

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

Appeal No. 88-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

GHOLAMHOSSEIN DANESHPOUR, Appellant,

Agency: DENVER HEALTH AND HOSPITAL AUTHORITY.

Hearing in this matter was held before Michael S. Gallegos, Hearing Officer, on September 30, 2003, in the Career Service Hearings Office, 201 West Colfax, 1st Floor, Denver, Colorado 80202. Appellant, Gholamhossein Daneshpour, appeared and was represented by Erin Wigglesworth, Esq. The Agency was represented by Assistant City Attorney, Rick Stubbs. John Thompson was the Agency's advisory witness at hearing.

Within these Findings and Order, the Hearing Officer refers to Gholamhossein Daneshpour as "Appellant"; the Denver Health and Hospital Authority as the "Agency" and the Career Service Rules as "Career Service Rules" or "CSR". The Career Service Rules are cited by section number and are those currently in effect unless otherwise indicated.

For the reasons set forth below, the Agency's 5-day suspension of Appellant is **AFFIRMED**.

ISSUES FOR HEARING

Whether there is cause for discipline and, if so, whether the degree of discipline imposed is reasonably related to the severity of the offense. Whether discipline was imposed due to discrimination based on race, religion or national origin.

BURDEN OF PROOF

1. Cause and Degree of Discipline: The burden of proof is upon the Agency to show, by a preponderance of the evidence, that there is cause for

discipline and that the degree of discipline imposed in this matter is reasonably related to the severity of the offense. CSR 16-10.

2. Discrimination claim: The burden of proof, regarding Appellant's claim of discrimination, is initially upon Appellant to establish a *prima facie* case of discrimination. Appellant must establish a *prima facie* case of discrimination by presenting evidence that tends to prove Appellant belongs to a protected class, was qualified for the job at issue, suffered an adverse employment decision *and* that the circumstances give rise to an inference of discrimination. (See *Colorado Civil Rights Commission v. Big O Tires, Inc.*, 940 P. 2d 397 (1997).)

3. Burden shifting model: If Appellant presents a *prima facie* case (as indicated above in paragraph 2.), a presumption of discrimination arises, and the burden of producing evidence that the adverse employment decision (discipline) was undertaken in pursuit of a legitimate nondiscriminatory purpose shifts to the Agency. This burden is one of production, not burden of proof. If the Agency meets its burden of production, there is no longer a presumption of discrimination and Appellant must then be given a full and fair opportunity to demonstrate, by competent evidence, that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination. *Colorado Civil Rights Commission v. Big O Tires, Inc.*, 940 P. 2d 397 (1997). See also *St. Mary's Honor Center v. Hicks*, 509 U.S. at 510-511, 113 S. Ct. at 2749, 125 L.Ed.2d at 418 and *Bodaghi v. Dept. Nat. Resour.*, 969 P 2d 718 (Colo. App. 1998.)

PRELIMINARY MATTERS

Appellant's Exhibits A and K were accepted into evidence without objection. Appellant's Exhibit C was not accepted into evidence as irrelevant. Appellant's Exhibits L and M were accepted into evidence over the Agency's objections as to age of the documents. No other exhibits were offered on behalf of Appellant.

The Agency's Exhibits 1a, 1b, 1c, 2, 3, 5a, 5b, 5c and 6 through 10 were accepted into evidence without objection. The parties stipulated to *photographs* of "Three posters purchased by John Thompson" as Exhibits 1a, 1b and 1c, rather than submit the posters as exhibits. Exhibits 5a, 5b and 5c are video diskettes and each also includes a written report. No other exhibits were offered on behalf of the Agency.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Hearing Officer finds the following to be fact:

1. Appellant is an engineer and an employee in career status. His duties, as a Senior Biomedical Technician for the Agency, include the repair and maintenance of medical equipment at 9 locations off-site from the Agency's "main campus" (hospital). Appellant submits time sheets for hours worked and overtime must be approved by his supervisor. Appellant's supervisor in April and early May 2003 was Baram Molai (Molai). Molai's supervisor, at that time, was John Thompson (Thompson).

2. Both Appellant and Molai are Iranian nationals and practicing Muslims. There were no other employees of Middle Eastern decent in the biomedical section of the Agency during 2002 through early May 2003. Thompson is neither Iranian nor Muslim.

3. Molai was Appellant's supervisor for approximately 11 years. They both speak Farsi as a first language. However, since the terrorist attacks of September 11, 2001, both are concerned about anti-Middle East sentiments and, therefore, they consciously chose to speak only English in the office. Molai and Appellant also share a love of Middle Eastern foods. Appellant is a good cook of Middle Eastern foods. However, the relationship between Appellant and Molai was that of supervisor/supervisee. They were not friends.

4. On one occasion the employees of the biomedical section planned a "going-away" luncheon for a co-worker, a Naval reservist who was being sent to Iraq. Invitations to the luncheon were made via two-way radios. Although Appellant carries a two-way radio, as part of his job duties, he did not receive an invitation to the luncheon. Appellant's co-workers took a longer-than-usual lunch break on the day of the going-away party.

5. On a regular basis, a group of co-workers took a breakfast (morning) break, during which they were away from their work areas for ½ an hour or more.

6. On occasion, employees of the biomedical section went to lunch together. They never invited Appellant to go with them.

7. Appellant's regular hours are 7:00 to 11:00 a.m. (lunch from 11:00 to 11:45 a.m.) and 11:45 a.m. to 3:45 p.m. However, because Appellant is assigned to perform emergency and urgent repairs at 9 locations, he often worked through lunch and often came to work early and/or stayed late. Therefore, he regularly reported overtime hours which his supervisor, Molai, approved. Nonetheless, Appellant was almost always behind on his workload.

8. Appellant usually completes paperwork in the mornings and makes visits to the off-site locations in the afternoon. Appellant has a bigger work load and larger inventory than any of the other biomedical technicians. He is responsible for thousands of pieces of equipment. Appellant often complained about his workload and, on numerous occasions, Appellant asked his supervisors regarding the possibility of a transfer to the main campus where his work load would be decreased. He was consistently denied a transfer.

9. In 2002 and early 2003, Appellant had numerous health problems, including diabetes, a back injury and depression following the death of his sister. Molai felt that Appellant was a "high-maintenance" employee and tried to counsel Appellant once a week regarding Appellant's workload and other concerns. Initially, Molai and Appellant met in Molai's office or at one of the off-site locations. At the off-site locations, they spoke in English and inspected or repaired medical equipment. However, because they were both more comfortable and intelligible to each other when speaking Farsi, Molai and Appellant began going away from the office for their weekly counseling sessions so they could feel free to speak Farsi. They often combined lunch with the counseling sessions.

10. Appellant was concerned that his counseling sessions with Molai did not qualify as work time and asked Molai about the appropriateness of such counseling sessions during his work day. Molai assured Appellant that such sessions were appropriate as part of his work day.

11. Molai neither sought nor received Thompson's approval for counseling sessions. However, Molai counseled many of the biomedical section employees on a weekly basis, throughout the week and, occasionally, took them to lunch. However, his counseling sessions with Appellant were always on Fridays. Molai was always available to the office by cellular telephone. Appellant responded well to such counseling sessions and stopped complaining as much as he had in the past.

12. Roger F. Bennett (Bennett) was an employee of the biomedical section. Molai was Bennett's supervisor and Bennett met with Molai more than once per week for 1 to 1 ½ hours per session. Bennett did not like Molai, disagreed with Molai's philosophies and shared his disagreement with his co-workers in the biomedical section.

13. In early 2003, Thompson received reports, from Molai's assistant, that Molai was often out of the office for extended periods of time on Fridays. In March 2003, Thompson decided to hire surveillance on Molai. The surveillance company provided Thompson with written reports and video disks of surveillance of Molai.

14. On April 4, 2003, in the parking garage at the main campus, Appellant got into Molai's car. They drove to Pete's Greek Café, arriving at approximately 11:09 a.m., and left at 12:12 p.m. Molai then drove around town, with Appellant in the car, until approximately 1:30 p.m. Both during lunch and while driving around, Appellant and Molai discussed Appellant's work duties, problems at work, work reports and vendors. Appellant reported 1 hour and 15 minutes for his lunch break on April 4, 2003.

15. On April 11, 2003, Molai drove his car from the main campus parking garage to the street at approximately 10:10 a.m. He picked up Appellant on the street and they drove to Appellant's apartment where Appellant cooked a Middle Eastern meal. They left Appellant's apartment at approximately 11:54 a.m. and drove around until approximately 12:39 p.m. During the meal and while they drove around, Appellant and Molai discussed work. Appellant reported 1 hour for his lunch break on April 11, 2003.

16. Initially Appellant was not an intended target of surveillance. However, after noting that Molai was spending the time away from the office with Appellant, surveillance was expanded to cover Appellant as well as Molai.

17. The Agency has an unwritten policy that requires employees to call the main campus office if the employee is going home for lunch. In this case, Appellant and Molai went to Appellant's apartment for lunch because Appellant wanted to pay back Molai for the lunches Molai had paid for and they could freely speak Farsi.

18. On April 18, 2003, at approximately 6:56 a.m. Appellant drove to the street in front of his apartment house. He was in the white van that he regularly drove to the off-site locations and to transport equipment, parts and tools for work. At approximately 7:02 a.m., Appellant entered his apartment building. He exited the apartment building approximately 11 minutes later, got into the van and drove away. Appellant stopped at his apartment to get his prescription medications which he had forgotten to take before leaving for work that morning. Appellant advised Molai about the stop and Molai agreed that it was necessary.

19. On April 18, 2003, at approximately 10:28 a.m., Molai parked behind Appellant's apartment building with Appellant in the car. They sat in the car, talking about work for approximately 10 minutes. Then Appellant and Molai went into Appellant's apartment where they had a Middle Eastern lunch and talked about work. They left Appellant's apartment building at approximately 12:15 p.m. and drove around until approximately 1:05 p.m. talking about work. Appellant reported 1 hour and 15 minutes for his lunch break on April 18, 2003.

20. On April 25, 2003, Appellant and Molai were in Appellant's apartment for about 2 hours beginning at approximately 10:30 a.m. After they

left the Apartment, they drove around until approximately 1:53 p.m. talking about work. Appellant reported 1 hour and 15 minutes for his lunch break on April 25, 2003.

21. On May 2, 2003 at approximately 9:53 a.m., Appellant parked the white van that he regularly drove for the Agency in a handicapped parking space, in front of a restaurant. Because he is diabetic and felt weak, Appellant decided to get something to eat. At approximately 10:13 a.m., Appellant left the restaurant and went to one of the off-site locations after which Appellant met Molai on the corner of 6th and Acoma at approximately 10:51 a.m. They went to Pete's Greek Café for lunch and left the café at approximately 12:05 p.m. Appellant reported 1 hour and 15 minutes for his lunch break on May 2, 2003.

22. On days when Appellant took a lunch break longer than an hour, Appellant worked late to make up for the extra time spent at lunch. On his time sheets for April 4, 11, 18 and 25 and May 2, 2003, Appellant claimed one hour of overtime for each day, which he used to catch up on his workload. Molai authorized the overtime and signed the time sheets.

23. On May 9, 2003, Thompson asked Appellant if he was a Muslim. This was offensive to Appellant because Thompson had never before wanted to know about Appellant's religious beliefs, Appellant was concerned about anti-Muslim sentiments and he had recently felt segregated from non-Middle Eastern staff members. (See paragraph 4, above.) Shortly thereafter, on the same day, Appellant received a pre-disciplinary letter from Thompson.

24. The pre-disciplinary letter charges Appellant with gross negligence or willful neglect of duty, dishonesty, unauthorized absence from work, failure to meet established standards of performance, failure to maintain satisfactory relationships with co-workers and failure to observe departmental regulations.

25. A pre-disciplinary meeting was held on May 20, 2003 in Thompson's office. One of Appellant's prior supervisors, Johnny Barnes (Barnes), Thompson and Appellant participated in the pre-disciplinary meeting. Thompson's demeanor was informational and cordial. However, Appellant felt that he was being subjected to the pre-disciplinary meeting because he is Muslim. Appellant did not allege discrimination at the pre-disciplinary meeting. Rather, Appellant said he was just following his supervisor's direction and that he had no intent to deceive or defraud the Agency.

26. On May 9, 2003, Thompson inquired whether Appellant was Muslim because he (Thompson) wanted the opinion of a Muslim on some posters he had purchased to frame for the Lowry Clinic. Thompson and the Community Health Director of Nursing, Terrance Shea, purchased the posters in response to a complaint that, while there was a large percentage of Arab clients

at the clinic, all the artwork on the clinic walls was culturally specific to Latinos. There was no artwork addressing Arabs or the Muslim view of life.

27. Appellant reported Thompson's actions and other allegations of discrimination to the Agency's Human Resources section. An internal investigation ensued. Appellant wanted Thompson to apologize for asking Appellant if he was Muslim. The investigator interviewed 7 or 8 staff members, including Thompson, but found no discrimination.

28. In determining whether discipline should be imposed and, if so, the degree of discipline, Thompson considered Appellant's work history including Appellant's performance evaluations and letters of gratitude from staff at the off-site locations. Thompson also considered the gravity of the infraction. That is, he considered that no other Agency employees were allowed to take long lunches, during which they drove around "aimlessly" and then take an hour of overtime to catch up on workload.

29. Thompson did not consider a prior incident in which Appellant was cleared of any wrong-doing. The incident involved a mistaken report that Appellant had reassigned himself away from the Eastside Clinic. Upon investigation it was determined that the Eastside Clinic had requested another technician by mistake. Appellant was not trying to get out of work at the Eastside Clinic.

30. As a supervisor, Thompson is accountable to the Agency, and has a fiscal responsibility, to insure that employees are paid for no more hours than the hours actually worked and that overtime hours are authorized only when necessary. Additionally, the Agency has employee safety interests which are better protected if the supervisor is aware of the employees whereabouts during the scheduled workday.

31. Based on the gravity of the infraction, Thompson decided to suspend Appellant for 5 days which Appellant served from June 9 through June 13, 2003.

32. Molai was dismissed from employment with the Agency as a result of the surveillance that Thompson authorized.

33. Appellant believes that he was disciplined because he is Muslim and an Iranian national.

34. Thompson credibly testified that, had Molai asked to counsel Appellant away from the office at a place where they felt free to speak Farsi, he (Thompson) would have granted that request.

DISCUSSION

1. **Discrimination:** In order to meet his initial burden, Appellant must establish a prima facie case of discrimination by presenting evidence that tends to prove Appellant belongs to a protected class, was qualified for the job at issue, suffered an adverse employment decision *and* that the circumstances give rise to an inference of discrimination. (See *Colorado Civil Rights Commission v. Big O Tires, Inc.*, 940 P. 2d 397 (1997).) In this case, the evidence presented at hearing shows that Appellant belongs to a protected class, in that he is Iranian (national origin) and Muslim (religion). The evidence presented at hearing indicates that Appellant is qualified for the job at issue. His suspension for 5 days was an adverse employment decision in that Appellant lost 1 week's pay.

At hearing, upon the Agency's motion for a directed ruling and based on the evidence presented in both the Agency's and Appellant's case-in-chief, the Hearing Officer found the circumstances surrounding discipline imposed on Appellant give rise to an inference of discrimination, in that neither Molai nor Appellant were well liked or included in the activities of co-workers, both are Iranian and Muslim, and they are the only two Agency employees disciplined for activities involving counseling sessions. (See Findings of Fact, paragraphs 3 through 6, 9 and 11 through 13.)

Following the Agency's and Appellant's case-in-chief, the Hearing Officer further found that the Agency produced a legitimate non-discriminatory purpose for Thompson's inquiry as to whether Appellant is Muslim and for the discipline imposed in this case. More specifically, the Agency produced evidence that Thompson was seeking Appellant's input into a project designed to address complaints of discrimination against Arabs and Muslims and, further, that the Agency had a legitimate reason to insure that times reported on time sheets are the actual times worked. (See Findings of Fact, paragraphs 26 through 32.) Additionally, the Agency met Appellant's allegations of disparate treatment with evidence that those treated differently were not similarly situated in that Appellant was the only biomedical technician assigned to off-site locations. That is, the other biomedical technicians had different job duties.

Following the Hearing Officer's ruling, Appellant was given a full and fair opportunity to demonstrate that the valid, non-discriminatory reasons for Thompson's actions were a pretext for discrimination. Appellant argued that there was a legitimate business purpose for the counseling sessions, including discussion of work and visiting off-site locations. However, the Hearing Officer finds that, although there may be legitimate reasons for counseling sessions and some counseling sessions may have occurred at the off-site locations, Appellant was disciplined for those times, memorialized by surveillance, where there was no work at off-site locations and time sheets did not accurately reflect Appellant's time away from the office. Therefore, the Hearing Officer concludes that Appellant did not meet his burden to show that Thompson's stated non-

discriminatory reasons for his (Thompson's) actions were a pre-text for discrimination and Appellant's allegations of discrimination are herein dismissed.

2. Cause for Discipline and failure to meet established standards of performance: Career Service Rules provide, in pertinent part: "The purpose of discipline is to correct inappropriate behavior or performance." (See CSR 16-10.) In this case, the inappropriate behavior consisted of taking long lunch breaks that were not accurately reported on time sheets. During the counseling sessions/lunch breaks, Appellant was not working on his paperwork and he wasn't maintaining or repairing medical equipment. Therefore, during those long lunches Appellant failed to meet his established standards of performance which, in and of itself, is cause for discipline.

a. Dishonesty, unauthorized absence from work, and failure to observe departmental regulations: At hearing Appellant admitted that he had been away from the main campus office and not at an off-site location for counseling sessions/long lunch breaks on April 4, 11, 18 and 25 and May 2, 2003 and he admitted that he filed time sheets indicating shorter lunch breaks than were actually taken. The Hearing Officer concludes that such action is dishonesty by falsifying records with respect to official reporting of work hours, even though Molai told Appellant such action was appropriate. That is, Appellant was aware that he did not work the hours reported. Additionally, dishonesty of the type exhibited by Appellant violates the Agency's Code of Conduct. (See Appellant's Exhibit 9.)

Based on the evidence presented at hearing, the Hearing Officer concludes that the counseling sessions away from the office, combined with lunches and driving around, were unauthorized absences from work, even though Molai told Appellant they were appropriate. That is, counseling sessions at the office or off-site locations may be appropriate and long lunches occasionally may be appropriate. However, driving around to discuss work issues is inappropriate, unless driving around is part of the employee's duties.

b. Gross negligence or willful neglect and failure to maintain satisfactory relationships with co-workers: Appellant was charged with failure to maintain satisfactory relationships with co-workers. However, the evidence shows that neither Molai nor Appellant were well liked or included in the activities of co-workers. (See Findings of Fact paragraphs 3 through 6 and 11 through 13.) The Hearing Officer concludes that, while there is insufficient evidence to conclude that either Appellant or Molai were victims of discrimination, the fact that Appellant was not well treated by co-workers made it nearly impossible for Appellant to maintain satisfactory relationships with co-workers. The Agency did not prove, by a preponderance of the evidence, that it was Appellant's failure to maintain satisfactory relationships with his co-workers. Rather, it seems a failure on the part of Appellant's co-workers and a lack of sensitivity on the part of Appellant's supervisors. Therefore, the Hearing Officer

concludes that the Agency has not met its burden and the charge of "failure to maintain satisfactory relationships" should be removed from Appellant's discipline letter.

Further, the Hearing Officer concludes that the Agency has not met its burden to prove, by a preponderance of the evidence, that Appellant engaged in gross negligence or willful neglect. Gross negligence in an administrative law context means "flagrant", "beyond all allowance" or "showing an utter lack of responsibility". (See *Lee v. State Board of Dental Examiners*, 654 P.2d 839 (Colo. 1982), *People v. Blewitt*, 192 Colo. 483, 563 P.2d 1 (1977).) Willful neglect is more than mere negligence in that it involves conscious or deliberate acts. (See *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 125 (1976); *Drake v. Albeke*, 188 Colo. 14, 532 P.2d 225 (1975).)

In this case, Thompson credibly testified that, had Molai asked to counsel Appellant away from the office at a place where they felt free to speak Farsi, he (Thompson) would have granted that request. That is, Appellant's counseling sessions/long lunches with Molai were not completely unallowable. Appellant was uncertain about the appropriateness of counting counseling sessions as work time. However, because Molai was his supervisor, Appellant felt compelled to comply with Molai's wishes. (See Findings of Fact, paragraphs 10 and 25.) The Hearing Officer concludes that the counseling sessions/long lunches and inaccurate time sheets were neither willful nor gross negligence on Appellant's part. Therefore, the Hearing Officer concludes that the Agency has not met its burden and the charge of "gross negligence or willful neglect" should be removed from Appellant's discipline letter.

3. Degree of Discipline: Career Service Rules provide, in pertinent part: "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." (See CSR 16-10.) Thompson considered Appellant's work history including Appellant's performance evaluations and letters of gratitude from staff at the off-site locations. He also considered the gravity of the infraction. Thompson considered that no other Agency employees were allowed to take long lunches, during which they drove around "aimlessly" and then take an hour of overtime to catch up on workload. He also considered that Appellant submitted inaccurate time sheets for April 4, 11, 18 and 25 and May 2, 2003.

In this case, because Molai is no longer Appellant's supervisor and, therefore, there would be no more counseling sessions in Farsi, Thompson could reasonably consider a level of discipline that addressed the greater concern of Appellant's falsifying records with respect to official reporting of work hours. Appellant admitted to 5 days, (April 4, 11, 18, and 25 and May 2, 2003), on which he took a longer lunch break than reported *and* accepted overtime pay. The undersigned Hearing Officer concludes that the loss of 5 days' pay is a level of

discipline that is reasonably related to falsifying 5 days' time sheets. That is, Appellant accepted overtime pay on days in which he under-reported his lunch break/counseling sessions away from the office. On one occasion (April 25, 2003), Appellant was away from the main campus office for approximately 3 ½ hours. Then he reported an hour of overtime, for a total of more than 4 hours falsely reported. (See Appellant's Exhibit 7, pages 3 and 4.) Certainly, the loss of one day's pay as discipline for falsification of more than ½ day's time sheet is reasonable in order to correct such inappropriate behavior. Therefore, the Hearing Officer concludes that the Agency has met its burden to show, by a preponderance of the evidence, that the degree of discipline imposed in this matter is reasonably related to the severity of the offenses.

CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction to make and issue Findings, conclusions and Order in this matter. City Charter C5.25 (4) and CSR 19-10.

2. Appellant met his initial burden to present evidence that tends to show the circumstances surrounding his discipline give rise to an inference of discrimination. The Agency met its burden to produce evidence of a legitimate non-discriminatory purpose for disciplining Appellant. Appellant did not demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination. Therefore, Appellant's allegations of discrimination are dismissed.

3. The Agency met its burden to show there is cause for discipline and that the level of discipline imposed is reasonably related to the severity of the offense *except* as to the charges of "gross negligence or willful neglect" and "failure to maintain satisfactory relationships with co-workers". Therefore, the charges of "gross negligence or willful neglect" and "failure to maintain satisfactory relationships with co-workers" shall be removed from Appellant's disciplinary letter in this matter.

ORDER

For the reasons stated above, the undersigned Hearing Officer AFFIRMS the Agency's decision to suspend Appellant for 5 days. Appellant's claims of discrimination are dismissed.

Dated this 30th day of December 2003


Michael S. Gallegos
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 same in the United States Mail, postage prepaid, on the 30th day of November 2003, addressed to:

Gholamhossein Daneshpour
30 South Pearl St., #206
Denver, CO 80209

Erin A Wigglesworth, Esq.
Davis Law Office, P.C.
1720 S. Bellaire Street, Ste. 1000
Denver, CO 80222

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in interoffice mail, on the 30th day of November 2003, addressed to:

Richard Stubbs, Esq.
Assistance City Attorney

Darlene Ebert
Office of General Counsel
Denver Health and Hospitals

