

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

Appeal No. 45-05

DECISION

IN THE MATTER OF THE APPEAL OF:

CATHRYN L. DIAZ,
Appellant,

vs.

DENVER PARKS AND RECREATION, DENVER ZOOLOGICAL FOUNDATION,
Agency,
and the City and County of Denver, a municipal corporation.

I. INTRODUCTION

The Appellant, Cathryn L. Diaz, appeals a one-day suspension assessed by the Agency, the Denver Zoo. A hearing concerning this appeal was held on August 11, 2005, before Hearings Officer Bruce A. Plotkin. The Appellant was represented by her non-attorney husband, after a pre-hearing conference concerning that representation. The Agency was represented by Mindi Wright, Esq., with Ms. Carol Flohr, the Appellant's supervisor, serving as the Agency's advisory witness.

Agency exhibits 1, 2, 4-8, 12-14, 17, and 19-26 were admitted without objection. Agency exhibits 10, 11, 13, 14, 16, and 18 were admitted over objection. Agency Exhibit 3 was denied. Exhibits 9 and 15 were not offered into evidence. The Appellant's Exhibits A-C were admitted without objection. Exhibits D and G were denied. The remainder of the Appellant's Exhibits were withdrawn.

The Agency presented the following witnesses: the Appellant, Ms. Leslye Bilyeu, Ms. Janet Houser, and Ms. Carol Flohr. The Appellant testified on her own behalf and also presented testimony of Mr. Michael Hernandez.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated Career Service Rules (CSR)16-50 A. 1), 7), 13), or 20); CSR 16-51 A. 1), 2), 4), 6), 10), or 11);
- B. if the Appellant violated any of the above-cited CSR, whether there was just cause for the Agency's decision to assess a one-day suspension of the Appellant;
- C. whether the Agency engaged in unlawful discrimination against the Appellant based upon her race;
- D. if there was not just cause to discipline the Appellant, whether she is entitled to deletion of the one-day suspension from her personnel record, back pay and lost benefits.

III. BACKGROUND

The Appellant is employed as an Administrative Support Assistant II in the Operations Section at the Denver Zoo. Operations is responsible for support services for other zoo departments. The office had two assistants and a supervisor, Carol Flohr, but budget cuts forced a reduction in staff to only the Appellant and Flohr.

The Appellant's duties include tracking two-way radio repairs for staff, each of which is worth over \$2,000. Her other duties include filing, typing, maintaining inventory logs, tracking petty cash, answering phones, tending one of the zoo entry gates, mail and package delivery, securing filing cabinets at the end of the day, and various office projects.

The Agency alleged the Appellant violated certain Career Service Rules, cited above, in the following incidents. On February 3, 2005, and on March 7, 2005 the Appellant failed to follow office procedure by failing to email Flohr the serial numbers of the two-way radios that had been repaired and returned. Flohr further alleged when the Appellant did send the information it was wrong.

On February 9, 23, and March 3, and 15, 2005 the Appellant failed to secure file cabinets in the Operations area. The cabinets contain paychecks as well as two-way radios, batteries, CDs, and other valuables.

On February 18, 2005, the Appellant left for lunch at 12:30 p.m., and was scheduled to return at 1:00 p.m. The Appellant called Flohr after 1:00 to say she had to take her 20-year old daughter to the doctor. When she returned at 2:00 p.m., she said she did not take her daughter to the doctor, but consulted with the doctor by phone.

Flohr assessed one hour of unauthorized leave against the Appellant for this incident.

On March 2, 2005 Flohr asked the Appellant to inventory the zoo periodicals that have been kept in Operations since the library closure. The Appellant stated the project was completed after two and one half days. When Flohr asked if the Appellant included the periodicals in the filing cabinet, she answered no because the file cabinet was locked. When they went to the cabinet, however, they found it open.

On March 8, 2005, Flohr asked the Appellant to place a fax from the doctor of another employee in the employee's file. Flohr later discovered the confidential fax in another employee's file, two file folders away.

On March 14, 2005, Flohr found two outstanding petty cash vouchers and asked the Appellant to follow up on them. Flohr stated the Appellant added incorrectly and therefore caused an employee anguish because he thought he lost some of the money given him. Subsequently the Appellant re-added the sum several times and came up with the correct amount verifying the employee had not lost any cash. In addition, Flohr found the Appellant's failure to bring the outstanding vouchers to Flohr's attention violated a prior directive. [Exhibit 12].

Flohr reviewed the Appellant's time card and found a pattern of excessive tardiness and absenteeism including the following between January and March 2005.

1/4/05	Tardy
1/5/05	23 minutes late Leave without Pay
1/7/05	Called in sick
1/10/05	Tardy
1/12/05	21 minutes late Leave without Pay
1/21/05	Tardy
1/24/05	Tardy
1/28/05	Tardy
2/7/05	Called in sick
2/8/05	Called in sick
2/14/05	Tardy then went home sick at 9:35 a.m.
2/15/05	Tardy
2/18/05	Tardy
2/22/05	Tardy
3/1/05	Tardy
3/4/05	Tardy
3/8/05	Tardy
3/10/05	Tardy
3/17/05	Left sick at 9:13 a.m.
3/18/05	Called in sick

[Exhibit 1].

Based upon these occurrences, a pre-disciplinary meeting was held on April 6, 2005. The Appellant was represented by her union representative, Ms. Cheryl Hutchison. Both the Appellant and her representative provided statements. Hutchison stated the radios were never lost, and that accounting for the radios was the responsibility of a former employee. She also stated Flohr offered to lock the cabinets for the Appellant as the Appellant was driving away. She also claimed since the Appellant did not personally give out cash, it was not her responsibility to track outstanding vouchers.

On April 19, 2005 the Agency served notice on the Appellant that she would be suspended for one day, effective April 20, 2005. This appeal followed on April 28, 2005.

IV. ANALYSIS

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

"Gross Negligence", under CSR 16-50 A.1), means the failure to use reasonable care that is flagrant or beyond all allowance, or showing an utter lack of responsibility, and justifies a presumption of willfulness and wantonness. In re Keegan, CSA 69-03, 8 (3/21/04), In re Daneshpour, CSA 88-03, 10 (12/30/03). In most cases, in order to find an employee's absences and tardiness violated this rule, more than frequent tardiness or absence is required. There must be a showing of some willfulness or wantonness in those absences. However, where the absence or tardiness impairs a critical Agency function, a violation of this rule may be found. See. e.g. In re Trujillo, CSA 28-04 (5/27/04) (Appellant's absence from his hospital laundry job caused short supply of essential, clean supplies for patients and doctors), and In re Aguirre, CSA 03-4 (8/16/04) (carelessness in leaving a gate unlocked raised imminent danger of harm or death to animals and people).

The Agency suggested the Appellant violated this rule by her continued absences, even after prior warnings, discipline, and counseling. [Agency closing statement]. No evidence presented by the Agency suggested the Appellant's absences, though admittedly frequent [Appellant testimony], were the result of more than simple carelessness or poor time management.

In addition, the consequences of the Appellant's attendance problems were that Flohr had to cover the Appellant's duties in her absence. No evidence presented by the Agency suggested that a critical Agency function was impaired by the Appellant's attendance failures, or that the Appellant was aware of any such impaired critical function. For these reasons, the Agency failed to prove the Appellant violated CSR 16-50 A.1) by a preponderance of the evidence.

B. CSR16-50 A. 7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing.

To prove a refusal to comply, the Agency must prove the refusal was intentional and willful disobedience. In re Trujillo, CSA 28-04, 9-10 (5/27/04). On June 30, 2004, the Appellant signed a directive from Flohr in which she agreed "your work day is 8:00 a.m. until 5:00 p.m. Monday through Friday. You are expected to clock in and be at your desk by 8:00 a.m...." [Exhibit 12]. The Agency claimed the Appellant's continued tardiness and absences after this directive violated CSR 16-50 A. 7). [Agency closing]. It is evident the Agency gave many opportunities to the Appellant to correct her habit of tardiness and unexcused absences. On July 8, 2004, she received a written reprimand for an unexcused absence. [Exhibit 7]. On September 16, 2004 she received a verbal warning for excessive tardiness. [Exhibit 6]. On February 15, 2005 she received a verbal warning for excessive tardiness. [Exhibit 5]. In addition Flohr testified she counseled the Appellant repeatedly in this regard. [Flohr testimony]. Yet, the Appellant's continued absences and tardiness, alone, without some evidence of her intent, is insufficient to prove a violation of this rule. The Hearings Officer concludes the Agency failed to prove the Appellant violated this rule by a preponderance of the evidence.

C. CSR 16-50 A. 13) Unauthorized absence from work, including but not limited to: when the employee has requested permission to be absent and such request has been denied; leaving work before completion of scheduled shift without authorization; or taking unauthorized breaks.

Unlike, CSR 16-50 A. 7), this rule does not require a showing of bad intent in order for an employee to violate its provisions. The purpose of sick leave is outlined in CSR 11-32, which allows such leave for personal or family incapacity due to illness or for a death in the family. The Appellant had ample notice of the Agency's requirement concerning abuse of sick leave, excess tardiness and absenteeism. [Exhibits 3, 5, 6, 7, 12]. Due to the Appellant's prior abuse of sick leave, she was required to provide a doctor's note for each sick leave absence. [Exhibit 12-4]. The Appellant's unexplained failure to comply [Appellant testimony], constitutes a violation of CSR 16-50 A. 13) by a preponderance of the evidence.

D. CSR 16-50 A. 20) Conduct not specifically identified herein may also be cause for dismissal.

The Agency identified the specific conduct described above as its basis for discipline. Therefore the Hearings Officer declines to apply this rule.

E. CSR 16-51 A. 1) Reporting to work after the scheduled start time of the shift

As stated above, the Agency amply catalogued the Appellant's frequent and continued tardiness, even after earlier discipline and counseling. The Appellant acknowledged her tardiness was a continuing problem as evidenced in this exchange.

Agency: You were having some problems getting to work by 8:00 [a.m.], weren't you?
Appellant Yes, I was.
Agency: And because of that Ms. Flohr worked with you and changed your report time to 8:30 in the morning...so you wouldn't be tardy in the morning.
Appellant: That's correct.
Agency: Tardiness was one of the themes in your past discipline?
Appellant: That's correct.
Agency: You've established a pattern and habit or tardiness, is that correct?
Appellant: Yes, I did.

The Appellant later sought to mitigate these admissions by explaining some tardiness was due to traffic conditions. She also claimed there is a seven minute grace period to clock in. Flohr denied such a policy and the Appellant provided no memorandum, policy or other evidence of a grace period. She then recanted after acknowledging Exhibit 6 required her to be at her desk by 8:00 a.m. The Appellant's admissions established that she violated CSR 16-51 A. 1) by a preponderance of the evidence.

F. CSR 16-51 A. 2 Failure to meet established standards of performance including either qualitative or quantitative standards.

Three requirements are prerequisite to finding a violation of this rule: 1. a prior-established standard; 2. clear communication of that standard to the Appellant; 3. the Appellant's failure to meet such standard. See e.g. Pabst v. Industrial Claim Appeals Office, 833 P.2d 64, 64-65 (Colo. App. 1992), In re Routa, CSA 123-04, 3 (1/28/05).

Exhibit 5 clearly established the Appellant's obligation to arrive punctually, her prior history of tardiness, and that she continued to arrive tardy subsequent to past discipline. She also admitted it is a problem that needs to be corrected. [Appellant testimony]. These admissions establish a violation of CSR 16-51 A. 2) by a preponderance of the evidence.

G. CSR 16-51 A. 4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.

Flohr stated "one of the biggest problems is Cathy's [the Appellant's] lack of communication. Recently Cathy just doesn't want to talk with me, doesn't want to communicate with me." Flohr stated when she does communicate with the Appellant it turns to confrontation. [Appellant testimony].

It was apparent from the testimony of both Flohr and the Appellant that communication between them is strained. That alone is insufficient to establish an unsatisfactory working relationship. No one is obligated to like a co-worker. However, when a lack of communication causes work-related problems, then the failure to

communicate may result in a violation of this rule. The important considerations here are (1) the Appellant and Flohr as her supervisor/backup comprise a two-person office, so if coverage is required, communication is critical. (2) If the Appellant fails to let Flohr know she will be absent, Flohr must either cover the Appellant's duties herself, in which case her own work is left unfulfilled, or the Appellant's duties are unfulfilled resulting in a degradation of services within the zoo. On numerous occasions Flohr had to cover the Appellant's responsibilities because the Appellant did not notify Flohr she would be tardy or absent. [Flohr testimony, Exhibit 9, 11, 12, 13, 14]. Flohr stated

"You may not fully understand the importance of communications. If your co-worker also calls in sick (as has happened in the past) I have had to reschedule meetings and/or cancel prearranged appointments of my own (as has also happened in the past). It also means I need to bring lunch as there will be no one to relieve me. There have also been times where I had planned on taking a pre-approved vacation day and had to come to work because of staffing shortages. Finding out at 8:00 am when I arrive for work that I am understaffed is unacceptable and will not be tolerated."

Exhibit 14-1.

The Appellant did not refute the inconvenience and cost to Flohr by the Appellant's continuing tardiness and absences. Under these circumstances, the Agency established the Appellant's violation of CSR 16-51 A. 4) by a preponderance of the evidence.

H. CSR 16-51 A. 6) Carelessness in performance of duties and responsibilities.

To prove a violation of CSR 16-51 A. 6), the Agency must establish that the Appellant had an important work duty or responsibility, and was heedless and unmindful of that duty, with the result that potential or actual significant harm resulted. In re Owoye, CSA11-05 (6/10/05).

The Agency's presented three incidents by the Appellant which led to its finding the Appellant in violation of this rule: (1) the Appellant's failure to complete the periodical filing project timely and accurately on March 2, 2005; (2) the March 8, 2005 misfiling of an employee's confidential medical disclosure; and (3) the Appellant's incorrect adding of a petty cash voucher on March 14, 2005.

1. As to the periodical filing project, Flohr stated "I am very concerned that it took you 2 ½ days to inventory a bin of periodicals that I estimate should have not taken more than two hours..." [Exhibit 1-3]. Flohr further stated another employee completed 2/3 of the project in about 5 ½ hours. *Id.* She inferred the Appellant was not honest about the project when she stated she did not complete the project because she was unaware of periodicals in a filing cabinet and that the cabinet was locked. When Flohr checked the cabinet she found it unlocked.

It is unclear what importance Flohr attached to this project, whether it was important, minor or busy work. More importantly, it was not clear whether the Appellant was heedless and unmindful of the project, or simply uninformed or unaware of the location of all the periodicals and the time during which the project should have been completed. In addition, Flohr admitted the work the Appellant did was accurate. Also, Flohr's estimate of 2 hours to complete the project may have been inaccurate in that another employee took 5 ½ hours to complete 2/3 of the project. [Exhibit 2-3]. It was not clear from these uncertainties what was the importance of the project, whether the Appellant was heedless in her execution of the project, and what harm resulted. Therefore the Agency's claim fails concerning the March 2, periodical filing claim.

2. Filing documents is an important duty for the Appellant. See Background, supra. This duty gains more importance for handling confidential documents. It is significant, then, that the Appellant was aware a confidential medical document needed to be filed, [Exhibit 2-3], and misfiled that document in another employee's file with the imminent potential of creating a breach of the employee's confidential medical records, until Flohr discovered the location of the misfiled paper.

Had the Appellant discovered her mistake, and promptly corrected it, before there was a potential for accidental disclosure, there may have been a closer question of whether her mistake violated this rule. Under the circumstances described herein, however, the Appellant's mistake, coupled with the potential significant harm there from, was careless in violation of CSR 16-51 A. 6) by a preponderance of the evidence.

3. The Appellant miscalculated the amount of cash taken by an employee on March 14, 2005. Clearly, accounting for the zoo's petty cash is an important function. See Background, supra, so that the miscalculation was, at least, unmindful. The Agency claimed the affected employee was caused "anguish" or was "upset" by the mistake, [Exhibit 2-3, Flohr testimony]. Such unsubstantiated hearsay evidence is inherently unreliable, so this claim fails. The March 8 incident alone, however, is sufficient to establish the Appellant's violation of this rule.

I. CSR 16-51 A. 10) Failure to comply with the instructions of an authorized supervisor.

Flohr concluded the Appellant failed to follow her instructions on March 3 and March 7, 2005 when the Appellant failed to email Flohr with the serial numbers of the two way radios that had been repaired to the office. The importance of that duty is to insure an accurate inventory of radios valued at over \$2,000 each. Flohr added when the Appellant finally sent information concerning the repairs, it was wrong. [Exhibit 1-2].

Flohr also stated on February 9, 23, March 3, and 15, 2005 the Appellant left a cabinet containing valuables unlocked even after reminding her. The Appellant at first admitted, then questioned whether another employee might have left the cabinet unlocked on those occasions. The Appellant's belated doubt as to her responsibility arose only after questioning from her advisor at hearing, and therefore lacked the

credibility. In comparison Flohr established the Appellant's violation by her contemporaneous notes regarding those incidents. Flohr's credibility was not challenged in this regard.

The Hearings Officer concludes the Appellant's failure to maintain an accurate inventory of radios, and failure to lock filing cabinets containing valuables after being instructed concerning both, constitute a violation of CSR 16-51 A. 10) by a preponderance of the evidence.

J. CSR 16-51 A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

The Agency identified the specific conduct described above as its basis for discipline. Therefore the Hearings Officer declines to apply this rule.

K. Appellant's Discrimination Claim.

Michael Hernandez, a former zoo employee and co-worker of the Appellant, testified that race may have played a role in hastening his departure from the zoo. [Hernandez testimony] That statement, without more, is not evidence of discrimination against the Appellant. The only other statements concerning discrimination were the Appellant's conclusory statement in her pre-hearing statement which contained no evidence, and the Appellant's closing statement, which is not evidence. The Appellant therefore failed to establish a prima facie case for race-based discrimination and that claim is dismissed.

V. REASONABLENESS OF DISCIPLINE.

The Agency established, by a preponderance of the evidence, that the Appellant violated CSR 16-50 13), and CSR 16-51 A. 2), 4), 6), and 10). Therefore, the Hearings Officer turns to the reasonableness of the one-day suspension assessed against the Appellant.

The test here is whether the degree of discipline is "reasonably related" to the seriousness of the offense. In re Champion, CSA 71-02, 18 (7/31/02), CSR 16-10. In determining whether the discipline is reasonably related, it must win the range of reasonable alternatives available to a reasonable, prudent agency administrator. In re Armbruster, CSA 377-01 (3/22/02), citing Adkins v. Div. of Youth Services, 720 P.2d 626 (Colo. App. 1986).

In determining whether the discipline is within the range of reasonable alternatives, the discipline may be found excessive where it is substantially based on considerations that are not supported by a preponderance of the evidence. In re Gustern, CSA 128-02, 20 (12/23/02).

At her pre-disciplinary meeting, the Appellant sought to minimize the impact of her mistakes. Regarding the failure to log in repaired two-way radios, she claimed they were never lost. In response Flohr stated if information is not timely and accurate, she has to

perform an audit of all two-way radios, costing two weeks and over 100 hours, and involves her and each employee who has a radio.

Regarding the Appellant's failure to lock cabinets on several occasions, she replied Flohr had offered to lock those cabinets, however Flohr replied she made that offer only as she saw the Appellant in her car, about to drive away for the day. Flohr's recollection was not rebutted.

The Appellant acknowledged her tardiness at the pre-disciplinary meeting. That tardiness has continued despite Flohr's attempt to accommodate her by shifting her work schedule to begin later, to Flohr's detriment. The Appellant's disciplinary record contains at least three disciplinary actions for tardiness within the past year. Flohr's frequent counseling the Appellant about her unauthorized absences, in addition to discipline, was not rebutted.

VI. CONCLUSION AND ORDER

Given the seriousness of the Appellant's violations, Flohr's attempt to counsel and accommodate the Appellant, the Appellant's continued violations for the same conduct, and the Appellant's prior disciplinary history involving similar conduct, the Hearings Officer finds the Agency's choice of a one-day suspension was well-within the range of reasonable alternatives available to it. For these reasons the Hearings Officer AFFIRMS the Agency's decision to suspend the Appellant for one day, effective April 20, 2005.

DONE this 7th day of September, 2005.

Bruce A. Plotkin
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Hearing Officer for the
Career Service Board