

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF
COLORADO

Appeal No. 87-07 A.

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

RONALDA MOUNJIM,

Appellant/Respondent,

vs.

DEPARTMENT OF PARKS AND RECREATIONS, and the City and County of
Denver, a municipal corporation,

Agency/Petitioner.

This matter is before the Career Service Board on the Agency's Petition for Review. Having reviewed and considered the full record before it, the Board **AFFIRMS** in part, **REVERSES** in part, and **MODIFIES** the Hearing Officer's Decision of July 10, 2008, on the grounds outlined below.

I. FACTUAL BACKGROUND

Appellant was terminated by the Agency on November 27, 2007. At the time of her termination she was a Recreation Coordinator, a position she had held since she began her employment in 1989. In January 2006, Appellant transferred to the Swansea Recreation Center where her immediate supervisor was Reginald Mickles.

In August 2006, Appellant received a written reprimand, the first disciplinary action of her career. In November, she was given an overall PEPR rating of "successful"; however, she received "needs improvement" ratings in four categories: Teamwork, Accountability and Ethics, Program Coordination/Development, and Working Relationships. Mr. Mickles placed Appellant on a Performance Improvement Plan (PIP) in April 2007 (**Exhibit 33**); however, the PIP was suspended when Appellant left for several months on family medical leave. On July 31, 2007, Mr. Mickles and Denise Brummond, a senior human resources professional, presented Appellant with a slightly modified version of the original PIP. **Exhibit 25**. It required Appellant to create by August 31, 2007, a project plan for fall outdoor events and indoor educational classes. The plan needed to include the following bullet point information:

- A timeline of objectives and delivery dates
- Prioritization of deliverables
- What meetings were established with instructors, principles [sic], parents, teachers, etc.
- Meetings for recruitment
- Tasks which came from the meetings
- Dates associated with specific tasks
- Monthly/Seasonal goals

Appellant and her union representative met informally with Mr. Mickles on August 24, at which time they discussed Appellant's lesson plans. **Ex. 29; Transcript, 2/26/08: 107.** Appellant then met with Mr. Mickles and Ms. Brummond for her 30-day PIP review on August 31. At that meeting, Appellant presented Mr. Mickles with a notebook of written materials. Mr. Mickles reviewed some but not all of the materials in the notebook and concluded that they were not relevant to Appellant's PIP requirements. Appellant was given a one week extension of time to submit an acceptable project plan. The August 31st notebook was not admitted into evidence at the hearing.

Mr. Mickles and Appellant met again on September 7, 2007. This time, Appellant gave Mickles four pages of written materials which included a lesson plan for a ceramics class and an attempt to address the 7 bullet points listed in the PIP. **Ex. 18.** Mr. Mickles testified that Exhibit 18 was not acceptable and did not meet the requirements of the project plan outlined in the PIP. **Transcript, 2/26/08: 118-119, 122-123.** On September 13, Appellant sent an email to Ms. Brummond stating:

I gave Rgggie [sic] these papers last Friday. For the 30 day review and he told me it look ok to him but he needed your ok. . . . I was under the assumption that I had meet [sic] my 30 days and the requirements. Thank you for your time and attention to this matter.

Ex. 8. Ms. Brummond did not respond to Appellant until September 24 when she sent an email stating that she had spoken to Mr. Mickles and Appellant's documents were not satisfactory. **Ex. 8.** By 2:00 p.m. that same afternoon, Appellant began emailing other recreation coordinators and supervisors, asking them if they could "answer" the 7 bullet points listed in her PIP and forward them back to her ASAP. **Exs. 9-16.**

On October 18, 2007, David Jerrow, another senior human resources professional at the Agency, met with Appellant and Mr. Mickles in the arts and crafts room at Swansea where he hand-delivered a pre-disciplinary letter to Appellant. Appellant became upset and accused Mr. Mickles of lying. **Transcript, 3/4/08: 251-252.** Appellant then went back to work while Jerrow and Mickles remained in the room with the door closed. Approximately 15-20 minutes later, Appellant, her husband and her union representative entered the room. Appellant and her husband were both highly emotional and upset about the pre-disciplinary letter. Mr. Jerrow, concerned for Mickles' safety, asked him to leave. Appellant insisted that Mickles needed to stay because he was the

one who was telling lies about her. **Transcript, 2/25/08: 153; 3/4/08: 260.** Mickles then left the room. Appellant's husband was angry and he began yelling at Jerrow. Appellant said things to her husband such as, "Look, Mark, look, Mark, this paragraph is nothing but lies about me," which made Appellant's husband more agitated and upset. **Transcript, 2/25/08: 155-156.** After unsuccessfully attempting to calm the husband down, the union representative left, leaving Mr. Jerrow alone with Appellant and her husband. He felt threatened by the situation and, after talking to Appellant and her husband for a short time, asked them both to leave.

The following day Appellant was placed on investigatory leave. The Agency revised its pre-disciplinary letter to include the events of October 18. **Ex. T.** At the November 13th pre-disciplinary meeting, Appellant, through her union representative, provided oral and written statements in her own defense. The Agency terminated Appellant's employment on November 27, 2007. Following a four day CSA hearing, the Hearing Officer reversed the termination and this appeal follows.

II. FINDINGS

A. CSR 16-60 A. (Neglect of duty); CSR 16-60 B. (Carelessness in performance of duties); CSR 16-60 J. (Failing to comply with lawful orders); and CSR 16-60 K. (Failing to meet standards of performance).

The major motivating factor in the Agency's decision to terminate Appellant was her failure to meet the requirements of her August 2007 PIP. The purpose of a PIP is to make an employee aware of performance deficiencies and to provide a reasonable opportunity for improvement. The PIP also serves to clarify management's expectations of job performance, particularly where an agency may seek to modify performance standards from what may have been required in the past. However, none of these objectives is served without clear communication to the employee about what management expects. As the Hearing Officer noted, a PIP should identify the performance deficiencies the employee is expected to address, the specific actions the employee must take in order to improve performance, and the standards by which the employee's performance will be measured.

With this in mind, the Board agrees with the Hearing Officer that the August 2007 PIP was not clearly communicated to Appellant. In its brief, the Agency argues that the PIP should have been clear and understandable to a long-term Agency employee and complains that the Hearing Officer spent an inordinate amount of time analyzing the phrase, "prioritization of deliverables." But the phrase itself highlights the communication problems inherent in the PIP: it is not language that is readily understandable to the average person and although the Agency believes its meaning is clear, Ms. Moreno, Mr. Mickles and Ms. Brummond all gave different explanations of what the phrase required Appellant to do. **Decision, p. 10.** Moreover, Mr. Mickles, Ms. Brummond and Appellant all testified that Appellant had difficulty understanding the 7 bullet points and another recreation coordinator, Ted Robinson, also testified that he did not understand the bullet points.

The fact that Appellant was a long-term employee does not change this analysis; there is no indication in the record that prior to transferring to Swansea Appellant had been required to create the kind of broad-scoped planning and marketing project that Mr. Mickles wanted. Certainly, a City agency may modify its job expectations to include new duties and responsibilities, or may seek to raise performance standards from what was expected in the past, but principles of fairness would still require that changes in management's expectations be clearly communicated.

The Agency contends that Mr. Mickles and Ms. Brummond spent time with Appellant going over the PIP and providing verbal examples of what she needed to do. While this may be true, the transcript illustrates the problems created by relying on verbal explanations instead of clearly written performance standards. At times during the hearing, Mr. Mickles' verbal explanations were no clearer than the written standard he attempted to explain (i.e., Mickles' explanation of "timeline of objectives and delivery dates," **Transcript, 2/26/08: 53-54**). At other times, Appellant rebutted Mickles' testimony (i.e., the contents of the mystery notebook, **Transcript, 3/4/08: 26, 34; 2/26/08: 111-112**), leaving the Hearing Officer to decide whether the Agency had met its burden of proof based solely on witness credibility.

Moreover, the testimony at the hearing was often confusing and convoluted, and adding to the confusion about what Appellant needed to do to meet her PIP requirements was the testimony about templates and whether Appellant had been given one or had access to one. The record shows that when the witnesses talked about a template, they were referring to a lesson plan template, not a project plan template. **Transcript, 2/26/08: 125; 3/4/08: 36**. Based on Appellant's PEPR ratings and the testimony of Mr. Mickles and Ms. Moreno, it is clear the Agency believed that Appellant had multiple performance problems, including deficiencies in her lesson plans, yet these other performance issues were not addressed in the PIP. Instead, Appellant's only 30-day PIP requirement was to create a project plan, which Mr. Mickles described as follows:

She had to do a project plan for arts and crafts and one for outdoor education. In that plan it basically would have what it was she was doing, the times, the dates, the class, the type of class that she was going to be doing. It would also have the meetings that she was -- if she had meetings, the places that she went, the times she went, what happened in those meetings. It was a plan that would be used so that I could actually put together -- when she gave me her classes, I could use that in terms of what I needed to spend on her and her classes.

Transcript, 2/26/08: 52-53. There is no indication anywhere in the record that this project plan, that broadly focused on planning and marketing activities, was supposed to include specific lesson plans. Yet on August 24, one week before Appellant's 30-day PIP review, Mr. Mickles met with Appellant and her union representative and discussed the need for more detailed lesson plans. **Ex. 29; Transcript, 2/26/08: 107**. It is not

surprising that on September 7, when Appellant was supposed to turn in a project plan, she turned in a much too detailed class lesson plan, when a lesson plan does not appear to be required by her PIP.

As the Hearing Officer recognized, the Agency's expectations about what the project plan needed to look like could have been communicated much more clearly through a written example, format or template, particularly when Mr. Mickles and Ms. Brummond knew that Appellant did not understand what she was expected to do.

The vagueness of the Agency's expectations was highlighted by the testimony surrounding the contents of the mystery notebook that Appellant gave to her supervisor on August 31. Mr. Mickles admitted that he gave only a cursory review to some of the contents of the notebook; nevertheless, he concluded that all the materials in the notebook were unacceptable and irrelevant to Appellant's PIP requirements. **Transcript, 2/26/08: 111-112.** On the other hand, Appellant testified that the notebook contained information on promotional meetings, the people with whom she met, and internet advertising. **Transcript, 3/4/08: 26, 29, 33-34.** The notebook was not admitted into evidence and the Agency offered no explanation for its absence. In fact, the Agency argued that it was Appellant's burden to produce the notebook as evidence of her compliance with the PIP. **Transcript, 3/06/08: 157.**

Unfortunately, the Agency misperceives its burden of proof in this disciplinary action. When an agency determines that materials submitted by an employee for purposes of a specific PIP requirement are so deficient as to justify disciplinary action, it is incumbent upon the agency to prove that deficiency, not the employee to prove compliance. Mr. Mickles' conclusions that Appellant's notebook was unacceptable and irrelevant did not meet this burden of proof.

For all these reasons, the Hearing Officer's findings that the Agency failed to prove violations of CSRs 16-60 A., B., J. and K., as those rules relate to Appellant's PIP requirements, are supported by evidence in the record and are not clearly erroneous. Those portions of the Hearing Officer's Decision are affirmed.

B. CSR 16-60 E. (Any act of dishonesty which may include, but is not limited to . . . (3) lying to superiors. . .)

In its brief, the Agency argues that the Hearing Officer erroneously interpreted this rule as it applied to Appellant's September 13th email to Ms. Brummond.¹ The Board agrees with the Agency as to the rule interpretation, but affirms the Hearing Officer's finding of no rule violation on alternative grounds.

The Hearing Officer determined that a violation of CSR 16-60 E. 3. required the Agency to prove: 1) the employee supplied incorrect information, 2) to a superior, 3) knowing it was false. However, the plain language of the rule includes any act of

¹ The contents of the email are set out in the Factual Background section of this decision.

dishonesty. The rule is not limited to false statements made to superiors but would include any knowing misrepresentations made within the employment context. Therefore, the Hearing Officer erroneously concluded that because Ms. Brummond was not Appellant's supervisor, Appellant could not have violated this rule.

The real issue is whether Appellant's email statement is a knowing misrepresentation designed to mislead Ms. Brummond, or Appellant's mistaken belief that she had done what she was required to do. Ms. Brummond provided the following testimony about her conversation with Mr. Mickles after the September 7th meeting but before September 13th :

Reggie and I, yes, we had briefly talked about it. He had said that she had met her goal -- or the time goal, that she turned it in on time, but what she turned in to him was very confusing. So, we were trying to figure out what to do at that point because she clearly was not understanding what was expected of her. And then, she sent this to me the following Thursday.

Transcript, 2/25/08: 32. Thus, Ms. Brummond knew what Mr. Mickles' position was before she received Appellant's email, and although the email appears to contain incorrect information about Mr. Mickles' acceptance of Appellant's materials, it also reflects her belief that she had met her PIP requirements. There is simply insufficient evidence in the record to conclude that Appellant's statement was knowingly false, and therefore, the Board affirms the Hearing Officer's finding of no rule violation.

For the same reasons, the Board also affirms the Hearing Officer's findings that the Agency failed to prove violations of CSR 16-60 E. 3. with respect to the two Girls' Club classes.

C. CSR 16-60 L. (Failure to observe written departmental or agency regulations, policies or rules.)

CSR 16-60 L. was the only rule violation the Hearing Officer found the Agency had proven, based on evidence that Appellant had overcharged the public for field trip fees. Nevertheless, the Hearing Officer concluded that the Agency did not prove the violation was intentional and no disciplinary action was warranted. To the extent the Hearing Officer interpreted this rule as requiring proof of intent before discipline may be imposed, that interpretation was incorrect. The Agency needed only to prove that there was a written policy, the employee was aware of the policy, and the employee failed to follow the policy.

Here, by Appellant's own admission, she was aware that field trip fees were set by city ordinance, she had received training on the fee schedules, and she was aware that those fees were kept in a notebook at the front desk. **Transcript, 3/4/08: 243-244.** The Board therefore affirms the Hearing Officer's finding that Appellant violated this rule, but modifies that portion of his Decision finding that no discipline was warranted.

D. The October 18, 2007 confrontation

All City agencies have the right to expect their employees to conduct themselves professionally and the record demonstrates that Appellant's conduct on October 18th was inappropriate, unprofessional and created a significant risk of workplace violence.²

Following the incident, Appellant was placed on investigatory leave and a new pre-disciplinary letter was issued which included the events of October 18 and added new rule violations, CSRs 16-60 M., O., Y. and Z. **Ex. T.** The Agency's notice of dismissal, however, does not contain these additional rule violations. **Ex. 1.** At the hearing, the Agency offered no explanation as to whether the omission of the additional rules from the notice of dismissal was inadvertent or intentional.

During its closing remarks, the Agency argued that Appellant's actions on October 18th were a violation of CSR 16-60 A., neglect of duty. However, the Hearing Officer concluded that the Agency failed to connect that rule violation to Appellant's conduct and noted that if there was a connection between the two, it was not apparent. The Board disagrees with the Hearing Officer's interpretation of neglect of duty in the context of this incident. Appellant's November 2006 PEPR contains her important job duties, including, "WORKING RELATIONSHIPS", which required Appellant to "maintain a professional demeanor with staff and participants." **Ex. 36-7.** Appellant received a "needs improvement" rating on this job duty. Unquestionably, Appellant's actions on October 18th demonstrated a complete failure to maintain a professional demeanor with Mr. Jerrow and Mr. Mickles, and her actions in initiating and escalating the confrontation created a significant risk of physical harm.

For these reasons, the Hearing Officer's finding that the Agency failed to prove a violation of CRS 16-60 A., neglect of duty, with respect to the October 18th incident is reversed.

E. Pre-disciplinary notice

In his Decision, the Hearing Officer not only evaluated the evidence presented at the hearing, but also analyzed the contents of the pre-disciplinary letter, concluding that it failed to state with specificity which facts alleged in the letter supported each particular rule violation. The Agency argues that the Hearing Officer's Decision would set a precedent requiring City agencies to write voluminously detailed pre-disciplinary letters that go beyond the requirements of due process and the career service rules. The Board agrees.

The career service rules mirror the provisions of the Denver City Charter in which career service employees may be terminated only "for cause" and may appeal a termination decision to the Board and its hearing officers. Because of the right to a post-

² The incident is described in detail in the Factual Background section of this decision.

termination hearing, an employee's pre-termination rights are limited: due process requires only notice of the charges, a recitation of the employer's evidence, and an opportunity to be heard. *Cleveland Board Education v. Loudermill*, 470 U.S. 532, 546 (1985). Here, the Agency's pre-termination letter, nine pages in length, adequately provided Appellant with notice and an opportunity to tell her side of the story. Accordingly, those sections of the Decision related to the contents and specificity of the pre-disciplinary letter are reversed.

E. Level of Discipline

Based on Appellant's violation of CSR 16-60 L., as it relates to overcharging the public for field trip fees set by ordinance, and CSR 16-60 A., as it relates to Appellant's conduct on October 18, 2007, the Board finds that a five-day suspension is the appropriate level of discipline and the Hearing Officer's finding of no disciplinary action is modified accordingly. In addition, because the Hearing Officer ordered the Agency to remove all references to the termination from Appellant's personnel records, that order must also be modified; the Agency is ordered to issue a new notice of discipline consistent with the Board's findings.

III. ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Decision, dated July 10, 2008, is **AFFIRMED** in part, **REVERSED** in part, and the disciplinary action imposed on Appellant by the Agency is **MODIFIED** to a five-day suspension, consistent with the Board's findings herein.

SO ORDERED by the Board on December 18, 2008, and documented this
8th day of January, 2009.

BY THE BOARD:


Luis Toro, Co-Chair

Board Members Concurring:

Tom Bonner
Nita Henry
Patti Klinge