PAPER SERVICE BOARD, CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 67-11A

IN THE MATTER OF THE APPEAL OF:

[Name]
Appellant,

vs.

DEPARTMENT OF ENVIRONMENTAL HEALTH,
the City and County of Denver, a municipal corporation,
Agency.

DECISION AND ORDER

Appellant was the Deputy Manager of the Department of Environmental Health. She was hired by and reported to the Manager, Nancy Severson. Eventually, the relationship between Severson and Appellant soured – and Appellant did nothing to hide that fact. Appellant would often be loud, confrontational and unprofessional in her dealings with Severson. Reading the record in its entirety, one could conclude that Appellant eventually came to believe the Agency was made up of two kinds of people; people who supported Severson, or people who supported her.

Eventually, Severson, due to a change of administration, left her position with the City. Bob McDonald, a former Division Director within the Agency, was temporarily appointed to the Manager’s position. Soon thereafter, Appellant wasted no time in being confrontational and unprofessional with him, letting him know how difficult it would be for her to work with him since she had trust issues with him. Individuals who Appellant perceived to be aligned with Severson, such as Communications Director Meghan Hughes, and Division Directors Doug Kelly and Celia VanderLoop (both direct reports to Appellant) continually felt the wrath of Appellant. Due to Appellant’s perceived fracturing of his management team by Appellant, McDonald decided to put Appellant on investigatory leave and asked CSA to perform a workplace investigation.

Shortly after the investigation was completed, Mayor Michael Hancock appointed Doug Linkhart as the Manager of the Department of Environmental Health. He determined, after reviewing the results of the investigation, that Appellant was a primary cause of the discontent
within the department. The Agency determined that Appellant’s conduct amounted to violations of Career Service Rules which warranted her dismissal.

Hearing Officer Valerie McNaughton conducted a five-day hearing. In a 17-page decision, she determined that three out of the six rules violation charges brought against Appellant should be sustained. She also determined that those sustained violations supported the Agency’s dismissal of Appellant. Finally, she concluded that Appellant failed to prove any of her Whistleblower claims. Because the Hearing Officer’s decision is supported by record evidence in every material respect, and because the Hearing Officer’s conclusions are well-reasoned and also well-supported in the record, we affirm.

Appellant raises several grounds on which she urges reversal of the Hearing Officer.

A. Due Process

Appellant urges us to overturn the Hearing Officer’s decision because of alleged “CSA Rule Violations.” Specifically, she alleges that the Agency violated CSR 16-40(E)(2), 16-40(B)(1), CSR 16-72(D) and CSR 19-44. She then claims that as a result of these rules violations, her rights under CSA rules were violated. Setting aside the repetitive nature of this argument, we find this allegation to be insufficient for us to overturn the Hearing Officer.

Initially we note that Agency rule violations generally do not constitute grounds upon which we are authorized to overturn a Hearing Officer’s decision (see, CSR 19-61). CSR 16-72(D), however, provides that:

Failure of a supervisor or appointing authority to comply strictly with the provisions of this section 16-70 shall not constitute a basis for reversing a disciplinary action on appeal unless the employee shows that his or her rights were substantially violated by the lack of compliance.

Consequently we are authorized to reverse this Agency’s discipline based on its rules violations, but only if those violations resulted in a “substantial” violation of the employee’s rights. Because we find no substantial violation of Appellant’s rights, we will not overturn the Hearing Officer’s decision upholding this dismissal.

Appellant claims that her rights were substantially violated because the Agency’s decision to terminate her was based on matters not contained in the pre-disciplinary letter or the letter actually imposing the discipline. She claims that this resulted in a violation of both, her rights to a proper pre-disciplinary conference, and, ultimately, her right to a fair hearing. While it is partially true that the ultimate decision-maker considered matters not contained in the pre-

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1 The grounds for review as enumerated in our rule 19-61 include only: new evidence; erroneous rules interpretation; policy-setting precedent; insufficient evidence; and lack of jurisdiction.
disciplinary notice or the actual letter of dismissal, we hold that this did not result in any substantial violation of Appellant’s rights.

First, we note that at hearing, Appellant consistently objected to the introduction of evidence of misconduct not found in the discharge letter. Just as consistently, the Hearing Officer ruled that she would not consider any misconduct not contained in the final letter imposing discipline as evidence supporting the Agency’s action.

As a result of the Hearing Officer’s rulings, Appellant, at her pre-disciplinary meeting, was given actual notice of the charges and evidence that would be considered against her; and, she was given an opportunity to present her side of the story concerning those actual charges. Because she had received actual notice of the charges, an explanation of the evidence which would be considered against her, and an opportunity to speak directly to those charges and that evidence, we believe the basic mandates imposed by Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) concerning pre-deprivation due process were implemented and that Appellant was afforded sufficient process prior to her being suspended without pay pending her post-deprivation hearing. (See, e.g., Riggins v. Goodman, 572 F.3d 1101, 1108 (10th Cir.2009), affirming that a party has been afforded constitutionally adequate process prior to a deprivation of a property interest when that pre-deprivation hearing included: “(1) oral or written notice to the employee of the charges against him; (2) an explanation of the employer’s evidence; and (3) an opportunity for the employee to present his side of the story.”) 2

So while it is true that Appellant was not given notice that the Appointing Authority who imposed the discipline considered matters outside of the pre-disciplinary letter when deciding to discharge the Appellant, it is also true, as the result of the Hearing Officer’s fastidious monitoring of this issue during the hearing, that anything that was not included in the letters, was not considered as evidence against her in support of the discharge. Consequently, the matters on which Appellant were not afforded notice were not considered as justification or cause in the Hearing Officer’s decision to affirm the Agency’s decision to discharge her. To the extent that the admitted lack of notice violated any of our Rules3, we believe the violation, and any alleged resulting harm to the Appellant, was cured by the Hearing Officer, who refused to consider matters not contained in the letters as supporting the decision to affirm the Agency’s decision to discharge. The lack of notice as to these non-issues did not amount to a violation of Appellant’s rights.

Appellant also claims that her right to due process was violated by the Hearing Officer when she permitted Agency witnesses to testify as to matters not contained in the letter of

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2 The Agency suggests at page 27 of its brief that the case of Merrifield v. Bd. of County Comm’rs for the County of Santa Fe, 654 F. 3d 1073, 1078 (10th Cir. 2011) provides that “lack of notice in a pre-termination letter does not establish a due process violation. The necessary notice may come from the hearing itself.” If the Agency is suggesting that lack of notice in a pre-disciplinary hearing can be cured by notice in the post-deprivation hearing, then we believe that the Agency has misinterpreted Merrifield. It seems clear to us that what the Tenth Circuit Court of Appeals was saying in Merrifield was that there need not have been any pre-notice notice, and that explanation of the charges and evidence given at the pre-deprivation hearing itself amounted to constitutionally adequate notice.

3 Including rules regarding the contents of pre-disciplinary and imposing discipline letters, as well as rules concerning pre-hearing statements.
dismissal. Again, we disagree. First, we must note here that, unlike the situation above where specific rules regarding the contents of letters authorize reversal of an Agency’s actions, mere evidentiary decisions made by the Hearing Officer at Hearing do not necessarily provide grounds for overturning the Hearing Officer.

In any event, despite the allegedly objectionable testimony, the Hearing Officer made it clear that she would not consider any of it in determining whether the Agency presented sufficient evidence at hearing to prove the charges brought and justify the penalty of dismissal. We believe the Hearing Officer kept her word. We do not see anywhere in the Hearing Officer’s decision; and Appellant, in her briefs, points to nowhere in that decision; where the Hearing Officer did, in fact, rely on matters not contained in the discharge letter in a manner which improperly held her responsible for non-noticed activity so that said activity amounted to cause for discharge. We believe the Hearing Officer was more than capable of separating background evidence from substantive evidence, and we believe she properly did that in this case.

Appellant expresses further concern for her due process rights in claiming that the Appointing Authority considered matters outside of the discipline letter to support his decision to discharge the Appellant. Here, while we agree with Appellant that this did, indeed, happen, we find that it did not amount to a violation of her rights for two reasons. First, as mentioned above, the Hearing Officer, essentially disregarded the testimony concerning matters outside of the discipline letter as to the issue of cause for her discharge.4

Second, Appellant was granted a de novo hearing.5 “A trial de novo is commonly understood as a trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken.” Turner v. Ross Miller, 35 Colo.App. 329, 334, 532 P.2d 751, 754 (Colo. App. 1975). The Hearing Officer made an independent judgment, separate and apart from that made by the Appointing Authority, in which she determined that the record contained enough evidence to meet the Agency’s burden of proving both, the existence of rules violations, and the reasonableness of the discipline imposed. In reaching that determination, the Hearing Officer took no account as grounds for discharge of the extraneous matters that might have been considered by the Appointing Authority.6

There is no evidence either in the record or the Hearing Officer’s decision, that the Hearing Officer afforded the Appointing Authority’s consideration of matters outside of the discharge letter any deference at all. In not affording deference to the Appointing Authority’s

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4 We acknowledge there are places in the record where the Hearing Officer does, in fact, consider non-noticed evidence. In every such instance, however, she does so not as a substantive reason amounting to just cause for the discipline, but rather as corroborating evidence, considered for the purpose of determining whether a properly noticed ground for discharge, and the evidence supporting that noticed ground, is more likely or not to be believed.

5 The de novo hearing was, at one time, required by Denver City Charter section C5.25. The Charter has since been re-numbered and amended. The requirement of a de novo hearing is no longer in the City Charter and is not found in any city ordinance, or in any of our rules. At least one court has questioned the necessity of granting career service employees de novo hearings. See, City and County of Denver v. Weeks, No. 10 CA 1408, p. 11, n. 3 (Colo. App. 2011) (unpublished). We make no ruling on that question today.

6 We also find it significant that the Appointing Authority testified that even had he not considered matters not contained in the dismissal letter, he would have determined that the rules violations had been committed and that Appellant’s discharge was necessary.
rationale, and in making independent determinations based only upon evidence adduced to prove matters actually contained in the discharge letter, the Hearing Officer protected the rights of the Appellant and insured that consideration of matters not found in the discharge letter did not creep into her deliberations. Consequently, we find that at no time before, during or after the hearing, were Appellant’s due process rights, or any other rights, violated.

B. Erroneous Rule Interpretations

At page 26 of her brief, Appellant argues that the Hearing Officer misinterpreted CSR 16-40(B)(1), (2), and (E)(2). But we see nothing in the Hearing Officer’s decision which amounts to an interpretation, or misinterpretation, of these Rules. Appellant’s claim is simply a re-hash of her due process argument. For the reasons stated above, we reject that argument.

C. Insufficient Evidence

Appellant’s argument found at page 27 of her brief that the “hearing officer (sic) view that the Appellant violated specific CSA rules were (sic) not based on sufficient evidence” appears to demonstrate a misunderstanding of the concept of insufficient evidence. We do not re-weigh credibility and make our own factual findings. Rather, we overturn a Hearing Officer’s factual findings for insufficiency of evidence under CSR 16-61(D) only where the Hearing Officer’s factual findings are “clearly erroneous.” A factual finding is clearly erroneous when it is unsupported by substantial evidence in the record considered as a whole; that is, where the factual finding has no support in the record. In the matter of the Appeal of: Ryan Murphy and the Department of Safety, No. 09-11A. Our review of this record leads us to conclude there is substantial evidence supporting all of the salient factual findings made by the Hearing Officer in support of her conclusions finding rules violations.

1. CSR 16-60(K)

The Hearing Officer sustained the alleged violation of CSR 16-60(K), failing to meet established standards of performance. In sustaining the charge, the Hearing Officer first found that the Agency had stated clear performance standards that Appellant was required to follow, those being: support her department’s needed transition; support shared services and serve as a senior level advisor; information management; leadership; support the Manager’s decisions in carrying out solutions; and support Human resources Services’ primary role in DEH personnel matters.

The Hearing Officer then found that Appellant violated CSR 16-60(K) by failing to support her Manager’s decisions. Specifically, the Hearing Officer found that Appellant, by continuing to argue and criticize, failed to support her Manager’s decision to transfer the Agency’s personnel functions to CSA under the Shared Services model. The Hearing Officer also determined that Appellant’s criticism of a subordinate for accepting assignments given to her directly by the Manager constituted further evidence of Appellant’s failure to support her
Manager's decisions. The Hearing Officer further determined that Appellant attempted to get employees to choose sides; either "for" her or "against" matters supported by the former Manager. These attempts at identifying "camps" of individuals, made up of people who were either "for" the Appellant or "against" her plainly violated the requirements that she support needed transition, exhibit leadership and support her Manager's decisions.

The record as found by us and the Hearing Officer is replete with evidence supporting the Hearing Officer's findings and conclusions stated above. The record also contains ample evidence supporting the Hearing Officer's conclusions that Appellant, essentially, engaged in an agenda that amounted to acting in opposition to anyone and anything that was supported by the former Manager. The Hearing Officer's findings supporting her conclusion that Appellant engaged in conduct in violation of CSR 16-60(K) is not clearly erroneous. It is supported by substantial evidence in the record.

2. CSR 16-60(O)

The Hearing Officer also found that Appellant engaged in conduct in violation of CSR 16-60(O), which prohibits the failure to maintain satisfactory working relationships. We find the record contains overwhelming evidence supporting this finding by the Hearing Officer. The utter lack of cooperation and civility shown by Appellant towards various individuals, including her direct supervisor (interim Manager), direct reports, other departmental employees (communications director, administrative staff) and CSA staff leave us with no doubt that Appellant violated this rule. One person described Appellant's behavior as "toxic" to the work environment. Two other people considered quitting rather than enduring a workplace with Appellant. The Hearing Officer determined that Appellant's comments about her co-workers and supervisors, made both in and out of the workplace, sabotaged the effective working of the department, by dividing the department into camps, by causing low morale in numerous employees, and by causing fear and uncertainty in numerous employees, all of which prevented employees from exercising their best judgment in the performance of their duties.

3. CSR 16-60(X)

The Hearing Officer also determined that Appellant violated CSR 16-60(X) when she discussed disciplinary issues with a non-employee. We first note that while Appellant challenges this finding under "sufficiency of evidence," we interpret the argument to be one of misinterpreting the rule. The facts are undisputed. Appellant divulged disciplinary information about an employee to an individual, outside of the CSA/discipline process, who was not even an employee of the City. Appellant argues that the release of information was authorized because it was made to a person who sat on a committee dealing with the Animal Shelter. We agree with the Hearing Officer's interpretation of this rule. A seat on an oversight committee does not entitle a member of the public to otherwise confidential information concerning employee discipline.
4. Appropriateness of Discipline

Appellant obliquely urges that the discipline administered by the Agency and upheld by the Hearing Officer was inappropriate. In doing so, she claims the Hearing Officer improperly considered the fact that Appellant never acknowledged that her conduct was inappropriate. Appellant implies that such a finding undermines her right to deny and defend against the charges brought against her. Again, we disagree.

Appellant had every right to assert she did nothing wrong – and every right to maintain that position up until the bitter end, which she has done. But, given the determinations made by both the Agency and the Hearing Officer that Appellant did, indeed, engage in serious misconduct, her position comes with a price. To the extent that the purpose of discipline is to correct improper behavior, both the Agency and the Hearing Officer were free to conclude, that when Appellant denied wrongdoing where they believed wrongdoing was manifest, there would be no punishment short of discharge which would result in an elimination of the improper behavior from the workplace. We believe the Agency and the Hearing Officer reasonably came to the same conclusion and that said conclusion is supported by the record. Appellant engaged in serious misconduct which caused significant damage to the workplace. Appellant’s insistence that the problem was seldom, if ever, hers, but rather, was everyone else’s, leaves us with the firm conviction that discharge was both a reasonable and necessary punishment for the proven rules violations.

5. Whistleblower Claims

Appellant objects to the Hearing Officer’s findings concerning her Whistleblower claims, but primarily as to how many of those claims were withdrawn by Appellant. Appellant alleges that only two Whistleblower claims were withdrawn, leaving three for consideration.

We acknowledge that it appears that the Hearing Officer considered two Whistleblower claims and found that Appellant had not proven those claims. Appellant, does not appear to take issue with those findings, and even if she did, we would hold that the record proves the Hearing Officer was correct in dismissing those claims.

As to the third allegedly extant claim, Appellant, in her brief, never identifies what that claim is, or how the record proves that the Hearing Officer erred in not sustaining said claim. Our review of the record finds no support for any claim of any Whistleblowing retaliation on the part of the Agency or its employees against Appellant.

For the above reasons, the Hearing Officer’s decision is AFFIRMED in its entirety.

SO ORDERED by the Board on January 3, 2013, and documented this 4th day of April, 2013.

BY THE BOARD:
Board Members Concurring:

Colleen M Rea

Derrick Fuller

Amy Mueller

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing ORDER on April 5, 2013, in the manner indicated below, to the following:

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