

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

Appeal No. 05-02

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

PATRICIA ANDERSON, Appellant,

v.

Agency: Career Service Authority and the City and County of Denver, a municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, Patricia Anderson shall be referred to as "Appellant." The Career Service Authority shall be referred to as the "Agency" or "CSA." The City and County of Denver shall be referred to as the "City". The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held March 26, 2002, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and appeared *pro se*. The Agency and City were represented by Mindi L. Wright, Esq., Assistant City Attorney, and Robert Babcock, with Sandra S Klawonn serving as the advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Agency:

Steve Adkison, Ted Pacheco, Sherer Murtiashaw, Sandra S. Klawonn

The following witness was called by and testified on behalf of the Appellant:

Appellant, Karen Brennan, Stephanie Foote, Linda Wasserman, Suzanne Comcowich

The following exhibits were offered and admitted into evidence on behalf of the Agency:

Exhibits 1 - 12

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

A – C, E - F

The following exhibits were admitted into evidence by stipulation:

Exhibits 1 – 10, A – C, E - F

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

None

NATURE OF APPEAL

Appellant is appealing a written reprimand for alleged violations of CSR §§16-50 A. 20), and 16-51 A. 2), 4), 5), 6), and 11). She seeks rescission of the written reprimand and its removal from her personnel file.

ISSUES ON APPEAL

Whether Appellant violated CSR §§16-50 A. 20) and 16-51 A. 2), 4), 5), 6), and 11)?

If Appellant violated any provisions of CSR §§16-50 and 16-51, what is the appropriate sanction?

PRELIMINARY MATTERS

The CSA filed a Motion to Dismiss on February 6, 2002, in which it argued that Appellant's failure to cite a specific CSR Rule in her Notice of Appeal during the grievance and in the Notice of Appeal required dismissal for lack of subject matter jurisdiction. Appellant responded to the Motion to Dismiss on February 15. Hearing Officer Joanna Kaye, upon review of the arguments presented by both parties and the relevant case law developed by this tribunal, found that Appellant, as Appellant was challenging a disciplinary action, this tribunal has jurisdiction to consider the matter and denied the Motion to Dismiss on March 19, 2002.

At the commencement of the hearing, The CSA raised the issue of the burden of proof in this case. The CSA argued that the reasoning in *In the Matter of the Appeal Gloria Maria Richardson*, CSA Appeal No. 23-01, a previous decision by this Hearing Officer, should apply and that Appellant should have the burden of proof during this hearing. The Hearing Officer noted that, while she previously ruled that an Appellant has the burden of proof when the issue is an appeal of a written reprimand because the matter comes before the Hearing Officer as a grievance appeal, that the Hearing Officer was going to follow the decision in *In the Matter of the Appeal of Martha Douglas*, CSA Appeal No. 317-01, and find that the Agency has the burden of proof in this case.

FINDINGS OF FACT

1. Appellant has worked for the Agency for almost fifteen years. She has been a Senior Personnel Analyst for eleven years. During the relevant period, she was a member of "Team D." Her assigned client was the Department of Public Works. She

was working with Public Works since 1997. She dealt primarily with the engineering divisions at Public Works.

2. During the spring of 2001, Appellant was approached by Karen Brennan, who was then an Analyst Specialist at Public Works. Ms. Brennan told Appellant that Stephanie Foote, Director of Public Works, was considering a reorganization of the Department when Allan Wheeler, Executive Deputy Manager, resigned.

3. While Mr. Wheeler was at Public Works, three Deputy Managers (City Engineer, Waste Water Management, Operations) reported to him and then he reported to Ms. Foote. Ms. Foote decided she wanted to create a fourth Deputy Manager position (Special Projects); all four Deputy Managers would report directly to Ms. Foote. This decision was made in late May-early June 2001.

4. Appellant told Ms. Brennan that she did not think that the reorganization design was a good idea but, that if they could justify it, there was nothing she could do about it.

5. The new Deputy Manager would be responsible for the Southeast Corridor and other Special Projects (the Pepsi Center, the new stadium district). Ms. Foote testified that one of her primary goals was to have a registered professional engineer in the position because he would be responsible for a number of large engineering bond projects. She stated that the person would be working with contractors from out-of-state, who would be unfamiliar with Colorado and City standards. He would need to be familiar with the professional standards for traffic, drainage, and construction. Ms. Foote indicated that Mr. Wheeler had been a professional engineer and, since this new position would assume many of Mr. Wheeler's duties, she wanted an engineer in this position.

6. Appellant was given either a hand-drawn or typed drawing of the new organizational chart by Ms. Brennan. In July a list of candidates was developed. The position's duties and reporting lines were firmed up in August. Everything was ready to go for recruitment in early September, but the actual recruitment was delayed because of the events on September 11.

7. Ms. Brennan testified that she prepared the ADA form used by the Human Resources Department to include all special qualifications for the position. Ms. Brennan stated that she indicated on the form that they wanted an engineer in the position. According to Ms. Brennan, the Human Resources Department is responsible for inputting the information into the computer and sending the referral on to the CSA.

8. There is no record that the referral with the special qualifications was ever received by the CSA.

9. Appellant testified that it would have been difficult to develop a Deputy Manager list with the special qualification with a sufficient number of candidates. She felt the City Engineer, which had ten candidates on it (a full list has fifteen candidates), was appropriate because those candidates also met the needs Ms. Foote indicated she had for the new Deputy Manager position.

10. The person Ms. Foote wanted for the new Deputy Manager position,

Dennis Royer, was on the City Engineer list.

11. At the same time Appellant was working on the new Deputy Manager position, she was also compiling a list for the Engineering Manager position, which reports to the City Engineer. Appellant testified that Leslie Thompson, the City Engineer, asked if she could use the City Engineer list for the Engineering Manager position. Appellant told her that she could.

12. Appellant testified that she felt she had the discretion to tell Public Works they could use the City Engineer list for both positions since they were both at the same or lower starting pay-grade.

13. The General Statement of Duties for the City Engineer classification provides: "Directs the operations of an engineering organization which involves the planning, design, and construction of engineering projects." The position requires the possession of a Professional Engineering License (PE) issued by the State of Colorado, a baccalaureate degree in engineering, and three years of experience as an engineering supervisor. (Exhibit 12).

14. The General Statement of Duties for the Deputy Manager classification provides: "Manages and directs multiple divisions within a Charter Department or Agency." The position does not have any licensing requirements. It does require a baccalaureate degree in business administration, public administration, political science, human resource management, or a related field, and three years of management experience which must have included responsibility for operation and staff function. (Exhibit 11).

15. The two classifications include many similar, but not identical, job responsibilities relating to supervision, formulation and implementation of goals, policies and procedures of operations, and budget development for the areas under their control.

16. Appellant thought she had told Sandra S. Klawonn, CSA team Manager, about the creation of the fourth Deputy Manager position and the special qualification request. Ms. Klawonn did not remember having been told about it. If she did inform Ms. Klawonn about it, Appellant did not do so in writing.

17. The first time any of the CSA supervisors became aware of Appellant using the City Engineer list as an alternative list for a position was when Ted Pacheco, Professional Services Supervisor, who was Appellant's direct supervisor, was approached by one of his assistants who was attempting to fill the personnel action for Deputy Manager. Mr. Pacheco, who had not been informed by Appellant about her use of the alternative list, went to her about her actions.

18. Mr. Pacheco, and Appellant then met with Steve Adkison, the other Professional Services Supervisor. They talked about the proper procedures that should have been followed to use an alternate list.

19. According to Appellant, Mr. Adkison subsequently came into her office and began to lecture her about the proper procedures and stressing the need to open the Engineering Manager list to other engineers. Appellant decided to reopen the list and present it at the next bulletin meeting (i.e., the weekly meeting during which

recruitment lists are approved and then placed into the bulletin and onto the web-page).

20. On November 20, Mr. Pacheco also spoke with Ms. Klawonn about Appellant's use of an alternative list. They decided that she had not followed the proper procedures as she had not asked for and received permission from the Personnel Director prior to using the alternative list for either the Deputy Manager or Engineering Manager positions, as required by CSR §4-40.

21. Ms. Klawonn and Mr. Pacheco spoke with Appellant and asked her for her interpretation of CSR §4-40. Appellant seemed upset by the fact that they were questioning her. She felt that the decision was within her discretion as a Senior Personnel Analyst and that she was carrying out what the client agency, the Department of Public Works, wanted. She told Ms. Klawonn and Mr. Pacheco that it would create more work for her if she had recruited for new lists, work that she felt was unnecessary because she was unsure whether she would be able to get enough candidates for either list.

22. After Ms. Klawonn and Mr. Pacheco spoke with Appellant about the use of alternative lists, they noticed a change in her attitude. Appellant was quieter when dealing with them and was not as friendly as she had been.

23. Appellant admitted that she was upset by the confrontation with Ms. Klawonn and Mr., Pacheco. She said that she tried to answer Ms. Klawonn's questions to her, but that she was afraid and flustered by the experience. She also admitted that her attitude changed toward both Ms. Klawonn and Mr. Pacheco afterwards. She said that she still tries to maintain a good working relationship with all her co-workers and tries to be cheerful even when she is in a bad mood.

24. Appellant testified that she did not know that she was supposed to get her supervisor's approval for the use of an alternative list. She thought that, as a senior analyst, she was supposed to work independently and not ask her supervisor everything. This view of the independence of the senior analyst was reiterated by at least two other staff analysts, one former and one current, Suzanne Comcowich and Linda Wasserman.

25. Jim Yearby, Personnel Director, issued an internal policy regarding human resources advice on August 1, 2001. It provides:

As an employee of the Career Service Authority, you are a representative and ambassador for the agency. As such, you can make decisions to the extent authorized. But none of us can make a binding decision which (1) violates CSA Rules, City Ordinances, or Charter Provisions; (2) makes an exception to established policy; or (3) binds another division or other City Agency.

(Exhibit 2)

26. Appellant and Ms. Comcowich testified that they did not see a copy of the Request for Special Qualifications Approval form, which is dated 10/01, until the December 2001 staff meeting. (See Exhibit 9)

27. Ms. Comcowich testified that she knew about the policy requiring a staff analyst to notify her supervisor of the use of special qualifications before then but that she had never been disciplined for not completing a special qualifications form or getting the approval from her supervisor. She also testified that it was not unusual to use a list for a lower or similar level position without the permission of a supervisor and that one could use the same list for all sorts of vacancies. She explained that she was expected to follow the CSR, but that the Rules are flexible, depending upon which agency was making a request. She stated that she was once disciplined for not being flexible enough when a request came from the Mayor's Office.

28. Ms. Foote testified that Appellant took time to go out into the field with Public Works employees to find out how they did their jobs. Ms. Foote felt very comfortable with Appellant. Ms. Foote testified that Appellant took time to explain to Ms. Foote what the classification system required of the workforce Ms. Foote manages.

29. Mr. Pacheco issued a written reprimand to Appellant on December 6, 2001, in which he informed Appellant that her decision to use the alternate lists for the Deputy Manager and Engineering Manager positions without permission of her supervisor violated CRS §4-40 and the CSA Internal Policy on Human Resources advice issued on August 1. Her behavior toward Mr. Pacheco and Ms. Klawonn since their initial discussions about the use of the alternative lists was also problematic. Appellant was cited for violating CSR §§16-50 A. 20) and 16-51 A. 2), 4), 5), 6), and 11. (Exhibit 3)

30. Appellant grieved the written reprimand to Mr. Pacheco at step one on December 11. Since Mr. Pacheco was absent, Ms. Klawonn accepted the grievance. (Exhibit 4) Ms. Klawonn denied the grievance on December 18. (Exhibit 5). Appellant delivered the grievance to Jim Yearby as the second step on December 27. Sherer M. Murtishaw, acting as Mr. Yearby's designee, denied the grievance on January 8, 2002. (Exhibit 7). Appellant filed this appeal on January 16, 2002. (Exhibit 1)

31. Appellant had no previous disciplinary action. Her previous three Performance Enhancement Program Reports ("PEPR") were all "Exceed Expectations" ratings (Exhibits A, B, C). The PEPR dated March 29, 2001, includes a note from Ms. Klawonn, which reads:

Pat-

You are amazing! You have consistently exceeded the expectations of a Senior Analyst even while you were working out of class as the Team Supervisor. Thanks for the extra hours and all the hard work!

Sandy

(Exhibit A, p. 2)

32. Essential Job Duty Number 6 for Appellant's Performance Enhancement Plan concerns communications and public contact. Included as the expected accomplishments – outcomes for the year January 2001 to January 2002 are

Discusses qualification, examination or classification requirements,

practices and standards with applicants, employees and managers and independently provides appropriate related and correct information to resolve issues without supervisory assistance.

Communicates with supervisor regarding potential problem situations.

(Exhibit F, p. 3, See also Exhibit 10, p. 3))

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Statutes

CSR Rule 16 governs discipline. CSR §16-10 sets out the purpose of the Rule:

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.

CSR §16-20, Progressive Discipline, provides in relevant part:

- 1) In order of increasing severity, the disciplinary actions which an appointing authority or designee may take against an employee for violation of career service rules, the Charter of the City and County of Denver, or the Revised Municipal Code of the City and County of Denver include:
 - a) Verbal reprimand, which must be accompanied by a notation in the supervisor's file and the agency file on the employee;
 - b) Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority;
 - c) Suspension without pay, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority;
 - d) Involuntary demotion, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority; and
 - e) Dismissal, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority.

- 2) Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed.

CSR §16-50, Discipline and Termination, provides, in relevant part:

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.

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

CSR §16-51, Causes for Progressive Discipline, provides, in relevant part:

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.

- 2) Failure to meet established standards of performance including either qualitative or quantitative standards.
- 4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.
- 5) Failure to observe department regulations.
- 6) Carelessness in performance of duties and responsibilities.
- 10) Failure to comply with the instructions of any authorized supervisor.
- 11) Conduct not specifically identified herein may be cause for progressive discipline.

CSR §4-40, Use of Appropriate Alternative Lists, provides:

When full certification is not available for a given class, the Personnel Director may declare a list for a different class an appropriate list provided the class chosen has an equal or higher beginning pay rate than the original class.

CSR §19-10 covers actions subject to appeal. It provides in relevant part:

§19-10 Actions Subject to Appeal

The following administrative actions relating to personnel matters shall be subject to appeal:

- d) Grievances resulting in rules violations: Any grievance which results in an alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career service, or the career service Personnel Rules. The grievance must be in conformance with and processed pursuant to the requirements of section 18-12 Grievance Procedure. The appeal form must state with specificity which career service charter amendment, ordinance or career service rule(s) are alleged to have been violated. An appeal may be dismissed if the appellant fails to cite the alleged rule violations(s).

Analysis

The City Charter C5.25 (4) requires 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. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

As the Hearing Officer ruled at the commencement of the hearing, the Agency has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances

Appellant was reprimanded for violating provisions of CSR §§16-50 A. 20) and 16-51 A. 2), 4), 5), 6), and 11).

Appellant is charged with violating CSR §16-51 A. 2), the failure to meet established standards of performance. As the Hearing officer has previously ruled in *In the Matter of the Appeal of Joseph Moorehead*, CSA Appeal No. 360-01, this provision covers performance deficiencies that can be measured by either qualitative or quantitative standards, such as those one would find in a performance evaluation or an agency or division's published policy and procedures. In this case, the Agency submitted, as Exhibit 2, a copy of an internal policy concerning human resources advice and the need for CSA staff to make decisions "to the extent authorized" and which do not violate the CSR, City Ordinances or Charter provisions, are exceptions to established policy or which bind another division or City agency. The Agency also submitted a copy of the Senior Analyst PEP signed by Appellant on July 31, 2001, which includes the requirement that a Senior Staff Analyst must communicate with her supervisor regarding potential problem situations. (Exhibit 10, p. 3, see *a/so* Exhibit F, p.

3).

The evidence presented in this case shows that Appellant made a decision about using alternative lists for the Deputy Manager and Engineering Manager positions which, while satisfying the needs of the Department of Public Works, was done without the Personnel Director's authority, as required by CSR §4-40, and without communicating with her supervisor about a potential problem. Appellant did not meet the expected accomplishments of her job classification. Her actions violated CSR §16-51 A. 2).

Similarly, Appellant violated the internal policy regarding the need to make decisions that were in compliance with all the CSR, including §4-40 regarding the use of alternative lists. This is a violation of CSR §16-51 A. 5).

Appellant was also charged with failing to maintain satisfactory working relationships with her co-workers, other City and County employees or the public. CSR §16-51 A. 4). Here the evidence is much less clear. Appellant's witnesses provided testimony that they had excellent working relationships with Appellant. Ms. Foote, in particular, was very high in her praise of Appellant. Appellant obviously has maintained an excellent relationship with her clients.

On the other hand, Ms. Klawonn and Mr. Pacheco testified, and Appellant admitted, that, after they asked Appellant about her interpretation of CSR §4-40, her attitude changed. Appellant stated that she felt intimidated by Ms. Klawonn, whom she considered to be her mentor, and that, while she was upset by being questioned by Ms. Klawonn and Mr. Pacheco, she tried to remain pleasant and cheerful when she was working with them.

While the working relationship between Appellant and her two supervisors may not be as friendly as it once was, it is not an "unsatisfactory" relationship within the meaning of this provision. This provision is not meant to punish an employee for a bad mood. It requires that the employee act in an unprofessional or inappropriate manner towards her co-workers, such as bad-mouthing them, ignoring them, continuing rudeness, or otherwise inhibiting the smooth operations of the unit. Appellant and her supervisors remain cordial to each other. Appellant still treats her supervisors with respect and professionalism. The allegation that she violated CSR §16-51 A. 4) is denied.

It is claimed that Appellant has been careless in the performance of her duties and responsibilities. CSR §16-51 A. 6). This provision is distinguishable from CSR §16-50 A. 1) in that it does not require either the reckless disregard of the consequences or the intentional performance failures that are necessary to establish either "gross negligence" or "willful neglect." However, this provision requires that the employee not care about how she is performing her duties. The Hearing Officer listened very closely to all the testimony about how Appellant performs her job. She is very attentive to her clients and she deeply cares about her work product. She has handled the balancing act of the competing interests of clients and the CSA well. The situation that led to Appellant's discipline was not due to carelessness, but to her taking great care in satisfying her client's demands. She made a mistake in not going to Mr. Pacheco and Ms. Klawonn before she decided to use the alternative list, but she was used to working independently and being given a large degree of discretion over her work. She made a mistake about the limits on her discretion,

but it was not due to carelessness. This allegation was not sustained and is denied.

The violations under CSR §§16-50 A. 20) and 16-51 A. 11) are dismissed. The purpose of these catchall provisions is to cover the rare instances when an employee engages in conduct that the Career Service Board did not specifically consider when they drafted the provisions describing reasons for discipline. In this case, specific provisions of CSR §16-51 A. cover Appellant's misconduct. The catchall provisions are dismissed.

The next question is the appropriateness of Appellant's discipline. Appellant has an exemplary work history. As recently as the August 2001, Ms. Klawonn wrote that Appellant "is amazing!" and that she consistently exceeds expectations, even when she is working out of her classification as a team leader. Exhibit A.

The real issue here is that there has been a breakdown in the trust and communication between Appellant and her two supervisors. All three of them have some responsibility for the breakdown. Ms. Klawonn and Mr. Pacheco were upset that Appellant made a decision that violated the CSR in that she did not seek the Personal Director's authorization to use the alternative list, and Appellant was upset because she felt that, although she had been taught by Ms. Klawonn that she had discretion to make certain decisions, she was now being questioned about her decisions. Appellant felt justified in her use of discretion to use the alternative lists because, according to her witnesses, alternative lists are frequently used and the requirement that the staff analyst get permission to use one seems to have been inconsistently applied.

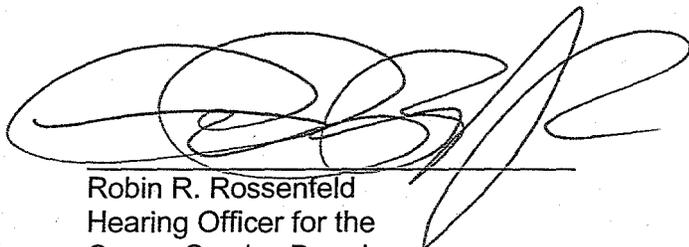
But the fact of the matter remains that Appellant should have spoken with Mr. Pacheco and/or Ms. Klawonn before she told the Department of Public Works that it could use the alternative list for two separate high-level positions. While Appellant was trying to satisfy the demands of a client and acted according to past practices (despite the internal policy), she failed to meet the internal requirements of her own Agency. It is very important to do everything according to the Rules when the positions that are being filled are as high-profile as a Deputy Manager handling some of the most important capital construction projects in the City and the Engineering Manager.

The issuance of the written reprimand was not the appropriate response to Appellant's error in judgment given the fact the policies have been inconsistently applied. Appellant should have been given a verbal warning and all Agency staff needed to be formally reminded of the internal policies.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer MODIFIES the disciplinary action as follows: the Agency's determination that Appellant violated CSR §§16-51 A. 2) and 5) is AFFIRMED; the Agency's determination that Appellant violated CSR §§16-50 A. 10) and 16-51 A. 4), 6) and 11) is REVERSED. The Written Reprimand is MODIFIED to a Verbal Warning and Appellant's personnel file corrected accordingly.

Dated this 30th day of April 2002.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in the U.S. mail, this 30th day of April 2002, addressed to:

Patricia Anderson
1881 S. Washington
Denver, CO 80210

I further certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in interoffice mail, this 30th day of April 2002, addressed to:

Mindi L. Wright, Esq.
Assistant City Attorney

Sandra S. Klawonn
Team Manager
CSA

