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

Appeal No. 69-05

DECISION

IN THE MATTER OF THE APPEAL OF:

STEPHANIE MARTINEZ,
Appellant,

vs.

DENVER INTERNATIONAL AIRPORT, DEPARTMENT OF AVIATION,
Agency, and the City and County of Denver, a municipal corporation.

I. PROCEDURAL INTRODUCTION

The Appellant, Stephanie Martinez, appeals a four-day (forty-hour), suspension without pay, assessed by her employer, Denver International Airport / Department of Aviation (the Agency), on June 10, 2005. The Appellant filed her appeal on June 16, 2005, pursuant to the Career Service Rules. A hearing concerning this appeal was conducted on October 6, 2005 by Bruce A. Plotkin, Hearings Officer. Agency Exhibits 1-4, 6, 9, and 12 were admitted by stipulation. The Agency withdrew Exhibit 5. Agency Exhibits 7 and 8 were admitted over objection. Appellant's exhibits A-J, AA, and BB, 13 and 14 were admitted by stipulation, while exhibits K-Z were admitted over objection. The Agency presented the following witnesses: Brandon Adderly, Chris Haggenjos, Michael Anderson, Michael Beadles, William Perez, Cedric Ennis, Suzanne Iversen, Joseph Lawrence, and Rowena Thomas. The Appellant testified on her own behalf.

II. ISSUES

The following issues were presented for appeal.

A. whether the Appellant violated Career Service Rule (CSR)16-50 A. 1), 3), 16), 20, each violation of which could result in dismissal, CSR 16-51 A. 2), 6), or 11), each of which constitutes a cause for progressive discipline; or CSR 15-10, the Career Service Authority Code of Conduct.

B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to assess a 40-hour suspension conformed to the purposes of discipline under CSR 16-10.

III. FINDINGS

The Appellant, was hired as an Aviation Operations Representative (AOR) at Denver International Airport in June, 2001, and was promoted to Aviation Operations Representative Supervisor (AORS) in July, 2003. At the time she tested for the AORS position in 2003, she signed an agreement not to divulge any information from the Career Service Authority (CSA) written examination. In addition to passing the written CSA examination, the Appellant interviewed with the Agency prior to her promotion.

As an AORS, the Appellant supervises AORs, including Michael Beadles, Christopher Haggenjos, and Jason Perez. Depending on the particular work shift, other AORs may come under her supervision during a particular shift. In February, 2005, the Agency posted an opening for an AORS. AORs Beadles, Haggenjos, Perez, plus two other AORs occasionally under her shift supervision, Michael Anderson and Cedric Ennis, expressed to the Appellant their interest in applying for that opening. The Appellant prepared a packet of material, [Exhibits 5, P,R,U,V,W] which she supplied to her three subordinates, and provided one page from the packet, [Exhibit 5], to the other two after they later heard about the information disseminated. The packet consisted of general materials the Appellant believed would assist the AORs in preparing to become an AORS, plus one page, [Exhibit 5], titled "Here are a few interview questions that you may want to think of." There was no evidence that any interviewee, other than these five, received any of the packet.

On May 4, 2005, the day of the AORS candidate interviews, Brandon Adderly, an AORS, obtained Exhibit 5 from Chris Haggenjos who was on his way to interview. Adderly did not know what questions were to be asked at the interview, but became suspicious due to the specificity of the questions. Haggenjos told Adderly he received the document from the Appellant and that she provided the same document to other AORs. Adderly brought the document to an assistant for Rowena Thomas, Manager of the Communications Center.

After Thomas reviewed Exhibit 5, she issued a notice, [Exhibit F], to all interviewees declaring the interviews invalid, and rescheduled them. When she heard what happened, the Appellant contacted her immediate supervisor, Joseph Lawrence, to ask for a meeting. On May 6, 2005 the Appellant met with Lawrence and Thomas, her second-level supervisor. The Appellant readily admitted providing the packet of information, including Exhibit 5, to three of the candidates, and Exhibit 5 alone, to two of the candidates who interviewed on May 4. The meeting was not recorded, but Lawrence took notes. [Exhibit 8]. On May 18, 2005, the Agency served the Appellant with a contemplation of discipline letter. A recorded pre-disciplinary meeting was held on May 26, 2005 with the following people in attendance: the Appellant, Suzanne Iversen, Employee Relations Analyst for the Agency, Joseph Lawrence, and Rowena Thomas. The Appellant attended *pro se*, and provided written and verbal statements denying any wrongdoing.

On June 10, 2005, the Appellant was suspended. She perfected her appeal on June 16, 2005. Prior to this disciplinary action, her work history was unblemished.

IV. ANALYSIS

Career Service appeals hearings are de novo reviews. The Agency bears the burden of proof to show, by a preponderance of the evidence, that the Appellant violated at least one of the cited disciplinary rules, and that termination was within the range of discipline that may 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 16-50 A. 1) Gross negligence or willful neglect of duty.

"Gross Negligence", under CSR 16-50 A.1), means 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). The Agency failed to prove the Appellant violated this rule for several reasons.

1. The Agency claims the Appellant violated this rule in two, irreconcilable ways. The Agency's first claim is: by providing interview questions to any candidate, the Appellant engaged in gross negligence. The Agency's second claim is: by failing to provide interview questions to all candidates, the Appellant engaged in gross negligence. [Thomas testimony]. Said another way, the Appellant shouldn't have provided information to any candidate, and she should have provided it to all candidates. The Agency may not discipline an employee both for engaging in and, at the same time, failing to engage in the same conduct.

2. Even considering each of the Agency's irreconcilable claims separately, the Agency failed to meet its burden of proof for the following reasons.

a. Gross Negligence by providing interview questions.

The Agency's proof consisted of three parts: (1) the Appellant interviewed in 2003; (2) the Appellant must have recalled or recorded her 2003 interview questions in creating Exhibit 5; and (3) the Appellant must have known those same questions would be asked for the May 4, 2005 interviews. The Appellant readily acknowledged part (1), her 2003 interview.

(2) origin of Exhibit 5.

The Agency's strongest evidence that the Appellant used her 2003 interview as the basis to create Exhibit 5 was the similarity between three of the seven "interview questions" the Appellant provided to her subordinates. [Exhibit 5] and three out of eight interview questions used during the May 4 interviews, [Exhibit 7]. Taken alone, the

similarity might permit an inference the Appellant provided those three questions from her 2003 interview.

In response, the Appellant insisted she did not provide the information in Exhibit 5 from memory or record of her interview, but instead provided publicly available, frequently-occurring supervisory information to anyone who asked for assistance. According to the Appellant, Exhibit I displays the source of each question for Exhibit 5. The AORs who testified at hearing affirmed the information provided in Exhibit 5 is readily available from sources inside and outside the Agency. Perez affirmed each of the items in Exhibit 5 was information that was "commonplace experience," or from manuals "readily available in the comm[unications] center," or from "common sense just from having worked here." [Exhibit BB interview with Jason Perez]. Referring to one of the questions common to Exhibits 5 and 7, Perez stated "anyone who works [in communications at the airport] knows the difference, or should know the difference between policies and procedures because we work with policies and procedures every day." [Perez testimony]. Haggenjos also affirmed the information in Exhibit 5 was readily available from sources in the communications center.

In its opening statement, the Agency stated one witness would testify the Appellant told him the interview questions came from the Appellant's recollection of her own interview questions. However, during the hearing, the only witness asked about that recollection, Anderson, did not remember the Appellant making such an admission. More importantly, Anderson was interviewed shortly after the May 4, 2005 interviews, [Exhibit BB, Michael Anderson interview], and did not recall the Appellant making such an admission even then, when his recollection would have been fresher.

From the evidence presented above, the Hearings Officer cannot conclude the Agency's position - that the similarity between three questions in Exhibits 5 and 7 can only have resulted from the Appellant's recollection - is more convincing than the Appellant's explanation - Exhibit 5 was created from readily available, frequently used information with which all communications center supervisors should be familiar.

(3) <u>whether the Appellant knew interview questions in 2005 would be the same as those in her 2003 interview</u>.

The Agency presented no evidence from which it may be inferred the Appellant knew or should have known the same questions from her interview two and one half years ago, would be repeated in the May 2005 interviews.

b. <u>Gross Negligence by failing to provide interview questions</u>.

The Agency seems to state "if you wrongly provide information to some, you must then provide it to all." One immediate problem for the Agency here is it assigns the affirmative burden to the Appellant to seek out all candidates for the interview while she was not privy to such information. Then, the Agency would require the Appellant to multiply her wrongful dissemination of information. More importantly, it seems only

common sense, as well as good mentoring, that a supervisor would provide career advancement information, such as test preparation, to those in her charge and not necessarily to those who are not in her chain of command or outside her Agency.

3. The Appellant's actions alleged to have violated this rule do not meet the criteria either for gross negligence or willful neglect of duty. For the Appellant to have violated this rule, she must have failed in some important way to perform some important work obligation. *See, e.g.* In re Roberts, CSA 179-04, 3 (6/29/05) (Gross negligence in the performance of duties is shown by a failure to perform that which is obviously unreasonable or inappropriate), Black's Law Dictionary (abridged 6th ed. 1991) (Gross negligence is an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another). Thus, some duty inherent to work must have been breached. When questioned how the Appellant violated this rule, Thomas explained the Appellant used poor judgment in giving out information, compromised the integrity of the interviews, and provided an unfair advantage to some candidates. Even if true, these allegations fail to state or even infer any work duty of which the Appellant was in breach. To the contrary, assuming the Agency's allegations to be true, the Appellant's actions would appear to have been taken completely outside of her duties.

In summary, the Agency claimed irreconcilable bases for proving the Appellant's violation of this rule, failed to establish what work duty the Appellant breached, and failed to meet its burden to prove the Appellant created Exhibit 5 from her memory or notes. The Agency also failed to prove the Appellant was likely to know the same questions asked during her 2003 interview would be repeated in 2005, did not prove how the Appellant's failure to provide the same information to all applicants could constitute a CSR violation, and failed to establish what work duty the Appellant breached. For these reasons, the Agency failed to prove the Appellant grossly or willfully neglected her duty in violation of CSR 16-50 A. 1).

B. CSR 16-50 A. 3) Dishonesty, including...lying to superiors...or any other act of dishonesty not specifically listed in this paragraph.

The Agency claimed the Appellant was dishonest under the "any other act" portion of this rule in three ways: by distributing questions to subordinates in advance of their interviews, thus giving them an unfair advantage; by failing to provide interview questions to all candidates; and by the Appellant's lying as to when she provided information to five AORs. [Thomas testimony, Agy closing statement].

1. Unfair advantage.

The unfair advantage cited by the Agency was that the Appellant's providing Exhibit 5 to some candidates allowed them to have advance notice of the questions to be asked during the May 4 interviews. Since the Agency's apparent criterion for having an unfair advantage is prior knowledge of the interview questions, it is inconsistent that at least two of the May 4 interviewees, who recognized all interview questions from their previous interviews, were not considered by the Agency to have an unfair advantage in

light of Thomas' acknowledgment that she has used the same interview questions for at least the past three to five years. [Thomas testimony]. By comparison, even by the Agency's accounting, the Appellant provided only three of the eight interview questions asked on May 4. Therefore the question arises "unfair advantage over whom?" The five candidates to whom the Appellant supplied three possible interview questions were not advantaged over candidates who had already been provided all eight questions by the Agency in their prior interviews. The Agency's answer to this dilemma was unconvincing. The Agency claimed the interviewees with prior interview experience were not provided an unfair advantage, since they could not know the same questions would be asked on May 4; yet, there was no evidence the Appellant knew the same interview questions would be asked on May 4.

Moreover, even assuming the truth of the Agency's assertion, that the Appellant knowingly provided three interview questions in advance to five candidates, it is unclear how that action, even if wrong, constitutes a dishonesty in any traditional sense. Dishonesty assumes an intent to deceive. *See, e.g.* Merriam Webster Online Dictionary, http://www.m-w.com/dictionary/dishonesty (12/29/05), Am. Heritage Dictionary of the English Language: 4th Ed, 2000, http://www.bartleby.com/cgi-bin/texis/webinator/sitesearch?FILTER=col61&query=dishonest&x=14&y=8 (12/29/05). The Appellant, on the other hand, provided information to anyone who sought it, and did so openly, contrary to indicia of dishonesty. Therefore, if it was wrong to provide questions to candidates, dishonesty does not describe the violation.

2. Failing to provide interview questions to all candidates.

In explaining how the Appellant was dishonest, Thomas stated "you can't give information to three or four employees and not the rest." [Thomas testimony]. As stated above, the Agency may not discipline the Appellant both for engaging, and failing to engage, in the same conduct. Moreover, Thomas' statement seems to require the Agency to disseminate all eight questions to all candidates, since it "gave" all eight questions to only two of the May 4 candidates. Such a result surely is not intended by CSR 16-50 A. 3).

3. When did the Appellant provide information to five candidates.

The Agency claimed the Appellant lied to Thomas about how long before the AORS interviews she provided information to five AORS candidates. [Exhibit 2, pp 3-5]. The Appellant stated she was not sure exactly when she provided information to some of them, [Appellant testimony], although she recalled, with great specificity, the times and conditions under which one of the candidates, Beadles, requested assistance in preparing for the AORS test and interviews.

The question of when the Appellant provided information to the five candidates would be important only if the date preceded the CSA written examination and contained specific test questions or answers. The significance would be that the integrity of the CSA written examination would have been compromised, and the Appellant would have violated her

confidentiality agreement, [Exhibit 2, CSA Exam Security Agreement]. The Agency, at times, stated it was disciplining the Appellant for providing such written examination information, *e.g.* Exhibit 2, p.5:("This is a clear violation of CSA Examination Security Agreement that you signed..."), but then seemed to abandon this claim, *e.g.* Agency Pre-hearing Statement, filed July 11, 2005 (which specifies the Appellant provided interview questions, but fails to mention the CSA written exam), only to renew the allegation at hearing. [Agency opening statement]. In any event, the Agency never produced evidence what written exam questions may have been compromised, without which the Agency's CSA written examination claim must fail. What is left is the Agency claim regarding the Appellant's providing interview questions in advance of the May 4 interviews, and it is irrelevant how much in advance those questions were provided. If the Appellant provided interview questions before the interview, the violations alleged by the Agency would be the same, whether two hours or two months before the interviews. Thus, even if the Appellant lied about when she provided information, it is of no consequence.

The Agency failed to prove any of the three allegations against the Appellant which formed the basis for it's claim of dishonesty. Thus, the Agency failed to prove the Appellant violated CSR 16-50 A. 3) by a preponderance of the evidence.

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

The Agency claims two bases for its assertion the Appellant violated this rule: by the Appellant's providing protected information to candidates before the CSA written examination and by providing interview questions in advance of the Agency interviews.

1. CSA written examination.

The Agency asserted the Appellant admitted wrongdoing by providing information to five AORS candidates. Thomas declared "you admitted in the [May 11, 2005] meeting that the information packet and/or questions were intended only for use for the CSA testing. This is a clear violation of the CSA Examination Security Agreement that you signed when you took the AORS test lest than two years ago..." Despite Thomas' statement, it is not clear, even if the Appellant supplied information before the CSA written exam, that wrongdoing occurred. The Agency, as stated above, failed to produce evidence than any CSA written examination question was compromised due to information supplied by the Appellant. The only evidence regarding what information was supplied prior to the written examination included a Performance Evaluation Program Plan (PEP) for the AORS position [Exhibit B], plan, a test simulation workshop put on by CSA, [Exhibit V], some of the "Building for Success Conflict Management Course" written by the CSA [Exhibit X], "Human Resources 2005 Supervisory Series" training manual from CSA training [Exhibit O], the Career Service Rules, and a redacted letter of reprimand. None of these documents is confidential, all are readily available, and none specified a written examination question. The Agency therefore failed to establish the Appellant violated her CSA Examination Security Agreement.

2. Interview questions.

The Agency's proof here is in the similarity between three of the questions in Exhibits 5 and 7. Thomas concluded "because at least three of the questions were so close to what we interviewed, I believe that those questions came from the questions she was given at her interview around two years ago." [Thomas testimony]. For reasons stated above, the Agency's conclusion is no more compelling than the Appellant's explanation.

The Agency failed to prove either of its claims which formed the basis for it's claim the Appellant violated CSR 16-50 A. 16). The Agency therefore failed to prove the Appellant violated this rule 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. No other basis for discipline is found. Therefore the Hearings Officer declines to apply this rule.

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

The Agency cited the following performance review standard in support of its contention the Appellant violated CSR 16-51 A. 2):

> Acts as a positive influence by upholding and demonstrating positive work ethics and performance standards.

[Exhibit 2].

Thomas wrote "The overall integrity of our section is being questioned both internally and externally as a result of your actions and this incident has negatively impacted on the morale among employees, your peers and management." [Exhibit 2, p.3]. No witness presented by the Agency stated or inferred this incident negatively affected his or her morale. Neither did any documentation supplied by the Agency state or infer what negative impact on morale the Appellant's actions had. On the other hand, three of the Agency's witness highly praised the Appellant's positive influence, work ethics and performance standards. [Haggenjos, Anderson, Perez testimony].

When asked how the Appellant violated this rule, Thomas answered "Well, I might agree that from the employees that she helped, it could be perceived as a positive influence; however from the employees she didn't help, that is not a positive influence, it's not a good or positive work ethic. It's cheating. It's being dishonest." [Thomas testimony]. This claim harkens back to the Agency's earlier argument that the Appellant should be disciplined both for assisting some, and for failing to assist all interviewees. For the same reasons stated above, the Agency's claim fails here as well. The Agency

failed to prove the Appellant violated CSR 16-51 A. 2) by a preponderance of the evidence.

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

In answer to how the Appellant violated this rule, Thomas stated "I think she was careless in her thought process and careless in what she did as a supervisor. We hold supervisors to a higher standard...and I believe that she did what she did, I think, I don't know that she cared about the outcome, the consequences, until after the fact, until after she realized what a problem she caused." [Thomas testimony]. This statement fails to establish how the Appellant may have been careless. For this and other reasons as explained under §IV. A., above, the Agency failed to establish a violation of CSR 16-51 A. 6).

G. 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. No other basis for discipline is found. Therefore the Hearings Officer declines to apply this rule.

H. CSR 15-10 Employee Conduct

The Agency originally claimed the Appellant violated this rule, [Agency Pre-Hearing Statement], then seemed to have abandoned that claim at hearing. It is unclear that CSR 15-10, a policy statement, may constitute, in itself, a basis for discipline. *See, e.g.* In re Stockton, CSA 159-02, 14 (12/03/02) ("As CSR 15-10 is a policy statement not providing the basis for discipline itself, an allegation of wrongdoing under this rule must be dismissed"). Even if a violation of this rule is considered a basis for discipline, the Agency provided no evidence of it, and therefore the claim, if any, fails for lack of proof.

VII. CONCLUSIONS

The Agency failed to establish any action or omission by the Appellant which constitutes a rule violation under the Career Service rules. To the contrary, the Hearings Officer finds, in the kind and degree of mentoring and assistance the Appellant provided to her subordinates prior to the May 4, 2005 AORS interviews, the Appellant acted with the highest degree of integrity, and in the best interests of her subordinates, the Agency, and the City of Denver.

It is apparent from the evidence and testimony at hearing, that the similarity in questions between Exhibits 5 and 7 derive from the Appellants experience, research and analysis of what any good AORS should know, rather than from an intent to shortcut the hiring process by supplying interview questions from memory. The very

openness of the manner in which the Appellant provided assistance to anyone who asked her makes it implausible the Appellant would risk potential career suicide so openly. It is much more likely, given her subordinates' glowing descriptions of her willingness to mentor, that her assistance derived from her dedication and willingness to go beyond her nominal duties to provide legitimate career assistance to her subordinates.

If there is anything to criticize in the Appellant's actions, it was her initial lack of conviction to stand up to wrongful accusations of malfeasance. Her initial apology during the May 6, 2005 meeting, appears to have been based on her eagerness to accept the accusations against her for no more reason than they were made, instead of pausing to examine the justification for those claims.

VI. ORDER

The Agency's suspension of the Appellant for forty hours without pay, beginning June 10, 2004, is hereby REVERSED. The Agency is ordered to restore the previously-lost pay and benefits which are reinstated from this decision. The Appellant's personnel record shall be amended accordingly, and references to this suspension shall be removed.

It is further ORDERED that all materials identified in this case as confidential, pursuant to Order dated September 13, 2005, shall remain under seal, pending the running of all appeals.

It is further ORDERED that, following the running of all appeal periods, all materials identified in this case as confidential, pursuant to Order dated September 13, 2005, shall remain sealed or disposed of in a manner consistent with that Order.

DONE this 4th day of January, 2006.

Bruce A. Plotkin
Hearings Officer
Career Service Board

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