

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

Appeal No. 76-06

DECISION

IN THE MATTER OF THE APPEAL OF:

DENISE LORIE GAGLIANO,
Appellant,

vs.

DEPARTMENT OF HUMAN SERVICES, and the City and County of Denver, a
municipal corporation,
Agency.

The hearing in this appeal was commenced on Nov. 17, 2006 before Hearing Officer Valerie McNaughton. Appellant Denise Lorie Gagliano was present and represented by N. Nora Nye, Esq. The Agency was represented by Assistant City Attorney Dianne Briscoe. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following decision:

I. STATEMENT OF THE CASE

Appellant Denise Lorie Gagliano appeals her dismissal dated Sept 7, 2006 from the position of Eligibility Technician-Medicaid for the Denver Department of Human Services (DDHS). Appellant filed a timely appeal of the action on Sept. 18, 2006 pursuant to the jurisdiction provided in the Career Service Rules (CSR) § 19-10 A. 1.

The parties stipulated to the admissibility of Exhibits 1, 2, 5, 6, A, E, G and H. The following exhibits were also admitted: Agency Exhibits 3, 4, 7 and 8, and Appellant's Exhibits B – D, F, I and K. Appellant withdrew Exhibit J.

II. ISSUES

The following issues are raised in this appeal:

1. Did the Agency prove by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules, and
2. Was dismissal justified under the CSR's progressive discipline rules?

III. FINDINGS OF FACT

Appellant was employed for eighteen years in various technical assignments with the Agency, including the food stamp and supplemental food units. For the five years preceding her termination, Appellant was assigned to the Family and Adult Services Division as an Eligibility Technician in the Medicaid Unit.

On August 8, 2006, Appellant asked her co-worker, QUEST Card Issuance Clerk Jesse Herrera, for information about how Appellant's daughter Candace could get a replacement for a lost QUEST card, which is issued to food stamp recipients. Mr. Herrera gave Appellant a toll-free phone number, and said Candace should come to see him so he could reissue the card. Later that day, Candace Gagliano and Appellant came to Mr. Herrera's window and requested the replacement card. Mr. Herrera recognized Ms. Gagliano from their previous meetings when Appellant would bring her daughter to work. Ms. Gagliano gave Mr. Herrera her identification document. Mr. Herrera compared the name on the identification with that on his computer records, and informed them that he would need confirmation of her identity from her caseworker, as the benefits were approved in her married name.

Appellant and Ms. Gagliano went upstairs to find the assigned caseworker, and learned she was out of the office. Caseworker Brenda Thomas gave Appellant the case file after Appellant told her that Mr. Herrera needed to see the signature on the food stamp file. Appellant and Ms. Gagliano returned with the file to Mr. Herrera's window, who told them he would need a QUEST authorization form from the caseworker. Appellant and Ms. Gagliano took the file back to Ms. Thomas and asked for the authorization form. Ms. Thomas examined the file, determined that Ms. Gagliano was the same person to whom food stamp benefits had been granted, and prepared the form. Appellant replaced the file in the file cabinet without having opened it, and returned to her own desk.

On Aug. 14, 2006, Appellant was given official notification that discipline was being considered against her based upon her actions on Aug. 8th. [Exh. 1.] The notice alleged violations of the department's confidentiality policy [Exh. 8], the Fraud Prevention/Quality Improvement Manual introduced at mandatory training on Aug. 1, 2006 [Exh. 3], as well as violations of other specified Career Service Rules. [Exh. 1.] At the pre-disciplinary meeting, Appellant presented her written summary of the events of Aug. 8th. [Exh. K.] On Sept. 7, 2006, Appellant was served with a letter of termination for failure "to observe departmental policy regarding confidentiality and avoidance of conflict of interest and appearance of impropriety" under the fraud prevention policy by interceding in her daughter's food assistance case, failing to consult with her supervisor, and failing to attend the fraud prevention training. It was also determined that Appellant violated the confidentiality agreement and the Career Service Rules prohibiting neglect and carelessness in the performance of her duties. No previous discipline was cited in the termination letter. [Exh. 2.]

Director of the Family and Adult Services Division Juanita Sanchez testified that she found Appellant had handled her daughter's case by having direct physical contact with her daughter's case file, and requesting details of the case status or benefits from the caseworker. Ms. Sanchez determined those actions were a violation of the confidentiality policy, which prohibits an employee from discussing case information with someone outside of the department: in this case, her daughter. Ms. Sanchez concluded that the same actions constituted neglect of duty, carelessness in the performance of duties, failure to observe the fraud prevention policy, conduct in violation of the Career Service Rules, and conduct which compromised the integrity of the city, in violation of CSR §§ 16-60 A, B, L, Y and Z. Appellant's failure to attend training on the new fraud prevention policy was also used to support the discipline decision. Ms. Sanchez testified that the primary reason for discipline was Appellant's breach of the confidentiality policy. Appellant's performance and disciplinary histories were not factors in the decision. Ms. Sanchez testified that she has always imposed termination as the penalty for any breach of the confidentiality policy, since she considers it a very serious offense.

On August 1, 2006, the Agency conducted training on its new fraud prevention policy as set forth in the 21-page Fraud Prevention/Quality Improvement Manual [Exh. 3], to be signed by each employee at the conclusion of the training. Appellant was not present at the training because on the day of the training she arrived too late to be admitted to the session. [Exhs. C, D.] The declared purpose of the fraud prevention manual was to detail:

the professional and ethical standards by which DDHS employees will determine eligibility, provide services, and administer benefits programs for Denver County residents. It also provides a framework for maintaining the public's trust, furthering the mission of the [DDHS], protecting the integrity of human services programs, and enhancing professionalism of DDHS employees. The guidelines and procedures detailed within the manual are not intended to replace those found within other existing agency policies, or the Employees Handbook, but to elaborate and embellish on those policies and guidelines.

[Exh. 3, p. 3.]

Section 1.3 of the manual sets forth the standards applicable to conflicts of interest and the appearance of impropriety:

DDHS employees are required to maintain a high degree of integrity and professionalism. Employees will avoid conflicts of interest and the appearance of impropriety at all times. Employees will not determine eligibility, provide services, investigate reports of abuse and neglect, establish child support orders, administer benefits or otherwise handle, influence, or

make decisions in cases which involve themselves or their immediate family . . . Employees who find themselves in situations where they must make decisions regarding eligibility, services, benefits, support orders, allegations of abuse and neglect, and child custody for any individual(s) listed above, must report the situation immediately to their supervisor.

[Exh. 3, p. 6.]

The Agency's confidentiality policy prohibits employees from being assigned, inquiring or obtaining information regarding an applicant or recipient from computer screens or the case file. [Exh. 8.]

IV. ANALYSIS

1. Propriety of Discipline under the Career Service Rules

In an appeal of a disciplinary action, the Agency has the burden to prove the action was taken in conformity with Rule 16 of the Career Service Rules, and that the degree of discipline was reasonably related to the seriousness of the offense, taking into consideration the employee's past record. CSR § 16-20.

A. CSR § 16-60 A. Neglect of duty

The Agency also asserts that Appellant neglected her duty by handling her daughter's case. Appellant's position at the time of termination was that of a Medicaid Eligibility Technician. The Agency failed to submit any evidence that Appellant neglected any known official duty of this position by assisting her daughter to locate a clerk to reissue a lost benefits card or failing to attend training on a specific day because of a change in work hours. Likewise, the Agency did not prove that Appellant knew or should have known she was neglecting a work duty by those acts. Therefore, I find that this allegation has not been established. See In re Feltes, CSA 50-06, 5 - 6 (11/24/06.)

B. CSR § 16-60 B. Carelessness in the performance of duties

An employee is careless in violation of this rule when she is heedless of an important work duty, resulting in potential or actual significant harm. In re Owoeye, CSA 11-05, 5 (6/10/05). A person exercises reasonable care when she acts with that degree of care which reasonable persons use under similar circumstances. See Black's Law Dictionary 146 (abr. 6th ed. 1991.)

The Agency did not identify any work duty that Appellant failed to perform by helping her daughter locate the issuance clerk, taking the case file to that clerk, or requesting another technician to verify her daughter's identity. The deciding official stated that Appellant was careless because she knew the client was her relative and assisted her in the face of that fact. The evidence showed that Appellant acted as a

volunteer in assisting her daughter to obtain a replacement food stamp card. Appellant was assigned to the Medicaid Division. The Agency did not argue that Appellant's time in assisting her daughter resulted in any uncompleted work in her own section, or that she otherwise neglected her work as a result of her actions.

Likewise, the Agency did not allege or prove that Appellant was careless in not attending training on Aug. 1st, which was one of two training sessions held at Appellant's work location. Employees were notified at 4:04 PM the day before the first emergency training sessions "for implementation of the new immigration laws". [Exh. C.] Appellant was already approved for a late arrival on Aug. 1st, which effectively prevented her from attending that training. [Exh. D.] Appellant was not informed that her absence from that training could subject her to discipline, and the Career Service Rules do not specifically authorize discipline for not attending training.

Therefore, I find that the Agency did not prove Appellant was careless in the performance of her duties in violation of CSR § 16-60 B.

C. CSR § 16-60 E. Any act of dishonesty

Ms. Sanchez testified that she did not consider Appellant's actions to be in violation of this rule. I find that the evidence does not establish that Appellant's acts violated this rule.

D. CSR § 16-60 L. Failure to observe written departmental or agency regulations

i. Fraud Prevention Policy

A central issue in this appeal is whether Appellant's actions in assisting her daughter to obtain a replacement food stamp QUEST card constituted "handling" the case within the meaning of the Agency's Fraud Prevention/Quality Improvement Manual. That manual states "[e]mployees will not determine eligibility, provide services, investigate reports of abuse and neglect, establish child support orders, administer benefits *or otherwise handle*, influence, or make decisions in cases which involve themselves or their immediate family." [Exh. 3, p. 6, emphasis added.]

The Agency argues that "handling" in the context of the policy includes physical possession of a relative's case file. It supports that interpretation by quoting various employees' understanding of the behavior prohibited by the rule. Appellant contends that the word "handle" does not give notice that the policy prohibits an employee from escorting a relative to the right worker to obtain a replacement benefits card while carrying an unopened case file to that worker.

The verb "handle" has six possible definitions:

1 feel or manipulate with the hands. 2 manage or cope with. 3 deal with. 4 control or manage commercially. 5 (handle oneself) conduct

oneself. 6 (of a vehicle) respond in a specified way when being driven: *the new model does not handle well.*

Soanes, C. and Hawker, S. (2005). Compact Oxford English Dictionary of Current English.

In construing administrative policies enforceable by disciplinary rules, the interpretation that carries into effect the intent and object of the policy must be adopted. See United States v. American Trucking Assns, Inc. 310 U.S. 534, 543 (1940). When the words of a policy are sufficient to determine its meaning, the plain meaning of those words are enforced. When a word is not one of definite content, its meaning may be ascertained by considering the words associated with it in the policy, and adopting "that sense of the [word] which best harmonizes with the context" under the maxim of statutory construction that "a word is known by the company it keeps." 73 Am. Jur. 2d *Statutes* § 134.

The fraud policy at issue enumerates five types of actions which are considered to be conflicts of interest if performed for relatives or friends. All five of those terms are types of affirmative official action which are taken by an Agency employee in the performance of their duties. The five specified actions are followed by the words, "or otherwise handle, influence, or make decisions in cases which involve themselves or their immediate family." The word "handle" should be read as having the same characteristics as the words in the policy to which it is linked: "influence" and "make decisions". Both the specific and more general words in the policy connote actions taken to determine and/or administer benefits for clients in furtherance of the Agency's mission.

That meaning is consistent with the stated purpose of the policy to detail the standards by which employees "will determine eligibility, provide services, and administer benefits programs for Denver County residents", and provide the "framework for maintaining the public's trust" in order to "protect the integrity of human services programs," among other goals. By comparison, public trust and the prevention of fraud are not adversely affected by allowing an employee to assist a relative to locate the right clerk in order to reissue a lost benefits card, or to request a caseworker to issue a form to verify identity. Those actions did no more than give the client minimal procedural directions once she had already been granted benefits. While a failure to give this assistance might have slightly delayed re-issuance of the card, Appellant's aid did not result in the grant of any new benefits or services. The Agency presented no evidence that the same assistance would not be given to any client as a part of good public service.

The testimony of other employees' understanding of the policy quoted in the Agency's closing argument is manifestly broader than the words used

in the policy. It is therefore not more persuasive evidence of the nature of the policy than the words of the policy itself.

The Agency determined that Appellant handled her daughter's case by having direct physical contact with the case file, and by requesting details of the case status or benefits from the caseworker. As a result of the Agency's conclusion that Appellant directly requested information from the caseworker, it concluded that she had violated the fraud prevention policy.

In this de novo hearing, I find that Appellant did not inquire about the status or benefits of the claim from the caseworker or from any Agency records. Instead, Appellant inquired of Agency employees how her daughter could obtain a replacement for a benefits card that she had misplaced, and escorted her to a caseworker who could prepare a form verifying that she was the person for whom benefits had been approved. Appellant's actions did not violate the terms or purpose of the fraud prevention policy.

I also find that Appellant earlier demonstrated her understanding that Agency policy prohibited her from being assigned to claims filed by those with whom she or a close relative had a personal relationship. [Exh. 7.] The fraud prevention policy is consistent with that understanding, and Appellant was not given notice that a stricter interpretation of that policy was to be enforced.

ii. Confidentiality Policy

The Agency official who imposed discipline considered the violation of confidentiality as the most important factor in her decision to terminate.

In relevant part, the confidentiality policy bars employees from being assigned, inquiring or obtaining information from Agency computer records or case files. It is undisputed that Appellant was not assigned to her daughter's case. In addition, there was no evidence that Appellant inquired about the status of benefits or obtained any information about the case from the computer or case records. Appellant's sole involvement was to walk her daughter to the issuance clerk, accompany her to the caseworker to get proof of her identity, and carry the unopened case file to the clerk before returning it to the caseworker. Those actions do not establish that Appellant asked for or obtained confidential information from computer or case records, or that she disclosed confidential information to anyone outside the Agency.

Notice of the conduct prohibited by a policy is of paramount importance to employees, especially where as here the Agency's decision-maker has indicated an intent to impose termination for any violation of the confidentiality policy. The evidence indicates that, before this discipline was imposed, claims technicians were permitted to communicate about procedural matters with co-workers whose relatives had filed claims, and the children of

employees were allowed in the workplace. Directly thereafter, Appellant's supervisor announced that children were no longer permitted in the building. By means of this disciplinary action, the Agency implemented a new interpretation of its confidentiality policy. Without notice of this new interpretation, Appellant had no opportunity to bring her behavior into compliance with it. Therefore, Appellant's actions did not violate the Agency's confidentiality policy.

E. CSR § 16-60 O. Failure to maintain satisfactory working relationships

Ms. Sanchez testified that she did not consider Appellant's actions in violation of this rule, and the evidence indicates that no such violation occurred.

F. CSR § 16-60 Y. Conduct which violates the rules, city charter, municipal code, executive orders or other legal authority

The Agency presented no evidence that Appellant violated any rules, charter or code provisions, executive orders or other legal authority other than those alleged in the disciplinary letters.

G. CSR § 16-60 Z. Conduct prejudicial to the good order and effectiveness of the Agency

The Agency did not submit specific evidence or argument in support of this charge, which was added to the Career Service Rules by amendment dated June 12, 2006. The rule requires proof of conduct that negatively impacts "the good order and effectiveness" or reputation of an agency, or that compromises the integrity of the City. The Agency has not proven that Appellant's actions in assisting her daughter impacted the City's effectiveness, reputation or integrity in any respect. I therefore find that the Agency has not established a violation of this section.

2. Appropriateness of Penalty

Since I have found that the Agency failed to establish that Appellant violated any of the rules alleged in the disciplinary letter, it follows that the penalty of termination is not appropriate under the Career Service Rules.

ORDER

The Agency's termination action dated Sept. 7, 2006 is hereby REVERSED.

Dated this 2nd day of January, 2007.


Valerie McNaughton
Career Service Hearing Officer