during their meeting he admitted diverting Dilaudid for several months, and now wanted to "come clean". Appellant admitted at hearing that this statement "minimized" the time period, since he knew he had been diverting for up to a year. Appellant told Ms. Mucklow that he saved the narcotics remaining after administering the correct dosage to patients, and wasted a comparable amount of saline in front of another nurse.

Ms. Mucklow's contemporaneous notes and testimony about that meeting differ substantially from the account given in Appellant's testimony. Ms. Mucklow's summary written on the day of the meeting noted that Appellant told her "he lied when I met with him previously. He stated that in fact he had been stealing Dilaudid from the Pyxis machines and charting that it had been wasted or he would chart that he gave it to the patient but in fact only gave the patient

saline.” [Exh. 9.] Ms. Mucklow testified that Appellant admitted he withdrew 2 mg Dilaudid syringes from the Pyxis machine, and either wasted the entire syringe or documented that he medicated the patient when he had given the patient saline instead of medicine. Ms. Mucklow said Appellant also admitted that he withdrew 10 mg Dilaudid PCA syringes, replaced the contents with saline, and placed the syringe in patient machine used to allow patients to control their own dosage. Appellant testified that PCA syringes hold 50 mg of medicine, and that Ms. Mucklow may have misunderstood what he said at their meeting.

Ms. Mucklow also recalled that Appellant told her he diverted “for the past 2 - 3 months”, and that he was currently taking the drug on a daily basis. [Exhs. 2.2; 9.] Appellant admitted at hearing that he had actually been diverting narcotics for nine months to one year, but stated that he was only using the drug on weekends.

On June 16, 2006, the Agency informed Appellant by letter that discipline against him was being contemplated based upon the results of its attached investigation which documented sixteen instances that were “highly suspicious for narcotic diversion.” [Exhs. 1 - 2.] The letter also summarized Ms. Mucklow’s memory of the May 31st conversation, which described the diversion method as either charting waste of the medicine or charting that he gave the patient Dilaudid when he actually gave the patient saline. The letter also repeated Appellant’s May 31st statement that he had been diverting for two to three months, and was using daily in May 2006. [Exhs. 2.2; 9.]

Appellant recalled that Ms. Mucklow expressed appreciation that he came forward, and a desire to do everything possible to help him with recovery and his employment with Denver Health. [Testimony of Appellant.] Ms. Mucklow testified that she was shocked by Appellant’s admission of drug diversion, since she had known Appellant for eleven years as a co-worker and then his supervisor, knew his wife since high school, and considered them both friends. Ms. Mucklow testified that she had received no previous complaints about Appellant, and that she felt sympathy for him.

Appellant admitted at hearing that he and his attorney did not contradict the information in the June 16th letter and the attached investigation during the predisciplinary meeting. Assistant Chief Nursing Officer Catherine Beckmann testified that Appellant was asked at the meeting to respond to the information in the letter, and Appellant responded that it was “pretty much accurate”.

As Assistant Chief Nursing Officer, Ms. Beckmann reviews all discipline for the Agency in consultation with Human Resources and the City Attorney’s Office, which review allows her to apply a consistent level of discipline for similar disciplinary offenses. Ms. Beckmann observed that the volume of drugs diverted by Appellant was the largest of any of the numerous diversion cases she had seen. She also found that, in replacing medication with saline, Appellant affected

the patients' pain levels, which is considered a vital sign in post-operative patients. She stated that high levels of pain can cause elevated blood pressure and disturbance of the bodily system that underwent surgery, and can thus lengthen hospital stays. Finally, she noted that Appellant's failure to accurately document patient care could have affected the Agency's compliance with standards of care imposed by the Centers for Medicare and Medicaid Services (CMS).

Based on the volume of narcotics diverted and the conclusion that Appellant's actions affected patient welfare, the Agency determined that termination was appropriate. The Agency took into consideration Appellant's absence of previous discipline, his initial denial of wrongdoing, and the level of discipline imposed on other nurses in similar circumstances. [Exh. A; testimony of Ms. Mucklow and Ms. Beckmann.]

At hearing, Appellant admitted diverting Dilaudid by removing unused medicine from a syringe after administering the proper dose to a patient, then replacing the removed amount with saline. Appellant stated he then emptied the syringe containing saline in front of another nurse in accordance with an Agency procedure developed to prevent diversion. This procedure is known as wasting. [Exh. 6.2.] Appellant estimated that he continued to do this for about nine months to one year. Appellant denied he ever administered saline to a patient, or that he failed to give any patient the prescribed amount of medicine. Appellant testified that he only used the narcotic during his days off.

After the suspected theft of controlled drugs was reported to the Denver Police Department in accordance with Agency policy, Appellant was charged with five counts of obtaining narcotics through fraud and deceit as a result of the same facts used in the dismissal action. [Exh. 6.3.] Appellant stated he recently pled guilty to two misdemeanor counts as a result of a plea agreement in the same criminal case.

IV. ANALYSIS

1. Career Service Rules

Jurisdiction is proper under CSR § 19-10 A. 1. In this de novo hearing on the appropriateness of the discipline, Agency bears the burden of proof to show by a preponderance of the evidence both that Appellant violated the disciplinary rules as alleged, and that termination was within the range of discipline that can be imposed under the circumstances. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.); In re Gustern, CSA 128-02, 20 (12/23/02).

A. CSR § 16-60 A: Neglect of duty

The only ground asserted by the Agency for imposition of discipline is Appellant's admitted diversion of narcotics as alleged in the disciplinary letter. [Exh. A.] Neglect of duty is established by a failure to execute an important work duty that causes significant potential or actual harm. In re Martinez, CSA 30-06, 4-5 (10/3/06).

The investigation revealed through undisputed Pyxis records and nursing notes that Appellant withdrew and immediately wasted Dilaudid on at least five occasions (incidents 3, 8, 11, 13 and 15), withdrew Dilaudid eight times when the patient was resting or sleeping (incidents 9 - 16), withdrew and then wasted Dilaudid when the patient received other pain medication (incidents 4 - 6, 12 - 14), and withdrew and wasted Dilaudid when the chart showed the patient declined any pain medication (incidents 7, 12, 13, and 16). The investigation also showed that Appellant failed to document that he withdrew Dilaudid for a patient on seven occasions, in violation of nursing standards (incidents 1 - 7). [Exh. 1.42 - 1.45]

Appellant admitted at hearing that he diverted Dilaudid for his personal use for up to one year. Appellant did not dispute the accuracy of the Pyxis reports and nursing notes other than by a general denial that he ever failed to administer the correct doses to patients. The hospital records are consistent with Appellant's May 31st admissions to Ms. Mucklow. RN Merri Martin corroborated that evidence by her testimony that on May 22, 2006, Appellant did not administer a prescribed medication he had withdrawn in the patient's name. Most importantly, the hospital records show the only time Appellant administered a dose to a patient was during incident 10, disproving Appellant's testimony that he withdrew medicine and always gave patients their proper doses. In addition, the records reveal that the entire dose was sometimes wasted, contradicting Appellant's statement that he wasted only the leftover after giving the patient the correct dose (incidents 8, 11, 13, and 15).

In contrast to the consistency of the Agency's evidence, Appellant revised his statements over time. On May 23, 2006, Appellant denied diverting narcotics. On May 31st, he admitted he had been diverting for two to three months by wasting any remainder after the proper dose was administered, and stated he was using the drug daily. At hearing, Appellant admitted he had been diverting for nine months to one year, but stated he only used on weekends. His denial that he used on weekdays or deprived patients of pain medicine would if believed rebut the Agency's allegation of patient harm, a finding necessary to support dismissal under Executive Order 94. However, because of the above inconsistencies, I find Appellant's denial that he deprived patients of medication not credible.

The Agency presented convincing evidence that Appellant failed to administer pain medication to patients, failed to accurately chart all care provided to patients, and failed to use narcotics for their intended purpose, in violation of this rule. On the basis of these findings, I conclude that Appellant neglected the important work duties of administering medication in accordance with doctor's orders and charting all patient care.

B. CSR § 16-60 C.1: Theft in the use of City property

Theft requires an intent to permanently deprive another of his property. In re Schultz, CSA 156-04, 6 (6/20/05).

Appellant admitted at hearing and in his May 31st meeting with Ms. Mucklow that he diverted the Agency's narcotics for his personal use. The investigation of Pyxis reports and nursing notes show that Appellant misappropriated at least 102 mg of Dilaudid over the course of one year. The Agency has therefore proven that Appellant violated CSR § 16-60 C.1.

C. CSR § 16-60 E: Dishonesty

Dishonesty requires proof that an employee knowingly communicated a false statement within the employment relationship. In re Roberts, CSA 179-04, 4 (6/29/05).

Appellant admitted at hearing and in his May 31st meeting with Ms. Mucklow that he lied to her on May 23rd when she asked him if he had been diverting narcotics. Since Appellant is a nurse entrusted with administering narcotics to patients, this conversation is and relates to matters clearly within the employment relationship. The evidence is undisputed that Appellant violated the above rule prohibiting acts of dishonesty.

D. CSR § 16-60 H: Improper possession of legal drugs while on City property or while on duty

This rule prohibits an employee from unauthorized possession of legal drugs while on duty. Appellant has admitted that he converted the narcotic hydromorphone from City possession while working as a charge nurse at Denver Health, and used that drug himself thereafter. I take judicial notice that hydromorphone is a Schedule II controlled substance. 21 USCS § 812. Appellant admitted that his possession of the narcotic was an improper rather than an authorized possession. Appellant's diversion of hydromorphone constituted improper possession of a legal drug in violation of CSR § 16-60 H.

E. CSR § 16-60 L: Failure to observe agency regulations

Appellant is next charged with violation of three agency regulations on the basis of his diversion of hydromorphone.

Denver Health Employee Principles and Practices Drug-Free Workplace policy governs the possession, use or sale of an illegal drug or alcohol in the workplace, similar in many respects to Executive Order (EO) 94, the City's alcohol and drug policy. [Exh. 4.] Both the department and City policies require an employee working in a position affecting public health or safety and taking legal drugs to obtain a determination that the employee does not pose a threat to his own or others' safety. [Exh. 4, p. 2; EO 94, p. 2.] The evidence is clear that Appellant did not disclose his drug use to his supervisor, and did not obtain a determination about whether that drug use posed a safety threat in the workplace. Appellant therefore violated both the agency and City drug policies.

Secondly, the Agency's Code of Conduct requires an employee "to store, handle, administer and report an illegal diversion of controlled substances" according to the rules pertaining to the product, and prohibits possession of drugs while at work. [Exh. 5.] By diverting Dilaudid and substituting saline, Appellant failed to handle and administer Dilaudid in the prescribed manner. Appellant also improperly possessed this controlled substance at work. These actions are violations of the Agency Code of Conduct.

Finally, the Denver Health policy governing the control and disposition of drugs for patient care areas requires a nurse wasting a drug to place his user ID in the sign-out entry and have another nurse witness the action. [Exh. 6.] The Agency presented no evidence that Appellant failed to comply with this rule.

F. CSR § 16-60 P: Conviction of or being charged with a crime

Appellant admitted that he pled guilty to two misdemeanors based upon the same facts which were used to support this discipline. The Agency did not demonstrate that the appointing authority followed the guidelines mandated by CSR § 16-61. For that reason, I find that the Agency did not establish that Appellant violated CSR § 16-60 P.

G. CSR § 16-60 Y: Conduct violating Executive Order 94

For the reasons stated in section E above, I find that Appellant violated Executive Order 94.

H. CSR § 16-60 Z: Conduct prejudicial to the good order and effectiveness of agency

This rule prohibits conduct that is by its nature prejudicial to the effectiveness

of the Agency, or that brings disrepute on or compromises the integrity of the City. In re Salerno, CSA 90-06, 12 (2/27/07).

Denver Health is a public hospital that provides medical care including surgery to those in need. Appellant held a position as charge nurse on the high acute care unit to those seriously ill or recovering after surgery. For several months before his actions were discovered, Appellant stole the narcotic pain medication Dilaudid after withdrawing it from the dispenser on behalf of a specific patient. Appellant attempted to conceal these thefts by using different syringes to waste the substituted saline, and having another nurse witness the ostensible waste of narcotics. Appellant often documented that he had administered the correct dose to the patient when he had not. The false statements prevented patients from getting needed pain relief, and had the potential to cause physical harm and lengthen the time needed for recovery. More often than not, Appellant was not the assigned nurse. His actions caused confusion in the treating nurse, and thus hindered the operation of the hospital in providing appropriate patient care. Appellant therefore violated CSR § 16-60 Z by conduct that was by its nature prejudicial to the effectiveness of the Agency.

2. Penalty

Appellant argues that termination was not appropriate given his otherwise positive employment record and his efforts to obtain treatment for drug abuse through the Colorado Nurse Health Program.

The Agency claims that immediate dismissal is justified because of the large amount of narcotics diverted and its concern that Appellant's actions affected the welfare of its patients. Executive Order 94, § IV A. 3. mandates dismissal for a first offense of being under the influence of illegal drugs in the workplace if "[t]he employee has endangered the lives of others, or foreseeably could have endangered the lives of others." [Exh. 7.12.] RN Merri Martin provided first-hand testimony that on May 23rd her patient was "in agony" for two hours because Appellant falsely documented she had received medication. Ms. Martin was unable to administer any other pain medicine until the appropriate time had passed after Appellant charted a dose that was not given. Appellant's odd behavior and needles in his scrub pockets led her to believe Appellant took the patient's dose himself. Ms. Beckmann testified that unrelieved pain can cause physical injury and complicate recovery.

The evidence showed that Appellant was a registered nurse entrusted with administering narcotics to patients, and that he engaged in a long-term pattern of conduct involving deception, theft and indifference to the welfare of vulnerable hospital patients in order to supply himself with a narcotic to which he had become addicted. His successful diversion of about 102 mg of Dilaudid over the course of nine months to a year using a variety of complicated methods to escape detection is a serious offense that does not justify characterization as a first offense. Under these circumstances, the Agency properly concluded that

any penalty short of termination was not proportional to the seriousness of the offense. Appellant's continued denial of the nature of his actions demonstrates that a lesser penalty would not have corrected the inappropriate behavior. CSR § 16-20.

While Appellant is to be commended for seeking and following through with long-term treatment and monitoring under the CNHP program, he did not make that effort until after his pattern of diversion had been discovered. Appellant's belated recognition of his addiction does not mitigate the serious nature of the misconduct.

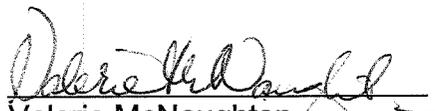
Appellant also argues that his penalty was harsher than those imposed on other nurses found to have engaged in drug diversion. However, Appellant was also found to have harmed patients by his actions. In contrast, the two other nurses who had diverted drugs were determined not to have harmed patients by their behavior. [Exh. J-2; R.] Executive Order 94 requires termination for a first offense of improper use of drugs if the employee endangered or could have endangered the lives of others. I find that the difference in severity of penalty was justified by the substantial difference between Appellant's misconduct and that of the other two employees.

The Agency established that termination was within the range of penalties that could be imposed by a reasonable administration in compliance with Rule 16 of the Career Service Rules.

ORDER

Based on the foregoing findings, it is hereby ordered that the Agency's termination action dated July 17, 2006 is AFFIRMED.

Dated this 8th day of June, 2007


Valerie McNaughton
Career Service Hearing Officer