

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

Appeal No. 81-06

DECISION

IN THE MATTER OF THE APPEAL OF:

CINDY ORTEGA

Appellant,

vs.

DEPARTMENT OF HUMAN SERVICES,

and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

The Appellant, Cindy Ortega, appeals her dismissal from the Denver Department of Human Services (Agency) on September 15, 2006, for alleged violations of specified Career Service Rules, Agency regulations, and an executive order. A hearing concerning the appeal was conducted by Bruce A. Plotkin, Hearing Officer, on February 15 and March 2, 2007. The Agency was represented by Assistant City Attorney Niels Loechelle while the Appellant was represented by Teresa Zoltanski, Esq. and Robert Thompson, Esq. Agency Exhibits 1-5 and Appellant's Exhibits A-E were admitted. The following witnesses testified for the Agency: Ivan Rodriguez, Renee Hernandez, Kathy Lapp, Liz Calvert, and the Appellant. The Appellant testified on her own behalf during her case-in-chief, and presented no other witness.

During a pre-hearing conference, the Agency moved for a protective order to conceal the identities of the children, custodial parent, and non-custodial parent of an Agency child support case central to this appeal. Over the Appellant's objection, the Agency's motion was granted. I memorialize that order below at §VI. B-E.

II. ISSUES

The Agency originally alleged the Appellant violated 10 Career Service Rules plus 14 Agency standards. [Exhibit 2]. Immediately prior to hearing, the Agency withdrew its allegation that the Appellant failed to answer her supervisor's telephone call while the Appellant was home on investigatory leave. Accordingly, the following claims were withdrawn: CSR 16-60 F, using official position or authority for personal

profit...; and CSR 16-60 J, failing to comply with the lawful orders of an authorized supervisor. In addition, the Agency withdrew its claim under CSR 16-60 X, divulging confidential or otherwise sensitive information... The following issues remained for hearing:

- A. whether the Appellant violated any of the following Career Service Rules: 16-60 A, B, E, J, K, L, Y, or Z;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss the Appellant conformed to the purposes of discipline under CSR 16-20;
- C. whether the Agency terminated the Appellant based upon unlawful discrimination or retaliation;
- D. whether the Agency's termination of the Appellant's employment violated any of the following: the Appellant's due process rights; the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq*; the Family Medical Leave Act of 1993, 29 U.S.C.S. §2601; Denver Charter §9.1.1 B; Denver Charter §§2-51 through 2-67; or Denver Revised Municipal Code (DRMC) §§2-91 through 2-100.

III. FINDINGS

The Agency is Denver's welfare department. The state audits and enforces performance of the 64 Colorado counties' provision of child support services. In addition to the state's power to sanction a county for failing to meet its child support obligations, there is a layer of federal oversight and enforcement. [Calvert testimony].

The Appellant was employed by the Agency for 12 years. She transferred to the Agency's Child Support Enforcement Section in January 2006 where she carried the working title of Support Enforcement Technician until her dismissal. One of the primary duties of that position is to ensure sufficient child support is paid from the non-custodial parent (NCP) to the custodial parent (CP). To wit:

Division GOAL(S): Mission

To assure that all children receive financial and medical support from each parent. This is accomplished by locating each parent, establishing paternity and support obligations, and enforcing those obligations.

[Appellant's Exhibit A p. 12]. See *also* [Exhibit A, pp.6-8, Exhibit E].

Three Agency documents governed the Appellant's duties. First, the Individual Performance Enhancement Plan, or PEP, defines the responsibilities and expected accomplishments upon which each employee is evaluated yearly. The Appellant's

PEP requires her to follow all Agency policies. Second, the "Denver Human Services Employee Handbook," (the Handbook) [Exhibit 1, Supplement #1], is a 70-page tome of employee rights, obligations and information. The Handbook contains requirements and procedures for avoiding and handling conflicts of interest. Third, the "Denver County Department of Human Services Fraud Prevention/Quality Improvement Manual (the Manual), further defines Agency's protocol for handling conflicts of interest. [Exhibit 1, Supplement #2, p. 6]. The Appellant received all three documents. [Exhibit A, Lapp testimony].

The Appellant understood the requirement to enter each case action into the Agency CBMS system and understood the requirement to turn over case files to a supervisor when there was a potential conflict of interest. When Lapp, the Appellant's immediate supervisor, was apprised of the Appellant's potential conflict of interest concerning an NCP in one of the Appellant's active cases, Lapp could not locate an entry in CBMS for the file location. The Appellant had been keeping the case file in her desk. [Exhibit 3, Lapp, Calvert testimony].

On August 25, 2006, a custodial parent (CP) telephoned the state welfare department to complain about the Appellant. The CP stated her children's father was living with the Appellant while the Appellant was handling the related child support case. A representative from the state contacted Calvert, the Director of the Child Support Division and the Appellant's second-level supervisor. Calvert contacted the Appellant immediately. The Appellant denied she had been dating the NCP, but Calvert placed the Appellant on investigatory leave effective August 28, 2006.

The Agency's investigation supervisor, Ivan Rodriguez, interviewed the CP on August 28. The CP confirmed her earlier allegation and added the Appellant was working "at a strip joint."

Rodriguez interviewed the Appellant on August 29. The Appellant told Rodriguez the NCP moved in with her on July 20, 2006. The Appellant also recounted she told the NCP she could lose her job for dating the NCP. She also declared she was dancing on amateur nights at PT's Nightclub for tips, but did not report the activity as a secondary job as she did not consider it a job. [Exhibit 3]. At the end of the interview, the Appellant executed a written statement to Rodriguez which affirmed the above-stated information concerning her relationship with the NCP. [Exhibit 3 attachment].

After reviewing Rodriguez' report, the Agency sent a contemplation-of-discipline letter to the Appellant on September 7, 2006. The notice stated disciplinary action was being contemplated, cited the Career Service Rules (CSR) being contemplated as the basis for discipline, and advised the Appellant of her right to representation at the pre-disciplinary meeting. [Exhibit 1]. The Appellant attended the pre-disciplinary meeting on September 15 without a representative. Regarding the Agency's allegation concerning her dancing at amateur nights on weekends at PT's Nightclub, the Appellant stated "it's not a job;" however, she acknowledged she was dating the NCP. [Exhibit 2]. The same day as the pre-disciplinary meeting, September 15, the

Agency sent its notice of termination to the Appellant. This appeal followed on September 27, 2006.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR § 19-10 A. 1, as a direct appeal of a dismissal. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

This case contains a mixed burden of proof. The Agency retains the burden of persuasion throughout the case to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to terminate the Appellant's employment complied with CSR 16-20. The Appellant retains the burden of persuasion throughout the case to prove the Agency engaged in unlawful discrimination, harassment or retaliation. She also retains the burden of persuasion to prove the Agency violated any of the laws specified in §II D, above. The standard by which the moving party must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 A. Neglect of duty.

To sustain a violation under CSR 16-60 A, the agency needs to establish each of the following by a preponderance of the evidence: 1) The Appellant had an important work duty. 2) The Appellant was heedless or unmindful of that duty. 3) No external cause prevented the Appellant's performance of that duty. 4) The Appellant's failure to execute her duty resulted in significant potential or actual harm. In re Martinez, CSA 30-06, 4-5 (Order 10/3/06), *see also* In re Simpleman, CSA 31-06 (Order 10/20/06). The Agency claimed the Appellant violated this rule by her failure to report her personal relationship with the non-custodial parent (NCP) of an active case assigned to her. The Agency also claimed the Appellant violated this rule by engaging in outside employment in violation of Agency policy.

a. Important work duty.

The duties for Agency employee are contained in the "DHS Fraud Prevention Manual" (Manual), [Exhibit 1, Supplement 2, p.6], and in the Employee Handbook (Handbook). [Exhibit 1, Supplement 1, p.9-10]. Both documents impress on employees the need to avoid conflicts of interest, and both require employees to seek permission to engage in outside employment.

The Manual prohibits an employee from continuing to handle a case which involves “partners in past or present intimate relationship[s] ... friends or close personal acquaintances.” The Manual also provides the procedure for handing over custody of a case in which an actual or potential conflict of interest arises. *Id at p.10*. In addition, the Manual prohibits the employee from keeping a conflict case file at her desk. *Id. at p. 11*. The Manual also establishes the duty to seek permission to engage in outside employment pursuant to Executive Order No. 10. [Manual p.6].

The Agency “Employee Handbook” (Handbook) restates the prohibition against conflicts of interest in accordance with the City of Denver Code of Ethics. [Calvert testimony, Exhibit 1, Supplement #1]. The importance of the prohibition against handling a conflict case is twofold: to avoid the conflict created by the Appellant’s obligation to enforce child support against an intimate partner or close friend [Calvert testimony]; and the potential cost to the Agency in sanctions, lawsuits and public perception. *Id.* The state of Colorado, in conformance with federal regulations, oversees each of the 64 Colorado counties for compliance with state and federal regulations. If the Agency fails to abide by state and federal regulations, it is subject to state and federal sanctions. [Calvert testimony]. In addition, the Agency would suffer a breach of the public trust, [Exhibit 2, p.4], and would become subject to law suits, if it acquiesced in employees’ retention of cases in which there was a conflict of interest. [Calvert testimony]. The Handbook also restates Executive order No. 10 regarding outside employment. [Exhibit 1, Supp. 1, p.60]. The Appellant received copies of the Manual and the Handbook, she was trained in their application, and she understood the procedure for handing over custody of a case in which a conflict develops. [Lapp, Appellant testimony, Exhibit 2, p.4].¹

Rather than challenge whether she received or was aware of the conflict of interest provisions in the Manual and Handbook, the Appellant challenged the Agency’s authority to enforce them under Denver Charter §2-99 (Enforcement of rules and regulations), alleging neither was promulgated pursuant to Charter Article VI, §2-91 *et seq.* The Appellant argued if Agency policies were not promulgated pursuant to Charter requirements, she has no duty to abide by them. I find this argument unconvincing. First, the Charter exempts from promulgation those rules, such as defining and setting forth conflicts procedures, “relating to internal operations, management or procedure,” Charter §2-91 (3). At the same time, the Charter permits agencies to adopt their own ethical standards. “Agencies may adopt a stricter code of ethics for their own use.” Charter §2-51. While the Denver Code of Ethics restricts “direct official actions” involving family members and “domestic partners,” [Denver Code of Ethics §2-61], the stricter Agency Code prohibits employees even from retaining files when conflicts arise, and further, adds “friends” to its list of relationships that require conflict protocol.

For reasons stated above, I find the Appellant was subject to the Agency’s Manual and Handbook. I also find the Manual and Handbook contained an important work duty, namely the procedure to avoid conflicts of interest. Finally, I find an agency regulation which requires

¹ While the Appellant did not fully affirm her receipt of and training in the conflicts provisions in the Handbook and Manual, she acknowledged she “probably” was trained. [Appellant testimony].

its employees to obey an executive order is, *per se*, an important work duty. Therefore, the Agency met the “important work duty” element of proof.

b. Heedless and unmindful.

The Agency claims the Appellant developed an intimate relationship with an NCP but continued to work on his case, in violation of her obligations to inform her supervisor and to hand over the file for reassignment. The Appellant responded she never had an intimate relationship with the NCP, and therefore did not have a conflict of interest in retaining custody of his case. For reasons explained extensively below, I find it more likely, by a preponderance of the evidence, that she and the NCP were intimate partners. Even if they were not intimate partners, the Appellant avowed she became close friends with the NCP and they would speak “a lot” during the time she was handling his children’s case. [Appellant testimony]. The same prohibition against retaining custody over a case applies whether the Appellant’s relationship with the NCP was one of intimate partner or friend. Manual p.6.

The Appellant also stated she took no official action on the case, as prohibited by the city Code of Ethics, after she began her relationship with the NCP. The Agency’s more restrictive conflict of interest prohibitions do not distinguish between merely retaining a case and taking official action upon a case in which specified relationships exist. The Manual requires employees, upon discovering a conflict or potential conflict, to notify a supervisor immediately and to turn over the case records for re-assignment. [Exhibit 1, Supp. 2, p.10]. Instead, after she became close friends with the NCP, the Appellant kept the file at her desk, and failed to note the file location in CBMS. She also failed to report the conflict, and failed to turn over the file to a supervisor. These failures were violations of the following Agency regulations.

Any case record that is identified as a ‘conflict of interest’ under Policy 1.3 should be stored under lock and key in the case reviewer’s office or cubicle...Case records should not be stored in the office or cubicle of the staff member who processed the case record or determined the actual eligibility benefit...” [Exhibit 1 Supp. 2 §2.2].

Access to case records identified as ‘conflict of interest’ shall be authorized only by the Manager, Deputy Manager, division director, section manager, program administrator, supervisor, authorized investigator, or staff member designated as case reviewer.” *Id at* §2.3.

The most powerful evidence concerning the “heedless and unmindful” element were two Agency exhibits: the Appellant’s handwritten admission that the NCP moved in with her while she was his children’s caseworker, [Exhibit 3 attachment], and her admission at the pre-disciplinary meeting that she had a dating relationship with the NCP. [Exhibit 4]. The Appellant countered that the investigator Rodriguez “badger[ed] me into confessing living with [the NCP].” [Appellant testimony]. The Appellant did not report this alleged criminal, ethical and CSR violation at her pre-disciplinary meeting, although she faced termination [Exhibit 1]; nor did she report Rodriguez’ alleged violations to anyone else who may have been able to assist her. The Appellant did not establish that Rodriguez had any motive to

fabricate his findings or to coerce the Appellant. On the other hand, it is significant that the Appellant raised this accusation for the first time at hearing and had a powerful motive to overcome her earlier admission. There is not a scintilla of reliable evidence that Rodriguez engaged in any wrongdoing when he obtained the Appellant's written statement.

The Appellant stated she felt intimidated by the pre-disciplinary process into admitting she dated the NCP. [Appellant testimony]. I find it unlikely the Appellant's intimidation at her pre-disciplinary meeting caused her to falsify her relationship with the NCP, while a similar sense of intimidation at hearing, [Appellant testimony], caused her to tell the truth.

The Appellant failed to act upon a CP's request to modify child support. She also failed to report and turn over a case in which she became at least close friends with the NCP. These omissions were heedless and unmindful of her duty to avoid such a conflict of interest.

c. External cause. The Appellant did not contest this element of a violation under CSR 16-60 A, and I find no external cause in the evidence which would have prevented the Appellant from complying with Agency rules regarding conflicts of interest and outside employment.

d. Significant potential or actual harm.

While the NCP was in custody, he applied for and was granted a reduction in child support payments from over \$300 per month to \$15 per month. However, within one week after his July 13, 2006 release from custody, he moved in with the Appellant even while she retained responsibility for his children's case. The Appellant's duty required her to assist the CP to obtain an order amending support payments, however when the CP requested her assistance, the Appellant did not act on the request, and instead advised the CP to go to court if she wanted to have the support order amended. In so doing, the Appellant caused a significant and tangible harm to the children she was charged with assisting. Further, once the CP learned of the intimate relationship between her case worker and the NCP, her call to the state, rather than to the Agency, was evidence of her diminished trust in the Agency, and proof of additional significant harm caused by the Appellant. The Appellant replied her relationship with the NCP was a private matter; however once that relationship transformed from client to close friend, the Appellant's legitimate expectation of privacy was required to defer to the City's interest in requiring that case managers maintain conflict-free dealings with all parties to their cases. Therefore, I find the Agency proved this element by a preponderance of the evidence.

The Agency proved each element of neglect of duty with respect to the Agency's conflict of interest claim. The Appellant failed to overcome the Agency's evidence. The Agency has therefore proven the Appellant violated CSR 16-60 A.

2. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

While CSR 16-60 A) and CSR 16-60 B), share similar elements of proof, they are distinguished in that, under 16-60 B., it is the Appellant's acts (performance), rather than her omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, a violation under this rule occurs for performing poorly, rather than neglecting to perform, an important duty. Since the Agency alleged the Appellant violated this rule for failing to notify her supervisor of her conflict, her omission is not a violation of this rule.

3. CSR 16-60 E. Any act of dishonesty, which may include, but is not limited to... Lying to superiors... with respect to official duties, including work duties, disciplinary actions...

At issue here is whether the Appellant lied to the Agency about her relationship with the NCP of an active case assigned to her. The Agency deemed the Appellant violated this rule on August 25, 2006 when she denied she was living with the NCP. [Exhibit 2 p.3].

The Appellant accused the investigator of lying about her admission in his report and accused him of badgering her into writing that the NCP moved in with her during the last week of July 2006. [Appellant testimony]. As noted above, she did not report this coercion to anyone in her chain of command, and she produced no evidence the investigator had a motive to lie or to coerce her into making a false statement. Also as noted above, the Appellant had a powerful motive to overcome her handwritten admission.

The Agency also established the Appellant admitted her relationship with the NCP at her pre-disciplinary meeting after denying that relationship on August 25. The Appellant replied she was intimidated by the meeting and didn't know what she was saying. Even assuming the truth of the Appellant's assertion, the Agency was entitled to rely on her statements in assessing discipline.

The Appellant's credibility ebbed considerably in her response to the Agency attorney question "[d]idn't you tell the state department of labor, when you filed an unemployment compensation claim, that one of the reasons you were trying to transfer out of Child Support was so that you could date [the NCP]?" At first she firmly denied making such a statement. When Agency counsel quoted from the Decision in that case, the Appellant then stated she could not remember [Appellant testimony]. This virtual admission is consistent with her statement to Rodriguez that she knew she could lose her job for dating the NCP "but continued to do so as she 'could not resist him,'" [Exhibit 3], and belies her subsequent denial.

The Appellant's version of the facts would require me to find that she gave critically incorrect information during an investigation that could lead to her dismissal. The Appellant's version also would require me to accept her claim that Calvert lied about the Appellant's admission on August 25, that the investigator badgered her into making a false statement, and that the pre-disciplinary meeting panel intimidated her into misstating the truth about her relationship with the NCP. On the other hand, aside from the Appellant's unsubstantiated

claim that Calvert has been "out to get her," [Appellant cross-examination] she did not claim any other pre-disciplinary meeting panel member had reason to intimidate her, nor did she claim the investigator harbored any enmity or wrongful motive. This convincing mosaic of evidence leads me to conclude, by a preponderance of the evidence, that the Appellant was dishonest about her relationship with the NCP, in violation of CSR 16-60 E.

4. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

At issue here was the second clause of the rule, the failure to do assigned work. Calvert testified the Appellant violated this rule by her failure to follow up on the CP's request for assistance in amending the NCP's child support order. [Calvert testimony]. The Appellant understood one of her primary duties was to procure proper child support. *Id*, and [Exhibit 1, Supp. 1]. She was well-experienced and capable of performing that function as evidenced by her past PEPRs. [Exhibit A]. She also was aware the NCP was no longer in custody and had begun working, both conditions that called for removing the temporary reduction in his child support obligation. Therefore, the Appellant's failure to seek a change to the NCP's temporary reduction in child support following his re-employment, was a failure to perform her assigned work under CSR 16-60 J.

5. CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards...

This rule covers performance deficiencies that can be measured either by qualitative or quantitative standards, such as those one would find in a performance evaluation. *In re Castaneda*, CSA 79-03, 12 (12/18/02). The Agency claimed the Appellant failed to meet the following PEP standards.²

Section II: Citywide Duties – Service, Teamwork, Accountability, Respect and Safety (STARS)

- a. Ensures sensitive, proprietary, and client personal information remains confidential.

Calvert testified the Appellant placed herself in a position to divulge confidential information, [Calvert testimony], but she did not present evidence that confidentiality was actually breached. The Agency presented no other evidence in support of this claim.

- b. Follows the performance and conduct standards for the section, and ensures that the essential duties and responsibilities of your job are fulfilled in an acceptable manner.

² Exhibit 2, 1-2. These standards were derived from the Appellant's 9-1-05 through 9-1-06 PEPR, Exhibit A, §II, p.4 of 10.

The Agency Manual and Handbook denote standards to follow when conflicts arise. The Manual requires employees immediately to notify a supervisor and to hand over files for which a conflict develops. The Appellant kept the file for the NCP's children at her desk during the time she had a close personal relationship with him, in violation of §§2.2 and 2.3 A of the Manual. The Appellant acknowledged she was aware the file was at her desk as she "meant to turn it in to [her supervisor] but never got around to it." [Lapp testimony]. The Appellant's intentional retention of the file for a case in which she developed a conflict of interest violated this established standard.

Another of the Appellant's essential performance standards was to ensure the children in her cases receive the support to which they are entitled. The Appellant's PEP states

Duty 1...Provide quality and professional child support services...Child support services include...the modification and enforcement of ...financial support orders."

[Exhibit A p.6]. This PEPR is not signed, but the Appellant did not dispute it applied to her.

The Appellant's acknowledgment that she talked "a lot" with the NCP prior to his release from custody, likely indicates she was aware of his release and job procurement. [Exhibit 3 attachment, Appellant testimony]. When the Appellant became aware the NCP was released from incarceration and began working, her failure to initiate proceedings to increase child support violated her PEP standard to enforce financial support orders.

4. Takes personal responsibility for performance, attitude, motivation and work products and outcomes.

One of the Appellant's primary performance criteria was to assist in the enforcement and modification of child support. [Exhibit A p.6]. As stated immediately above, the Appellant failed to seek modification of the NCP's support obligation. This same neglect of duty constitutes a failure to take personal responsibility for her work product and outcome.

6. If a problem arises, communicates it immediately to immediate supervisor.

Calvert testified the Appellant violated this provision by failing to alert her supervisors as to the conflict of interest that developed when she entered into an intimate relationship with the NCP. [Calvert testimony]. The Appellant was obligated to report this conflict immediately to her supervisor(s) so that the case could be reassigned. [Exhibit 1, Supplement 2, p.6]. The Appellant's denial of her relationship with the NCP was unconvincing for reasons as previously stated above. She was therefore in breach of this Agency standard of performance.

8. Considers ethical implications of decisions.

Conflicts of interest are ethical violations. See, e.g. Mickens v. Taylor, 535 U.S. 162, 189 n.13 (2002). It appears the Appellant understood the impropriety of entering into a relationship with the NCP. She told the investigator she knew she could lose her job for dating an NCP. [Exhibit 3]. The Appellant's consideration and rejection of the ethical implications of her decision is a violation of this standard.

6. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules. The Agency claimed the Appellant violated the following written policies.

DHS Fraud Prevention/Quality Improvement Manual.

Section 1.3
Policies

Avoidance of Conflict of Interests & Appearance of Impropriety.

This section prohibits employees from handling cases in which they have or had a relationship including partners in past or present intimate relationship, friends or close personal acquaintances. This section also requires employees to "report the situation immediately to their supervisor..." Finally, this section requires employees to comply with Executive Order 10 regarding outside employment that "might tend to affect the judgment or actions of any officer or employee in the performance of their duties.

Past or present intimate relationship. The Appellant's intimate relationship with the NCP of an active file in her caseload has been amply established, above. The Appellant continued to handle that case during her relationship with the NCP in violation of §1.3.

Reporting. The Appellant not only failed to report her conflict of interest to a supervisor, but kept the file at her desk³ after the conflict arose without logging the file location into the ACES system, making it less likely a supervisor would discover the conflict. The Appellant's failure to report her conflict of interest was a violation of §1.3.

Outside employment. This section requires employees to report outside employment that might affect their judgment or actions in the performance of their duties. The Agency presented no evidence the Appellant's dancing for tips outside of her work hours might have affected her judgment or actions in the performance of her duties. Therefore, this claim fails.

³ "Case records should not be stored in the office or cubicle of the staff member who process the case record or determined the actual eligibility benefit (see conflict of interest procedure)." Manual § 2.2.

Section 1.4
Policies

Fraud

This section of the Manual prohibits the fraudulent provision of services or benefits to those not entitled to them. This section also prohibits falsification of official records and documents. Although the Agency cited this provision in its notice of termination to the Appellant, [Exhibit 2 p.2], Calvert testified she found no fraud. I find this claim is withdrawn.

Section 2.1
Procedures – Conflict of Interest

This section defines the required steps once a conflict is discovered. These steps require notification of a supervisor, and turning over all records related to the case. Lapp testified she saw the Appellant sign a copy of the Manual. [Lapp testimony]. The Appellant did not contest that she received the Manual. Therefore, both the Appellant's failure to inform her supervisor that she developed a conflict of interest with the NCP and her retention of his file violated this provision.

DHHS HANDBOOK

P. 9
Ethics
Conflicts of interest.

The Handbook prohibits an employee from having "a financial or other interest which is in conflict with the proper discharge of your duties." The Agency claimed the Appellant violated this provision by entering into an intimate relationship with a NCP, failing to report the relationship, and continuing to handle the case during her relationship. [Calvert testimony] I find the Appellant's relationship with the NCP violates the "other interest" provision of this standard, as the relationship was in conflict with the proper discharge of her duty to enforce child support and to turn over the case file.

Outside Employment

The Handbook requires employees to "obtain written permission from your supervisor to engage in employment outside of your DHS job... that ... might tend to affect the judgment or actions of any officer or employee in the performance of their [sic] duties." [Handbook, *citing* Executive Order No. 10]. Renee Hernandez, HR Analyst at the Agency, stated employees are required to report outside sources of income where there is a set schedule and regular hours. [Hernandez testimony]. These requirements were not supported by any other evidence. Moreover, it appears the Appellant's dancing did not meet those criteria. The Appellant testified she

danced only occasionally on amateur nights and did not have regular hours.

7. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.

The Agency claimed the Appellant violated this rule by her dancing for tips at PT's Nightclub without first obtaining permission. City ethics requirements regarding outside employment are more expansive than Executive Order No. 10, in that the qualifier – "that might tend to affect the judgment or actions of any officer or employee in the performance of their duties" - is eliminated. City ethics standards, adopted by the Agency, flatly require employees "must obtain written permission from your supervisor to engage in employment outside your job." [Exhibit 1, p.6 *citing* City Code of Ethics]. The Agency offered scant evidence of indicia that might tend to prove Appellant's dancing constitutes outside employment,⁵ and apparently, it was only a secondary consideration. Lapp, the Appellant's immediate supervisor, approached the Appellant about the subject in May 2006, but did not pursue it afterward due to the Appellant's many personal issues during the ensuing months. [Lapp testimony]. In addition, Calvert stated the outside employment issue, alone, would not have been a sufficient basis upon which to terminate the Appellant's employment. The Agency's conclusory assumption that the Appellant's dancing for tips on amateur nights constitutes outside employment, was not established by a preponderance of the evidence, and a review of the case law is inconclusive.⁶ I do not rule here whether this practice is subject to reporting, only that the Agency failed to prove it.

8. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

To sustain this violation, the agency must prove the Appellant's conduct hindered the agency mission, or negatively affected the structure or means by which the agency achieves its mission. *In re Simpleman*, CSA 31-06, 10 (10/20/06). An important part of the Agency mission is to help those in need, [Exhibit 1 Supp. 1 p.8 Mission Statement]. Child Support Technicians accomplish this mission by enforcing child support orders. [Exhibit A p.6]. As a Child Support Enforcement Technician, the Appellant's failure to seek an amendment of the NCP's temporary reduction in child support when she knew he was working again hindered an Agency mission in violation of CSR 16-60 Z.

⁵ e.g., the amount the Appellant earned from dancing was disputed, and the frequency of the Appellant's dancing was not established.

⁶ See, e.g. *Moody v. Razooly*, 2003 Cal. App. Unpub. LEXIS 1730 (CA Unpublished Opinions 2003), *Jaros v. City of Toledo*, 120 Ohio App. 3d 515, 698 N.E. 2d 476 (Ohio App. 1997), *Donovan v. Tavern Talent & Placements, Inc.*, 1986 U.S. Dist. LEXIS 30955 (D. Colo. 1986), *Harrell v. Diamond A Entertainment*, 992 F. Supp 1343, 1348 (D. Fla. 1997), 51 A.L.R. Fed. 702,2.

D. Appellant Claims

1. Discrimination

The Appellant claimed the Agency discriminated against her based upon her Hispanic ethnicity and based upon her gender. She testified at hearing that the Agency did not engage in unlawful discrimination against her, so it became unclear if she was pursuing her claim. [Appellant testimony]. If the Appellant was pursuing this claim, her proof is subject to the burden-shifting test to establish a prima facie case for discrimination first announced in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and as adopted by Colorado. Bodaghi v. Department of Natural Resources, 969 P.2d 718 (Colo. Ct. App. 1998) (rev'd on other grounds). Intentional discrimination is proven by evidence of 1) membership in a protected class, 2) an adverse employment action, and 3) evidence which supports an inference of discrimination. In re Johnson, CSA 135-05, 3 (Order 3/10/06).

The Appellant is Hispanic and therefore meets the first criterion. The Agency's dismissal of the Appellant meets the adverse action test. With respect to an inference of discrimination, the Appellant's evidence is that, in all three cases in which Calvert terminated employment including that of the Appellant, the employees were Hispanic. [Lapp cross exam]. By itself, this evidence supports an inference of discrimination. Therefore, under the McDonnell Douglas analysis, the Appellant established her prima facie case. The burden of production then shifted to the Agency to produce a non-discriminatory reason for the dismissals.

The Agency responded that one of the other two employees was terminated for falsifying court records, specifically, for processing her own traffic ticket, stating it was satisfied when it was not. The other employee was terminated for using Agency resources to look up information on her boyfriend's child support account. The Agency therefore established a legitimate business reason for each of the other terminations. The Appellant failed to present any evidence that rebutted the Agency's response, nor did she otherwise show the Agency's stated reasons for dismissing her were, in reality, a pretext for unlawful discrimination against Hispanic women. She therefore failed her burden of persuasion to prove discrimination by a preponderance of the evidence.

2. Retaliation

A retaliation claim must be supported by evidence of a materially adverse action, meaning an Agency action that is likely to deter a reasonable employee from making or supporting a claim of discrimination. Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405 (2006). The Appellant's claim, in essence that Calvert did not like her, [Appellant testimony], fails to establish a material Agency action.

3. Due Process

The Appellant's claim here is she was not afforded notice of her pre-disciplinary meeting, and was not allowed to have representation at that meeting, ostensibly in violation of CSR 16-40.⁷ The Appellant acknowledged receipt of Exhibit 1, the Agency's contemplation of discipline letter, prior to the pre-disciplinary meeting. [Exhibit 4]. The letter contains specific notice of the pre-disciplinary meeting date, time and place. Notice is also provided of the Appellant's right to representation. Nothing more is required. The Agency's contemplation letter therefore fully complies with the mandates of CSR 16-40.

4. ADA

It was unclear how the Appellant claimed the Agency violated the ADA. During her testimony, the Appellant stated she suffers from a bi-polar disorder, has difficulty dealing with the deaths of a close friend, a close family member, and difficulty coping with effects of surgery several years ago. [Appellant testimony]. If these statements were intended as a claim of disability, under the ADA, "disability" means (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 29 C.F.R. §1630.2 (g). The Appellant presented no evidence she was disabled under any of three definitions within the meaning of the ADA. Moreover, it is unclear what accommodation the Appellant sought. Consequently, this claim fails.

5. FMLA

To maintain an action under the Family Medical Leave Act, 29 U.S.C.S. §§ 2601-2654 (2000), the employee is required to show: (1) she was an eligible employee as defined in 29 U.S.C.S. § 2611(2); (2) the employer was an employer as defined in 29 U.S.C.S. § 2611(4); (3) the applicant had a serious medical condition as defined in 29 C.F.R. § 825.114; and (4) the employer engaged in a prohibited act as defined in 29 U.S.C.S. § 2615. DeLong v. Trujillo, 25 P.3d 1194 (Colo. 2001). The Appellant claimed the Agency violated the FMLA in her appeal. She testified she had bipolar disorder, [Appellant testimony], but she presented no evidence she sought leave during the applicable period to this appeal, nor did she allege the Agency engaged in a prohibited act. The Appellant's Exhibit G, certification of FMLA leave from August 2005 to September 2005 is irrelevant to the period for this appeal. For these reasons, this claim fails.

⁷ CSR 16-40 is titled "Pre-disciplinary Notification of Contemplation of Disciplinary Dismissal and Notice of Pre-disciplinary Meeting." The Appellant did not directly make a claim under this rule, but the evidence comports with it.

6. Denver Charter §9.1.1 B.

This Charter section provides “[d]ismissals, suspensions or disciplinary demotions of non-probationary employees in the Career Service shall be made only for cause, including the good of the service.” For reasons stated below, I find the Agency met this obligation.

7. Denver Charter §§2-51 through 2-67.

These Charter sections comprise the city’s code of ethics. The Appellant presented no evidence concerning what Agency action may have been an ethical violation.

8. DRMC §§2-91 through 2-100.

This article of the DRMC governs the adoption of Agency rules and regulations. The Appellant argues that neither the Handbook, [Exhibit 1, Supp.1], nor the Manual, [Exhibit 1, Supp. 2], was adopted pursuant to rule-making requirements in DRMC §2-91 *et seq.* and therefore they are not binding “departmental or agency regulations, policies or rules.” I am not persuaded. The Manual and Handbook are not subject to rulemaking requirements. “Rules, regulations, or rules and regulations shall mean the whole or any part of rules or regulations adopted pursuant to Charter or ordinance authority...but **shall not include...rules relating to internal operations, management or procedure...**” DRMC §2-91 (3) (emphasis added). The Manual and Handbook are not rules or regulations adopted pursuant to Charter or ordinance authority, and are designed for internal operations – such as employee rights and responsibilities – and management and procedures, such as the procedure for handling conflict cases. This exclusion and the article read as a whole make it apparent that internal requirements such as reporting conflicts of interest do not fall within the scope of this article.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee’s past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

Oddly, after recanting her earlier acknowledgements of wrongdoing and denying any wrongdoing throughout her hearing, the Appellant answered “yes” to the question “do you think some degree of discipline is appropriate?” While this affirmation indicates the Appellant acknowledged wrongdoing to a degree, in every other utterance, she denied wrongdoing and lacked remorse. Moreover, in disregard of potentially damaging consequences to others, the Appellant accused witnesses of lying, even while the evidence strongly corroborated their testimony.

The breach of trust caused by the Appellant's breach of conflict of interest rules was evidenced by the CP's call to the state, rather than to the Agency, to investigate the Appellant's conflict of interest. Calvert considered the full range of penalties available to her before deciding on dismissal. The Appellant's actions violated the very mission of the Agency, to protect those who most need its protection. For these reasons I find the Agency's election to dismiss the Appellant was within the range of reasonable alternatives available to it. The Appellant's continued failure to acknowledge wrongdoing suggests a lesser penalty would not have corrected the inappropriate behavior.

VI. ORDER

A. The Agency's termination of the Appellant's employment on September 18, 2006, is AFFIRMED.

B. The Hearing Office file for this case shall be redacted as follows:

1. the child support case referenced in this appeal shall be redacted as to the names of the children, the custodial parent, the non-custodial parent, and any other directly-identifying information such as the DHHS case number;

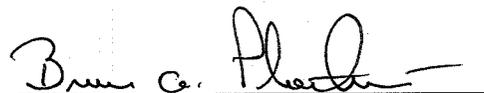
2. The name of the custodial parent shall be replaced by "CP;" the name of the non-custodial shall be replaced by "NCP;"

C. the original, un-redacted documents shall be sealed.

D. The Agency shall file its proposed redactions, made in accordance with this order, with a copy served on the Appellant or her representative, on or before 14 days from the date of this Decision. The Appellant shall file her objections, if any, within 21 days from the date of this Decision.

The parties and representatives in this case shall not disclose, or permit to be disclosed, the identities of the children, custodial parent and non-custodial parent of the DHHS case referenced above, except as permitted by law.

DONE April 11, 2007.



Bruce A. Plotkin
Hearing Officer
Career Service Board