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

Appeal No. 102-00

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: **LINDA M. SANDOVAL,**

And

Agency: DEPARTMENT OF SAFETY, DENVER FIRE DEPARTMENT, and the City and County of Denver, a municipal corporation.

NATURE OF APPEAL

Linda Sandoval, ("Appellant") challenges her dismissal from employment with the Denver Fire Department ("Agency") as a payroll and personnel technician. The Agency's dismissal was based upon several grounds. In summary, Appellant was convicted of a felony, which the Agency alleges impacted her ability to perform the duties and responsibilities of her position. The Agency further alleges that the Appellant failed to disclose a previous criminal record on her application for employment, and that she allegedly violated the then existing residency rule, which required her to reside within the corporate limits of the City and County of Denver (the "City").

The Appellant disputes much of the factual allegations, and further contends that the Agency lacked just cause for dismissal. She also contends that her dismissal was actually retaliation by the Agency for her reporting misconduct on the part of her supervisor.

ISSUES ON APPEAL

Whether the agency proved by a preponderance of the evidence that the appellant violated the following Career Service Rules, (CSR) Charter Amendments, or Departmental Rules:

CSR §§ 16-50 (3), (9), (11), (17), (20); and
CSR §§ 16-51 (5), (11); and
Denver Fire Department Code of Conduct Standards, 4 and 13.

If so, whether the agency had just cause to discipline the appellant, and whether the disciplinary action taken by the agency, namely dismissal from employment, was reasonably related to the seriousness of the offense(s), considering all of the circumstances.

Finally, whether the Appellant proved by a preponderance of the evidence, that the disciplinary action taken by the Agency was retaliatory.

PRELIMINARY JURISDICTIONAL MATTERS

The Appellant was notified in writing by the Agency on December 29, 1999, that it was contemplating disciplinary action against her. A pre-disciplinary meeting was held in January 2000. [Exhibit 8]. After that meeting the Agency decided to undertake further investigation into the Appellant's background and history. On March 13, 2000, the Appellant was notified that she was being placed upon Investigatory Leave. [Exhibit 5]. On March 24, 2000, the Appellant was again notified that the Agency was contemplating disciplinary action against her. [Exhibit 6]. On March 31, 2000 the Appellant received another notice that the Agency was contemplating disciplinary action against her [Exhibit 7]. A predisciplinary meeting was held on April 12, 2000, with the Appellant in attendance. The Appellant was then notified of her dismissal on April 26, 2000. [Exhibit 8].

Pursuant to Career Service Rules, the Appellant filed her appeal with the Career Service Hearing Office on May 5, 2000. Neither party has contested the jurisdiction of the Hearing Officer.

Based upon these facts the Hearing Officer finds that this appeal has been timely filed, and that under CSR §19-27, the Hearing Officer has jurisdiction and authority to affirm, reverse or modify the actions of the Agency giving rise to this proceeding. The Hearing Officer further determines that the Appellant was afforded the Pretermination Hearing as set forth by the United States Supreme Court in *Cleveland Board of Education v. Loudermill, et al.*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 53 U.S. L.W. 4306 (1985) and as required by Career Service Rules.

INTRODUCTION

A hearing on the merits was held on November 27, 28, 29 and 30, 2000, before Michael L. Bieda, Hearing Officer for the Career Service Board. The Appellant was present, and was represented by Mr. John Palermo, Esq. The Agency and City were represented by Assistant City Attorney Ms. Linda Davison, Esq., with Assistant Chief Jim Sestrich serving as the advisory witness on behalf of the Agency and the City.

The following witnesses were called to testify by the Agency and the City: the Appellant, Ms. Linda Sandoval; Ms. Terri Padilla; Assistant Fire Chief James Sestrich; Mr. Tracy W. Howard, Deputy Manager of Safety; and Lt. John P. Drogheo.

The following witnesses were called to testify by Appellant: the Appellant, Ms. Linda Sandoval; Ms. Dolores Arlene Garcia; Ms. Mary Ida Stines; and Ms. Margaret Lucero.

Exhibits 1-17 were offered and admitted into evidence on behalf of the Agency. Exhibits A, F, G, J, K, O, U, V, and AA were offered and admitted into evidence on behalf of the Appellant. All other exhibits were not admitted and not considered in this decision.

FINDINGS OF FACT

The Appellant is employed with the Agency as a Payroll & Personnel Technician. She started with the Fire Department on May 1, 1995 as a Specialty Clerk. She was later assigned to her present position in January 1996. Prior to her position with the Fire Department, she also worked for the Denver County Court. She began her career as a City employee with the Denver District Attorney's office in 1991.

The most serious portion of this appeal involves the allegation by the Agency that the Appellant was convicted of a crime, which allegedly impacted upon her ability to perform the duties and responsibilities of her job. [CSR §16-50 (9)]. It is not contested that in 1996, a jury convicted the Appellant of Theft, a class 4 felony, and Abuse of Public Records, a class 1 misdemeanor. [Exhibit 1]. This conviction took place in the Denver District Court. The Appellant was sentenced to 4 years with the Department of Corrections on the Felony Theft, with the sentence suspended on the condition that she comply with the terms and conditions of probation. She received 2 years probation for the Abuse of Public Records conviction, which ran concurrently with the Theft conviction. The Appellant was ordered to pay restitution in the amount of $10,296, plus $2,760, plus the customary court costs and fees. (The actual amount of restitution was $6,684 with the balance representing a statutory 50% penalty). This judgement of conviction was later affirmed by the Colorado Court of Appeals. [Exhibit 14 pp. 33-38]. The Colorado Supreme Court denied certiorari. [Exhibit 14 p. 63].

The factual basis for the conviction involves conduct of the Appellant between August 12, 1991 and June 23, 1992. During that period for the purpose of fraudulently obtaining unemployment benefits, the Appellant submitted regular false status reports to the Colorado Department of Labor and Employment claiming that she was unemployed. During that period she was actually employed full-time for the Denver District Attorney's Office. The Court determined that due to her fraud, she had actually received $6,684 in benefits to which she was not entitled.

While not included in the conviction, there is also substantial indication throughout the criminal file [Exhibit 14], that the Appellant had engaged in this type of illegal conduct on several previous occasions, prior to the period for which she was convicted. The unemployment benefits involved beyond those in the criminal conviction involved additional several thousands of dollars.

The Appellant also falsified her applications for employment with the City. These applications are found at Exhibits 3 & 4. One was completed in 1991 and the other in 1996. Both applications ask if the Appellant has "ever been found guilty of ANY law violations other than parking tickets or juvenile offenses". [Emphasis included in original text]. In both cases the Appellant marked the box indicating "No". In fact, Exhibit 14, which is the District Court file, indicates at least 6 criminal convictions dating back to 1969, ranging from petty theft, resisting arrest, disturbance, and DWAI. None of these are disclosed on the employment applications.

Finally, the Appellant also admitted during the hearing before the Hearing Officer that she had asked a fellow employee of the Department to lie on her behalf as to her place of residence. The evidence was clear that the Appellant asked Lieutenant John Drogheo of the Fire Investigation Bureau to lie about her residency for the purpose of showing compliance with the residency rule. Lieutenant Drogheo also confirmed this through his testimony at the hearing.

Prior Discipline and Warnings

The Appellant has not been previously disciplined.

DISCUSSIONS AND CONCLUSIONS OF LAW

Applicable Rules, Executive Orders, Departmental Policies and Regulations

For the sake of brevity, the Hearing Officer will limit this discussion to the prior conviction charge and the allegations of dishonesty as they pertain to the decision to terminate the Appellant pursuant to CSR §§ 16-50 (3) and (9). At the time of Appellant's discipline, the following applicable Career Service Rules, Ordinances, Executive Orders and Departmental Policies were applicable and in effect:

§5-62 Employees in Career Status

An employee in career status

1) may be disciplined or dismissed only for cause, in accordance with Rule 16 DISCIPLINE.

* * *

Section 6-10 Purpose

The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. 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 or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance.

The disciplinary action taken must be consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

Section16-50 Discipline and Termination

A. Causes for dismissal.

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

* * *

3) Dishonesty, including but not limited to: altering or falsifying official records or examinations; accepting, soliciting, or making a bribe; lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours; using official position or authority for personal profit or advantage, including kickbacks; or any other act of dishonesty not specifically listed in this paragraph.

* * *

9) Conviction of a crime which impacts the individual's ability to perform the duties and responsibilities of

the job.

* * *

20) Conduct not specifically identified herein may also be cause for dismissal.

Section 16-51 Causes for Progressive Discipline.

A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.

* * *

5) Failure to observe departmental regulations.

The following applicable provisions of the Denver Fire Department Code of Conduct Standards are applicable to this case:

EVERY MEMBER SHALL:

* * *

4. Always conduct themselves to reflect credit on the Department and the City of Denver.

* * *

13. Obey the law.

[Exhibit 12].

Analysis of agency evidence

It is without question that Appellant was convicted in 1996 of a serious crime involving moral turpitude and the theft of public moneys. In order for this conviction to

violate CSR § 16-50 (9), it must be shown to impact the employee's ability to perform her duties. In this case, the Appellant was convicted of stealing $6,684 of public funds. Her present duties require her to have access to the sensitive and confidential personnel files of the Denver Fire Department. Part of her duties require her to input leave time for the employees into the computer system. This data in turn directly effects the disbursal of payroll from public funds to employees, including her own pay. The evidence clearly establishes that the department must be able to rely on the person performing this function to be absolutely honest and trustworthy. Contrary to the contentions of the Appellant, the availability of an audit or other internal departmental procedure to monitor this function cannot be a substitute for a trustworthy employee.

The Agency contends that due to the nature of the conviction and the fact that it involves the theft of public moneys related to employment issues, it can no longer trust the Appellant with the sensitive information available to her. Moreover, the Agency contends that the Appellant cannot be trusted to have access to the computer system, which controls employee benefits, financial records and compensation.

As previously noted, there are substantial indicia in the criminal file that the conviction is not the first and only incident of this type of misconduct by the Appellant. In fact, the file indicates that this type of activity may have gone back as far as 1987. The Appellant denies receiving additional overpayments of unemployment benefits while working for Petro Data Inc. in the amount of $370, and Evergreen Operating Corp. in the amount of $1,859. However she does admit receiving unemployment benefits overpayments of $1,112 in 1995 while working for the County Court. This is in addition to the amounts included in her conviction while working at the Denver District Attorney's Office.

With regard to the falsification of her employment applications, the Appellant contends that with the exception of the DWAI these are not her convictions. She claims that she thought the applications only asked for felonies and that she was not required to disclose the DWAI. She claims that she did in fact disclose the DWAI on the second application, and that someone "altered" her second application and removed it.

The record and the evidence do not support either of her contentions. The language in the applications is clear on its face and speaks for itself. At the very least the Appellant's testimony is tantamount to an admission that she failed to disclose the DWAI conviction on the first application. Moreover, as the Agency points out, nowhere in the criminal trial or sentencing hearing does the Appellant contest the accuracy of her criminal record. For her to now claim that it is not her record is simply not believable. Finally, the contention that her second application was altered is likewise not supported by credible evidence. The motivation for someone to remove a DWAI disclosure from her application is doubtful.

The Hearing Officer can only conclude that the Appellant did in fact misstate her criminal record on her application and in doing so once again falsified an official document. While the Hearing Officer has determined not to rely on this as a basis for a separate violation of the Career Service Rules, it is nevertheless further indicia of the lack of trustworthiness of the Appellant.

There are also other indicia of her propensity to misuse public forms, such as her misuse of the open enrollment health care benefits form in 1991 wherein she claims that Ben Martinez is her spouse for purposes of including him on her health care coverage. Yet, it is clear from the evidence that he was in fact a "boyfriend" and not her spouse. [Exhibit 16]. Thus, the Appellant has evidenced a continuing pattern of misconduct that involves moral turpitude. This includes theft of public funds and misuse and falsification of public records.

It does not take much of an imagination to visualize how a dishonest person might misuse the sensitive personnel information of the Denver Fire Department and system access for personal gain. Add to that the Appellant's demonstrated propensity for dishonesty, and her attempt to have Lieutenant Drogheo lie about her residency, and the Agency's determination that it can no longer trust the Appellant has a reasonable basis. Given all of the circumstances, the Agency's determination cannot be viewed by a reasonable person as arbitrary or capricious. Moreover, the Hearing Officer makes an independent finding that the Appellant cannot be trusted to handle sensitive personnel and financial information.

As such, this lack of confidence in the trustworthiness of Appellant precipitated by her felony conviction, necessarily and reasonably constitutes a substantial impact on the Appellant's continuing ability to perform her duties. Practically speaking, the impact is no less than if she were incarcerated. She can no longer be relied upon to perform the essential job functions of her position as a payroll and personnel technician.

Accordingly the Hearing Officer finds in favor of the Agency, and concludes that the Appellant has violated CSR §16-50 (9).

Her conviction and underlying misconduct, along with her attempt to have Lieutenant Drogheo lie on her behalf, also constitute dishonesty, and therefore violates CSR §16-50 (3). (Dishonesty). It goes without saying that her conviction is indicative of serious disobedience of the law, in violation of Departmental Code of Conduct Standards and CSR §16-50 (20) (other conduct) and CSR §16-51 (5) (violation of departmental regulations). Finally, the Appellant's conduct leading to her conviction, and other misconduct, constitute a gross failure to conduct herself in a manner to reflect credit on the Department and the City of Denver, in further violation of Department regulations.

Violation of Department Regulations

The Hearing Officer therefore finds that there is a preponderance of evidence to support a conclusion that the Appellant violated the following Career Service Rules, any of which would support dismissal:

§16-50 (3)	Dishonesty
§16-50 (9)	Conviction of a Crime
§16-50 (20)	Other conduct
§16-51 (5)	Failure to observe departmental regulations.

The evidence also supports a conclusion that the Appellant violated paragraphs 4 (good conduct) and 13 (obey the law) of the Department Code of Conduct. Appellant is therefore subject to discipline.

Analysis of appellant's evidence

Because appellant alleges retaliation, as the proponent, she bears the burden of proving those allegations by a preponderance of the evidence. The Appellant contends in her Prehearing statement that she "was dismissed in retaliation for her having pointed out improper conduct on the part of other employees." In her More Particular Statement, Appellant alleges that her alleged mistreatment at the hands of various individuals at the Agency or department was due to her "challenging Linda Becker, who was favored by McMillan."

A review of the evidence submitted does not support this contention. First, the decision to terminate or for that matter to discipline, was not made or initiated by Chief McMillan, as alleged by Appellant. The evidence is all but uncontroverted that the decision to terminate was made by Acting Manager Tracy Howard. He testified that he did not discuss the Appellant's case with McMillan prior to making his decision to terminate. In fact, both Chief Gonzales and Tracy Howard signed the dismissal letter [Exhibit 8], not McMillan. There is no evidence that either decision-maker discussed their decision with McMillan prior to taking the disciplinary action against Appellant.

The Agency correctly contends that in order to establish a claim for retaliation, the Appellant must prove a nexus or causal connection between the decision to terminate and the person alleged to carry the grudge. Purrington v. University of Utah, 996 F.2d 1025 (10th Cir. 1993) (Title VII retaliation claims); Richmond v. Oneok, Inc., 120 F. 3d 205 (10th Cir. 1997) (FMLA retaliation claims); Morgan v. Hilti, Inc., 108 F. 3d 1319 (10th Cir. 1997) (ADA/FMLA retaliation claims).

In this case there is no credible evidence that either Chief Gonzales or Tracy Howard had any communication with Chief McMillan concerning Appellant prior to the Agency action. The Appellant would have the Hearing Office infer that the various

individuals involved conspired to terminate her due to a supposed "blue code" conspiracy. Apparently Appellant claims that the professional members of the department all cover for each other, and that in this case that would include conspiring with each other and lying in order to have her terminated. While the Hearing Officer is not naive to this type of potential official misconduct, there simply is no credible evidence to support the Appellant's contention that it occurred here. Moreover, it is hard to imagine that the professional members of the department would risk their careers simply to have the Appellant terminated, especially when the evidence against her is apparent. In the final analysis, any alleged whistle blowing by Appellant was of little consequence to members of the department.

The evidence further indicates that McMillan was never part of the Appellant's disciplinary process. There is no evidence that he was involved with the investigatory leave letter [Exhibit 5]. Likewise with the first Notice of contemplation of disciplinary action [Exhibit 6], or the second Notice of contemplation of disciplinary action [Exhibit 7]. McMillan was not present at the predisciplinary meeting held on April 12, 2000 [Exhibit O].

The Hearing Officer must therefore conclude that even if the Appellant were found to have engaged in "whistle blowing" activity as to either Chief McMillan or Becker, she has failed to establish that there was any casual connection between Chief McMillan and her discipline.

Appellant's theory that she was terminated due to her reporting of embezzlement by her supervisor has another major flaw. The evidence indicates that her reporting was after the fact of discipline and termination. She was unable to produce any credible evidence that she had reported this alleged misconduct by her supervisor prior to her termination. As an example, Appellant claims to have reported the alleged embezzlement to investigator Natalie Cohen, and that there was a transcript of it. Yet, when pressed on this point, she admitted that it was not in the transcript, and that her report had in fact been made "off the record". The transcript in question is represented in the record as Exhibit 17. Her claim that the discussion about her supervisor is off the record is even more incredible when viewed in the context of the full transcript of the interview of September 16th 2000. The transcript reveals that there is a general discussion on the record about her dissatisfaction with her supervisor, Linda Becker. That would have been the perfect time to raise the supposed "embezzlement" accusation, if it were in fact made.

With no credible evidence that the whistle blowing took place prior to the termination, and no causal connection between McMillan and the disciplinary action, Appellant's retaliation theory must fail.

Justness of Discipline

The City Charter, C5.25 (4) and CSR 2-104, and 2-10 (b) (4) require the Hearing

Officer to determine the facts in this matter "de novo". This has been determined by the Courts to mean an independent fact-finding hearing considering evidence submitted at the *de novo* hearing and resolution of factual disputes. *Turner v. Rossmiller*, 35 Co. A. 329, 532 P. 2d 751 (Colo. Ct. of App., 1975).

CSR §16-10 states:

> The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. **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 or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance. (Emphasis added).

Thus, while the Hearing Officer may defer to the discipline imposed by the agency, he is required to make an independent, *de novo* finding and determination as to the reasonableness of the discipline to be imposed, consistent with the provisions of CSR §16-10. In this case, the Appellant was convicted of a class 4 Felony, Theft, which involved the theft of public funds. She was also convicted of a class 1 misdemeanor, Abuse of Public Records. She has displayed a continuing pattern of dishonesty and lack of candor throughout her career. Given the sensitive nature of her position and the need for absolute trust when handling public records, a suspension or reprimand would be inadequate. A suspension or reprimand could not address the continuing lack of trust by the Denver Fire Department in this individual. Anything less than dismissal will not correct this situation.

Notwithstanding the Appellant's lack of a past disciplinary record, given the serious nature of the Appellant's misconduct and the lack of suitable alternatives, the Hearing Officer concludes that dismissal is the only suitable remedy.

MISCELLANEOUS

The findings regarding the felony conviction and related misconduct make the Agency's allegations concerning the Appellant's violation of Career Service Rules with respect to her employment application and residency violations, moot.

ORDER

For the reasons stated above, the action of the Agency dismissing the appellant Linda M. Sandoval from her position as a Payroll and Personnel Technician is hereby AFFIRMED, without modification.

Dated this 23rd day of January, 2001.

Michael L. Bieda
Hearing Officer for the
Career Service Board

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