CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO  
Appeal No. 60-17A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

CRISTELLA RODRIGUEZ,  
Petitioner-Appellant,

vs.

DENVER PARKS AND RECREATION,  
and the City and County of Denver, a municipal corporation, Respondent-Agency.

Cristella Rodriguez (Appellant) was a Recreation Center Coordinator employed by the City's Parks and Recreation Department (Agency) at its Green Valley Ranch Recreation Center. A friend of hers sought to rent a room at the Rec Center for a birthday party. Appellant failed to obtain a deposit for the room, undercharged for use of the room, and attended the party while on duty. As a result of her attending the party, she failed to pay attention to her responsibility of supervision over the facility, and partygoers were able to access employee-only and other non-public areas of the Rec Center. Management learned of these irregularities and brought charges against Appellant, which included allegations of theft and dishonesty. The Agency discharged Appellant as a result of her misconduct involved with the room rental.

Appellant appealed her discharge. The Hearing Officer determined that the Agency proved seven out of the eight rules violations charged against Appellant, including a charge of theft. The Hearing Officer also determined, however, that the Agency failed to prove that Appellant violated the Career Service Rule prohibiting acts of dishonesty. The Hearing Officer affirmed the Agency's discharge of Appellant.

Appellant has appealed the Hearing Officer's decision to this Board. Appellant claims that the Hearing Officer misinterpreted applicable authority and that he should not have upheld some of the alleged rules violations, and should not have upheld the Agency's decision to discharge the Appellant. We agree that the Hearing Officer misinterpreted several Career Service Rules and that he should not have upheld the imposed penalty of discharge.

The imposition of discipline is guided by Career Service Rule 16-41. This Rule provides:
16-41: Purpose of discipline

The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

Our review of this record leaves us convinced that both the Agency failed to abide by this Rule when it chose to discharge the Appellant, and the Hearing Officer misinterpreted this Rule by finding that the Agency had justified the penalty of discharge.

We note the first line of this rule states that the purpose of discipline is to correct inappropriate behavior where possible. The Hearing Officer made no findings of fact indicating that the Agency had considered, let alone determined based on evidence, that Appellant was incapable of correcting her inappropriate behavior. Similarly, the Hearing Officer, in his decision, made no determination that Appellant was incapable of correcting her inappropriate behavior.

The Hearing Officer did consider whether Appellant was capable of reform, or rather, we should say that the Hearing Officer gave lip service to the concept of Appellant's ability to reform. Indeed, the Hearing Officer again made no analysis as to Appellant's ability to reform, but only stated his opinion that even if she were able to reform, the Agency was reasonable in discharging her given the seriousness of the proven rules violations. He did not make any finding or conclusion that she was incapable of reform.

Rule 16-41 requires the disciplinary decision to take into account the employees past record. We believe the Agency's decision and the Hearing Officer's decision fails to adequately do this. All the Hearing Officer stated was that Appellant had no prior discipline before this incident. The Hearing Officer does not appear to take into account that this spotless disciplinary record was accumulated over the course of a twenty-seven-year career with the City. An unblemished record over the course of a year or two is one thing. A pristine record over the course of twenty-seven years is quite another thing, and merits far more consideration and weight than either the Agency or the Hearing Officer afforded it.

The only thing, then, that could conceivable justify the imposition and upholding of the penalty of discharge based on this record, is the severity of the offense itself. Given what actually happened in this case, however, we do not believe the severity of the misconduct warrants discharge.
We first note that the Agency, in part, based its decision to discharge Appellant upon the belief that she had engaged in misconduct in violation of CSR 16-29(D) which prohibits acts of dishonesty. The Hearing Officer, however, determined that the Agency had failed to prove this Rule violation.

The Hearing Officer determined that Appellant's misconduct stemmed from ignorance but not willful or knowing dishonesty. The Hearing Officer further determined that Appellant was unaware that she had violated rules and requirements. So, while dishonest conduct is certainly serious, the Agency failed to prove that Appellant engaged in dishonest conduct; and her alleged but unproven dishonesty, therefore, cannot support the Agency's decision to discharge the Appellant.

Appellant was also charged with theft in violation of CSR 16-29(B). We do not question that theft, is, indeed, a serious offense. The Hearing Officer determined that Appellant's failure to collect a deposit and charge the renters the appropriate rate for the party room amounted to theft (Hearing Officer Decision, p. 3). We believe the Hearing Officer has misinterpreted this Rule and that the record does not support a finding that Appellant committed theft.\(^1\) While it is unclear exactly what definition of theft the Hearing Officer employed to reach his conclusion, we recognize that the Colorado Revised Statutes, Section 18-4-401 defines theft:

(1) A person commits theft when he or she knowingly obtains, retains, or exercises control over anything of value of another without authorization or by threat or deception; or receives, loans money by pawn or pledge on, or disposes of anything of value or belonging to another that he or she knows or believes to have been stolen, and:

(a) Intends to deprive the other person permanently of the use or benefit of the thing of value;

(b) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit;

(c) Uses, conceals, or abandons the thing of value intending that such use, concealment, or abandonment will deprive the other person permanently of its use or benefit;

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\(^1\) We acknowledge that Appellant's brief does not make this specific argument. We also believe, however, that Appellant adequately raised this issue by arguing generally that the Hearing Officer misinterpreted Career Service Rules and then claiming that the Agency did not prove certain rules violations while referencing money as an "issue."
(d) Demands any consideration to which he or she is not legally entitled as a condition of restoring the thing of value to the other person; or

(e) Knowingly retains the thing of value more than seventy-two hours after the agreed-upon time of return in any lease or hire agreement.

In this case, based on the Hearing Officer's analysis, the only things that could be considered "things of value" for purposes of a theft, would be the room that was rented, or the deposit and fees that were not collected. But certainly, Appellant did not deprive the City of future use of the room and she did not take any money. And given the Hearing Officer found that Appellant's misconduct regarding the rental of the room was unintentional, there is no way her conduct could meet the "knowing" requirement for proof of theft. The Hearing Officer's finding that Appellant committed theft in violation of CRS 16-29(8) is a gross misinterpretation of that Rule.2

Appellant has also argued that her punishment was unfair and disproportionate to that given to a male supervisor holding a similar position who was given a demotion for giving out free passes to the Rec Center he supervised (Santistevan). We agree with the Agency that Appellant is prohibited from raising an argument of discrimination for the first time on appeal.

We also recognize that our system of discipline is not a comparable discipline system and that disparities in discipline under similar circumstances are not, in and of themselves, fatal to the appropriateness of any one discipline. But we disagree with the Agency when it asserts that the loss to the City occasioned by Santistevan's misconduct pales in comparison to the loss occasioned by Appellant's misconduct.

According to this record, the value of the room rental was $1,134.00. Assuming the City received (albeit in a belated fashion) the $325.00 the renter attempted to pay, and no more than that for the room, the City lost $809.00 on the room rental. The only other possible monetary loss the City could have incurred would be salary paid to the Appellant for time she was not working.

On the day in question she clocked in at 3:30 and clocked out at 11:00 after the party. There is no allegation that she did not perform work for the first 90 minutes of her shift. Assuming Appellant earns approximately $27.00 per hour,3 the most the City would have lost here would be $162.00, making the total monetary lost to the City to be approximately $971.00 for all of Appellant's misconduct.

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2 If the Hearing Officer employed a different definition of theft, he did not state in his decision what that definition was. We note that Hearing Officers in the past, have used the definition of theft found in the Colorado Revised Statures. See, e.g., In re Schultz, CSA 156-04, 6 (Order 6/20/05)

3 Salary rates are generally available from the website of the City's Office of Human Resources.
In Santistevan's case, the Agency originally alleged that he unauthorizedly gave out 47 free passes, which the Agency valued at $17,000.00. So while the Agency believed its monetary loss from Santistevan's misconduct to be over seventeen times greater than that of the loss caused by Appellant, the Agency, nevertheless, sought only to demote Santistevan while it chose to discharge Appellant.4

All of this convinces us that the Hearing Officer erred in interpreting CSR 16-41 and other rules in upholding Appellant's discharge. Appellant did not steal anything, that is, she did not commit theft. She did not act dishonestly. According to the Hearing Officer she did not even break the rules she was found to have broken intentionally. She had worked for twenty-seven years without a prior discipline. And her agency, in a prior instance, was willing to demote someone for what they believed to be a $17,000.00 monetary loss, while seeking the discharge of Appellant.

We do not believe that discharge was in the range of alternatives available to a reasonable and prudent administrator under these circumstances based on the record of this case and the Hearing Officer's findings.

The Agency did not prove that Appellant stole or was dishonest. The Agency did not prove that Appellant intentionally or knowingly committed any rules violations, though it did prove that Appellant committed rules violations. The Agency did prove to this Board, however, that Appellant should not be a supervisor or a manager.

Accordingly, we MODIFY the Hearing Officer's decision. The Agency is ORDERED to re-instate Appellant to employment in a non-management, non-supervisory position; this re-instatement to be without back pay or back benefits.

SO ORDERED by the Board on June 7, 2018, and documented this 20th day of September, 2018.

BY THE BOARD:

Neil Peck, Co-Chair

Board Members Concurring:

Karen DuWaldt

Tracy Winchester

4 And while the Hearing Officer in Santistevan found that he only improperly gave away two passes, that would still mean that the Agency's monetary loss was approximately, $723.00.