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

Appeal No. 50-06

DECISION

IN THE MATTER OF THE APPEAL OF:

JULIA FELTES,
Appellant,

vs.

DEPARTMENT OF GENERAL SERVICES, DIVISION OF CENTRAL SERVICES, and the City and County of Denver, a municipal corporation,
Agency.

The hearing in this appeal was commenced on October 2, 2006 before Hearing Officer Valerie McNaughton. Appellant Julia Feltes was present and represented herself, accompanied by her advisor Alfonso Suazo. The Agency was represented by Assistant City Attorney Joseph A. DiGregorio. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following decision:

I. STATEMENT OF THE CASE

Appellant Julia Feltes appeals her dismissal dated July 6, 2006 from the position of Contract Administrator with the Department of General Services, Central Services, collectively referred to as the Agency. Appellant filed a timely appeal of the action on July 20, 2006 pursuant to the jurisdiction provided in the Career Service Rules (CSR) § 19-10 A. 1, alleging that the dismissal violated the Career Service Rules, and that it was motivated by race, sex and age discrimination, harassment and retaliation. At the commencement of the hearing, the Agency moved to dismiss the latter complaints based upon Appellant's failure to exhaust the internal complaint process pursuant to CSR § 15-100 et. seq. Appellant admitted that she did not file a complaint based on the appeal's underlying facts before filing this appeal. The motion to dismiss the discrimination, harassment and retaliation claims was therefore granted.

The following exhibits were admitted into evidence: Agency Exhs. 1 – 6, 9 – 26, 28 – 35, 37 – 39, and 41, and Appellant's Exh. B.

II. ISSUES

The following issues are raised in this appeal:

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

2. Was dismissal justified under the CSR's progressive discipline rules?

III. FINDINGS OF FACT

Appellant served as Administrative Operations Supervisor for the Central Services Division from 1998 to December 2005. In that position, Appellant performed accounting and budgeting functions and oversaw the office personnel, which was reduced in number from four to one by 2003. Appellant was reassigned to the non-supervisory position of contract administrator in January 2006.

In September 2003, Appellant reconciled her excel spreadsheet of payroll clerk Roberta Lopez' leave records with that prepared by another clerk, Patti Peri. [Exhs. 24, 25.] In October 2003, during a routine review of Ms. Lopez' pay and leave, Appellant discovered that Ms. Lopez had not subtracted leave without pay (LWOP) from her paycheck, which resulted in her inappropriate receipt of a full paycheck. As a result, Appellant instructed Ms. Lopez to deduct pay for the LWOP hours from her paycheck by no later than the end of 2003. In late October, based upon Ms. Lopez' actions and the loss of trust they caused, Appellant and her supervisor, Division Director Carolyn K. Woolsey, decided to train Administrative Support Assistant (ASA) II Esperanza Ortega in Ms. Lopez's payroll duties, and gradually have Ms. Ortega take over those duties once the new payroll system was in place in 2004. From October to December 2003, Ms. Lopez continued to handle some payroll duties, including running the balancing register that controlled the amount of the Division paychecks. [Exhs. 19 – 23.] Appellant gave Ms. Lopez a "meets expectations" rating for the period ending October 16, 2003, and made no mention of these performance issues. [Exh. 28.]

On Nov. 25, 2003, an employee donated 40 hours of sick leave to Ms. Lopez. On Dec. 9, 2003, Ms. Lopez called Career Service Authority (CSA) payroll assistant Deborah Saraceno to request that this donated sick leave be backdated to May 2003 in order to allow her to cover some time off for which Ms. Lopez had no paid sick leave. [Exhs. 32, 39.] CSR § 11-34 a) prohibits the use of sick leave in advance of accrual. That request was denied. [Exhs. 31 – 33.]

In October 2004, the city Auditor's Office began an operational and performance audit of the Central Services Division at the request of Luis Colon, the new Manager of the Department of General Services. As a part of that audit, Lead Auditor Sonia Montano examined the Division's 2003 leave and payroll records, including Appellant's excel spreadsheets of Ms. Lopez' leave hours. As to the leave issues, the audit concluded that "employees were inappropriately allowed to use leave", the failure to

reconcile leave records led to incorrect leave balances, and donated sick leave was taken before it was available. These findings were based upon Ms. Lopez' failure to take LWOP and her use of donated sick leave. "When these transactions occurred the employee was in charge of payroll and leave accounting at Central Services. Therefore, the employee took advantage of their position for personal benefit. Management oversight of this employee's activities was lacking." [Exh. 2, pp. 5, 13.]

As a result of the findings of this audit announced at the October 2005 exit meeting with Agency officials, Human Resources Analyst Regina Garcia was ordered to conduct an investigation focusing on payroll issues and the use of LWOP within the Division. After assembling the 2003 records, she found that Ms. Lopez had not included her LWOP on the balancing registers, which allowed Ms. Lopez to be paid a full paycheck. Ms. Garcia recommended to Ms. Lopez's current supervisor, Controller Bill Riedell, that Ms. Lopez be disciplined. He agreed, and served Ms. Lopez a notice that discipline was being contemplated against her. At the predisciplinary meeting, Ms. Lopez presented to Mr. Riedell a letter from Appellant stating that she had already administered a verbal warning to Ms. Lopez on October 7, 2003, and had in addition stripped Ms. Lopez of her payroll and leave accounting duties based on her inaccurate leave accounting. [Exh. 4.]

Mr. Riedell then suspended the disciplinary proceedings against Ms. Lopez, and investigated her claim that she had already been disciplined, as that would prevent any other discipline based on the same misconduct. Mr. Riedell determined from Ms. Lopez' leave slips that she was not at work on October 7, 2003, the date Appellant claimed she had administered the verbal warning. Appellant later stated she was mistaken about the date, and that the verbal warning was given on October 8, 2003, but that her only record of it was in a journal she kept at home. Mr. Riedell requested that Appellant bring in the journal in order to confirm the discipline.

At first, Appellant refused to bring in the journal, citing that she did not wish him to see her personal journal. On Jan. 27, 2006, after being ordered to produce it by her supervisor Darryl Winer and assured she could redact any personal information, Appellant gave the journal to Mr. Winer, who met with Mr. Reidell and Appellant to review the relevant entries. Mr. Reidell noted that the journal began on October 6, 2003, appeared to be new, and was for the most part written in the same ink and handwriting. The entry for October 8th stated, "Gave Roberta a verbal warning concerning her use of sick leave and payroll mistakes." There was no mention of a change in Ms. Lopez' duties. [Exh. 8.]

Because the journal did not clearly resolve the issue, Mr. Riedell requested further investigation. Ms. Garcia informed him that she had located a written documentation of a verbal warning issued by Appellant on another employee, which was placed in that employee's personnel file in accordance with Agency practice. This established that Appellant was aware of the proper Agency procedure for issuance of a verbal warning. Ms. Garcia also determined that Ms. Lopez was allowed to continue the inappropriate leave and pay practices after Appellant stated she had removed those

duties from her. Mr. Riedell concluded that Ms. Lopez had not been given previous discipline for her use of leave, and imposed a three-week suspension. That suspension was appealed. The Agency and Ms. Lopez settled the appeal by the city's repayment of the amount taken for the suspension, in return for Ms. Lopez' withdrawal of her discrimination charge, and her statement that Appellant did not give her a verbal warning in October 2003 for the pay and leave practices which led to the suspension. [Exh. 5.]

Former Director of Central Services Darryl Winer became Appellant's supervisor in August 2005. At that time, he reviewed Appellant's six previous disciplinary actions, and informed Appellant she would be starting with a clean slate with him, as he believed his job was to "knock down hurdles" in order to give his employees the opportunity to succeed. Mr. Winer became informed of the controversy surrounding Ms. Lopez when Mr. Riedell asked him to order Appellant to produce the journal. In the subsequent investigation of Ms. Lopez' leave practices, Mr. Winer determined that Appellant continued to approve Ms. Lopez's balancing registers which allowed Ms. Lopez to receive full pay despite LWOP shown on her leave slips, and that Ms. Lopez had been paid for a total of 92.5 hours she had not worked up to the end of October 2003. [Exh. 1.] The balancing registers showed that the first repayment of eight hours of unearned pay was not deducted until Dec. 2003, contrary to Appellant's account of the reprimand. [Exh. 22, p. 2.]

At the same time, Ms. Lopez's use of donated sick leave was investigated. Ms. Garcia determined that Ms. Lopez had attempted to obtain pay for donated sick leave before it was donated, in violation of the CSR. In addition, Ms. Garcia found that Appellant had taken a sick leave donation form from a donor and dated it inaccurately in order to allow Ms. Lopez to use it to cover time that would have otherwise been LWOP. [Exh. 37.] Ms. Garcia compared the excel spreadsheets prepared by Appellant and another employee, and determined that Appellant had added 68 hours of donated sick leave to Ms. Lopez' credit before the donation occurred. [Exhs. 24, 25.]

Finally, the Agency investigated Appellant's written statement submitted on behalf of Ms. Lopez, and in particular her statement that she had stripped Ms. Lopez of her leave and payroll duties. [Exh. 4.] Mr. Winer interviewed Ms. Ortega and reviewed pay and leave records. He concluded that this was not true.

Based on these findings, disciplinary action was initiated against Appellant. At the predisciplinary meeting, Appellant stated that, in addition to noting Ms. Lopez' verbal warning in her journal, she had recorded it on her calendar, but that the calendar was lost during the move. Mr. Winer found it "greatly concerning" that Appellant raised this for the first time six months after the issue was first raised, in spite of the importance of that issue in Ms. Lopez' and Appellant's own discipline. [Exh. 1-12.]

Appellant offered her journal into evidence, and it was admitted without objection as Appellant's Exhibit B. The Agency did not receive or request a copy of the journal. After reviewing the 56 pages on which there are entries, I find that the journal is a daily

record of work performed by Appellant in her job from Oct. 6, 2003 to May 19, 2004, with additional entries on July 13 and 14, 2004. Appellant testified that she initially refused to bring in the journal because it contained her feelings about her job, including her opinions of Agency Manager Luis Colon and former Manager Dan Barbie. My review of the journal revealed that it contains no personal entries, and only four entries mentioning Mr. Colon or Mr. Barbie, none of which were critical or personal in nature.

Appellant stipulated that the LWOP listed in her dismissal letter from Jan. 1, 2003 to Nov. 21, 2003 for fifteen pay periods was not deducted from Ms. Lopez' pay in the appropriate pay period. The dismissal letter lists a total of 92.5 hours of LWOP over that period, and Appellant does not dispute that amount.

The Agency terminated Appellant after consideration of the above facts, her work history, and her previous disciplinary actions, by then seven in number, including three suspensions in the past year. Mr. Winer concluded that Appellant's actions constituted a premeditated cover-up of inappropriate conduct, and represented a fundamental lack of honesty which destroyed his trust in Appellant. Based on that conclusion and Appellant's previous long disciplinary record, Mr. Winer imposed the penalty of termination.

IV. ANALYSIS

1. Propriety of Discipline under the Career Service Rules

In an appeal of a disciplinary action, the Agency has the burden to prove the action was taken in conformity with the Rule 16 of the Career Service Rules, and that the degree of discipline was reasonably related to the seriousness of the offense, taking into consideration the employee's past record. CSR § 16-20; In re Roberts, CSA 179-04, 3 (6/29/05).

A. CSR § 16-60 A. Neglect of duty

The Agency first asserts that Appellant's actions constituted neglect of duty under CSR 16-60 A. The term "neglect of duty" in the public employment context has been defined as the neglect or failure to perform a duty required by virtue of office or law. State ex rel. Hardie v. Coleman, 155 So. 129, 132 (Fla. 1934); cited by Overton v. Goldsboro City Board of Education, 283 S.E.2d 495, 499 (N.C. 1981). While the definition "remains an abstraction until viewed in the light of the facts surrounding a particular case", a supervisor manifestly neglects his duty when he allows his subordinates to perform their duties in an obviously inaccurate manner over an extended period of time. See Gubser v. Dept. of Employment, 271 Cal.App.2d 240, 242 (Cal.App. 1969). In states having a similar ground for dismissal of a public employee, their appellate courts have indicated that a violation requires proof of knowledge or intent. "[D]ismissal . . . on this ground alone cannot be sustained unless it is proven that a reasonable man under those same circumstances would have recognized the duty and would have considered himself obligated to conform." Overton, supra, at 500. "The

phrase 'neglect of duty' . . . means an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty." Gubser, supra.

Here, Appellant's employment required her to supervise her payroll clerk's performance of payroll and leave reporting, and in particular her clerk's reporting of her own leave. In violation of this duty, Appellant allowed her clerk to run the balancing registers for payroll without deducting her own leave without pay. As a result, her clerk received pay for work not performed. Even after Appellant discovered that her clerk had been doing this for at least eight months, Appellant took no action to prevent her clerk from continuing to do the same thing for the remaining four months of 2003. In addition, Appellant failed to take steps to assure that over eight days of donated sick leave was not taken until the donations occurred, in violation of CSR § 11-34. Appellant was on actual notice of Ms. Lopez's improper leave and pay practices as of at least October 8, 2003, but continued to allow those practices to continue. These actions constituted neglect of Appellant's duties in her then-current assignment of Administrative Operations Supervisor.

B. CSR § 16-60 B. Carelessness in the performance of duties

An employee is careless in violation of this rule when she is heedless of an important work duty, resulting in potential or actual significant harm. In re Owoeye, CSA 11-05, 5 (6/10/05). A person exercises reasonable care when she acts with that degree of care which reasonable persons use under similar circumstances. See Black's Law Dictionary 146 (abr. 6th ed. 1991.)

Appellant admitted that she failed to supervise her payroll clerk in the performance of her duties, resulting in the city's overpayment of wages to the clerk. The Agency also established that Appellant allowed the clerk to take donated sick leave before the donation occurred, in violation of Career Service leave rules. Appellant offered no rebuttal to the credible testimony and records that corroborated that testimony. I find that the Agency proved that Appellant was careless in the performance of her duties in violation of CSR § 16-60 B.

C. CSR § 16-60 E. Any act of dishonesty

In support of this allegation, the Agency offered testimony and supporting exhibits that Appellant: 1) added an inaccurate date on a donation of sick leave in order to allow her payroll clerk to use the leave before it was donated; 2) created a fake personal journal covering eight months showing a verbal warning that did not occur in order to prevent her clerk from further discipline for misconduct; 3) recorded 68 hours of donated sick leave that did not exist onto her August 2003 excel spreadsheet for Ms. Lopez; and 4) lied to her supervisors about the events surrounding the claimed verbal warning and her performance of her duties.

The sole contested factual issue as to this allegation is whether Appellant manufactured the journal submitted as Exhibit B; in particular the entry dated Oct. 8,

2003 showing that she gave Ms. Lopez a verbal warning. [Exhs. 3, B.] Only one sentence of this one-page entry is devoted to the verbal warning, which it states was given for the "use of sick leave and payroll mistakes," rather than LWOP. The entry contains no mention that Appellant removed Ms. Lopez' payroll duties. At her predisciplinary meeting on Jan. 18, 2006, Ms. Lopez presented Appellant's statement about the verbal warning, which gave a much more detailed version of the warning, a different date, and that she "stripped "Ms. Lopez of her payroll responsibilities at that time. [Exh. 4.] It is undisputed that a verbal warning was never placed in Ms. Lopez' personnel file, and that Ms. Lopez continued to perform payroll duties, including those related to her own leave and pay. Ms. Lopez' PEPR dated only 10 days thereafter contains no mention of the performance problems or the removal of duties. Most convincingly, Ms. Ortega testified that she performed only payroll backup until the beginning of 2004, and was not trained in payroll until that time.

I find that Appellant altered official records related to donated leave, and lied to her supervisors with regard to her duty to administer disciplinary action, acts of dishonesty which violated CSR § 16-60 E.

D. CSR § 16-60 Z. Conduct prejudicial to the Agency

The Agency did not submit specific evidence or argument in support of this charge, which was added to the Career Service Rules by amendment dated June 12, 2006. The rule requires proof of conduct that negatively impacts "the good order and effectiveness" or reputation of an agency, or that compromises the integrity of the City. The damage done by Appellant's misconduct was confined to an overpayment of about two weeks in wages, which was repaid within a few months. The Agency has not proven that the misconduct reflected on the Agency's reputation through any public disclosure, or that the integrity of the City has been compromised in any respect. I therefore find that the Agency has not established a violation of this section.

2. Appropriateness of Penalty

Discipline under the Career Service Rules is corrective in nature, and must be reasonably related to the seriousness of the offense, taking into consideration an employee's record, including past discipline. CSR § 16-20. An employee's failure to correct behavior after previous discipline may be considered in determining the appropriate penalty for later offenses. CSR § 16-50.

The Agency demonstrated that Appellant neglected her supervisory duties, performed those duties carelessly, falsified official records, and lied to her supervisors orally and in writing over the course of the 2 1/2 years covered by this series of events. The Agency took into consideration that Appellant's behavior was a premeditated pattern of false statements in an attempt to cover up a payroll clerk's dishonesty, which resulted in a financial impact to the City, albeit a minor one. Darryl Winer, Appellant's supervisor and the deciding official, testified that Appellant was the only employee he

had terminated in his 31 years with the City, and that it was necessary because the evidence of extremely serious conduct was overwhelming.

Mr. Winer also considered that she had failed to correct her past misconduct, including gross negligence, refusal to obey orders, and misrepresentation of facts, for which she was disciplined on seven occasions by reprimands and suspensions over the past two years. Appellant testified that her past discipline was the product of supervisory harassment. Mr. Winer admitted that he "did not appreciate" the approach used by some of Appellant's previous supervisors, but that he did not strongly weigh her prior discipline based upon his lack for first-hand knowledge of those situations.

Mr. Winer decided to terminate because of the serious nature of the misconduct, and his conclusion that he could no longer trust Appellant to be truthful. Based upon the totality of the evidence, I find that the penalty of dismissal was within the range of discipline that could be imposed by a reasonable administrator.

ORDER

The Agency's termination action dated July 6, 2006 is hereby AFFIRMED. Appellant's claims of discrimination, hostile work environment and retaliation are dismissed.

Dated this 24th day of November, 2006.

Valerie McNaughton
Career Service Hearing Officer

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NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at www.denvergov.org/csa/career service rules.

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL:

Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, Dept. 412
Denver CO 80202