

DECISION

IN THE MATTER OF THE APPEAL OF:

BONNIE LESLIE, Appellant,

vs.

DEPARTMENT OF AVIATION

and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, Bonnie Leslie, appeals the termination of her employment by her employer, the Department of Aviation, Operations Division, at Denver International Airport (Agency). A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, over three days, May 3, 2011, July 19, 2011, and September 28, 2011. The Agency was represented by Robert A. Wolf, Assistant City Attorney. Ms. Leslie was represented by Michael J. O'Malley, Esq. Agency exhibits 1-22, 24-27, and 28, in part, were admitted into evidence. Exhibits for the Appellant were admitted, as follows: B, D-3 – D-7, D-11.1, D-11.2, D-13, D-14, D-30, F, G-1, G-2, G-5, H, J, K, L, and M. The following witnesses testified for the Agency: Roberta Miller, Sarah Bruton, Harry Brett, and Diane Culverhouse. The Appellant testified on her own behalf and also presented the following witnesses: Drew Elkins, Jeremiah Smith, Peter Smith, James Johnston, and Robert Mancuso. For reasons which follow, the Agency's termination of the Appellant's employment is MODIFIED to a five-day suspension.

II. ISSUES

The following issues were presented for appeal:

whether Leslie violated any of the following Career Service Rules: 16-60 A., B., K., L., M., O., or S.; and

if Leslie violated any of the aforementioned Career Service Rules, whether the Agency's decision to terminate her employment was excessive or based upon considerations not supported by a preponderance of the evidence.

III. FINDINGS

A. Performance

The Appellant, Bonnie Leslie, was an Aviation Emergency Dispatcher (AED) assigned to the night shift in the Communications Center at Denver International Airport (DIA). She was employed there from April 1999 through her termination on February 21, 2011. An AED's duties include receiving emergency calls, dispatching appropriate police, fire, and paramedic services, monitoring progress of those responses, retrieving recorded data associated with emergencies, and assisting new hires with training. [Exhibit K-1; Leslie Testimony]. At the same time AEDs field and make emergent calls, they must enter and update information via "tickets" created by computer aided dispatch (CAD) software. Pursuant to Agency standard operating procedures checklists, when taking an emergency call, AEDs must ascertain the: type of emergency; location; description; existence, number and type of injuries; number of people involved in the emergency/accident; and the caller's name, number, and involvement in the incident. [Exhibit 3-7; Culverhouse Testimony, 5/3/11]. The extent to which these questions are answered accurately depends on the information the caller is able to convey, sometimes irrespective of the AED's efforts and follow-up questions. [Miller, Brett, Peter Smith, Mancuso, Leslie Testimony].

Sarah Bruton was hired as the Manager of the Comm. Center on August 31, 2009, to oversee the five supervisors and their teams. Bruton determined that lack of performance management caused inconsistency, so she implemented many changes toward correcting those deficiencies. She instructed supervisors to meet regularly with the employees on their teams, to evaluate their employees' performance to ensure that they acted consistently in their duties, and to implement supervisor situation reports (SSRs) to document both extraordinary and substandard performance. She instructed Diane Culverhouse, who had become an AOR¹ Supervisor in March 2009, to draft Standard Operating Procedures to guide employees through the requirements of managing various emergency events at the airport. [Culverhouse, Bruton Testimony, 5/3/11].

On March 12, 2010 at 2:22 a.m., Leslie received a call reporting an accident involving a lavatory truck. The caller stated his supervisor requested police and paramedics. Leslie dispatched police and paramedics; however, she did not inquire further, to determine the type and extent of the emergency, pursuant to standard operating procedures (SOP). [Exhibit 3-8 – 3-9]. Consequently, the call was processed as a routine medical call instead of an auto accident with injuries.

On June 28, 2010, AOR Supervisor Ashley Sykes notified all Comm. Center employees, by email, of revisions in procedures for handling fire department responses. She required all Comm. Center employees to sign an acknowledgement of training by July 4, 2010. On July 10, 2010, Sykes verbally counseled Leslie for failing to sign her

¹ Aviation Operations Representative

acknowledgement. Notably, Sykes, Culverhouse, and AOR Brandon Baker also failed to sign their training acknowledgements by July 4. [Exhibits 6, 7, 10-2].

On December 11, 2010, Jeremiah Smith, an AOR manning the Communications Coordinator station, received a phone call from maintenance control stating a shuttle bus was hung up on a barrier on level 5 west side, although the caller did not give the exact location. Maintenance control stated there were no injuries reported to them. Smith attempted to locate the bus on closed circuit television, but was unsuccessful. He called back to maintenance control, and determined a more precise location. He reconfirmed there were no injuries reported. After locating the bus on closed circuit television (CCTV), he notified Leslie, who was the AED on duty, that the call was a non-injury accident, and to send police for traffic control. [Smith Testimony, Exhibit E-9].

Leslie created a CAD ticket, coding it a non-injury accident, and notified DPD of the accident. [Exhibit 8-3]. Then she found the bus on CCTV and observed the bus driver inspecting the bus. She noticed he appeared to be limping, and advised Robert Mancuso, the supervisor on duty. Mancuso confirmed with Smith that there were no injuries reported; however, upon further observation, Leslie and Mancuso decided paramedics should be dispatched for the driver. Leslie made the notation into CAD, then dispatched paramedics to the scene. At that moment, another call came in, requesting medics for the driver's minor injuries. Leslie changed the CAD code to reflect that it was an injury accident. [Exhibit F-2]. Since SOP 80-9 requires the AED to dispatch Denver Fire Department for an accident with injuries, Leslie and Mr. Mancuso discussed sending them; however, Mr. Mancuso instructed her that dispatching DFD was unnecessary for this incident. [Mancuso, 7/19/11; Leslie, 9/28/11].

On January 9, 2011, DIA went on a snow alert at 6:06 a.m.. The maintenance division usually notifies the Comm. Center of a snow alert by contacting the CAISS² position or the supervisor on duty. When a snow alert reaches a certain level, bus routes can change; however, there is no established protocol for notification to, or within, the Communications Center. Leslie was aware of the snow alert, but was unaware bus routes had changed. [Leslie Testimony]. At 7:53 a.m., Leslie, who was the police dispatcher for that shift, answered a call for Roberta Miller, the call-taker/medic dispatcher, who was on another call. The Communications Center changes shifts at 8:00 a.m., and the staff for the incoming shift were in the Center to receive briefings regarding ongoing incidents from outgoing staff, as is customary during shift changes. [Leslie Testimony, 7/19/11]. The caller reported he was on "an employee bus that just rolled, coming from the employee parking lot... we're down in a ditch...and...we got one lady with an injured arm, at least. Anyhow, I can't even tell where we are." Leslie inquired whether they came from 78th Avenue and Employee Parking Lot A or B, on the landside or airside. The caller said they left from "planeside parking lot," and repeated he couldn't tell where they were. She asked if they were headed toward Gate 1, and he replied they were headed, "what we call 'the long way,' I'm not sure which Gate it is. We've got employee buses that are driving by us...but I don't know if they can see the bus down here. We're down in a drainage culvert." [Exhibit 15]. While Leslie was

² Computer Aided Integrated Security System. The CAISS computer integrates security monitoring of doors, gates, screening points, break rooms, and other points of access to secured areas.

fielding that call, Miller called out that she also received a call reporting a bus rollover. [Exhibit 14-3; Leslie Testimony, 9/28/11]. Leslie ended the call when she believed she ascertained the location of the bus.

Leslie consulted with Kim Archuletta, at the CAISS position, and Cedric Ennis, at the Comm. position, confirming they received corroborating information from their sources as to the location of the rollover. To create a CAD ticket, a location must be entered, and at 7:55 a.m., she typed in the location as "78th Ave heading to Snake Road." She dispatched DFD and DPD to that location, and advised Miller to dispatch medics. She then received information that the rollover was in a different location from the location she just entered into CAD. Four minutes later, at 7:59 a.m., she entered into CAD "Com and DFD advised of correction on accident location," then "correct location is 75th at return to term in the culvert." She briefed her relief, Ken Chaulk, then clocked out at 8:03 a.m. Chaulk did not log in with his own ID, but continued to make entries into CAD regarding the incident, using Leslie's ID, from 8:01 a.m. until the end of the incident report. [Exhibit 9-3].

B. Interpersonal Relations

On September 29, 2010, Roberta Miller was working her last shift of on-the-job training. Immediately before the 10:00 p.m. shift change, she received a call. When Miller ended the call, she briefed Leslie, who was coming on duty for the night shift, that the caller was a security guard named Juanita, who witnessed a female walk off with another guard's carry pouch. Leslie asked Miller if she had any other information about the guard's identity or position, since guards' locations are identifiable by position, but Miller received only the guard's first name. The person in the oncoming CAISS position asked Leslie if she received any additional information regarding the guard's identity. Leslie responded in a raised voice that she did not know who Juanita is, and that no one provided additional identifying information. [Exhibit 1; Exhibit 25; Miller testimony; Leslie Testimony]. Miller and others overheard the exchange while clocking out. Two co-workers reassured Miller that she was doing a great job, and "that was just Bonnie." [Exhibit 25]. Miller was hurt by Leslie's response, because Miller thought it made her look like she didn't know what she was doing, but she did not discuss it with Leslie, did not report it at the time, and nothing more was made of it until the Agency's contemplation letter in this case, seven months later.

On October 15, 2010, Harry Brett's shift overlapped with that of Leslie by one hour. When Leslie started her shift at 10:00 p.m., Brett left his station to get dinner, because he had worked for nine hours without a break. The next night, at the beginning of her shift, Leslie asked Brett "are you going to leave station again tonight?" [Exhibits 24-4, 26-1]. Although Brett took offense at Leslie's comment, because he thought it was sarcastic and felt it implied he had done something wrong, he did not say anything to her about it, [Brett Testimony], and nothing more was made of the incident until the contemplation letter issued in this case, in January 2011, three months later.

On November 5, 2010, Miller briefed Leslie regarding a call from a Skywest supervisor reporting a sex assault. Miller reported to Leslie the information she had about the incident. Miller also explained "they didn't tell me what type of sex assault it

was." While Miller was clocking out, Mancuso, the supervisor on duty, asked Leslie what kind of sex assault had occurred, and Leslie responded, "I don't know what kind of sex assault it was, they didn't tell me." Miller overheard Leslie's response from the time clock area she was leaving, and repeated "they didn't say what kind of sex assault it was, verbal or physical." [Leslie, Miller, Brett Testimony; Exhibit 25]. Although Miller took umbrage at Leslie's response to Mr. Mancuso, because she felt it made her sound like she did not know what she was doing, she did not confront Leslie about this incident, [Miller Testimony], and nothing further was made of the incident until the January 2011 contemplation letter in this case.

Around October 21, 2010, Brett complained to Culverhouse regarding his negative interactions with Leslie, and asked her to speak to other employees to substantiate his complaints. He also requested that Culverhouse not schedule him to work any shifts with Leslie. Culverhouse advised him to document his complaints, and, after conferring with Bruton, she began an investigation. [Culverhouse, Brett Testimony]. Culverhouse instructed all seven AEDs hired in July 2010 to document any concerns they had about Leslie or Mancuso. [Miller, Bruton, Culverhouse Testimony]. Only Miller and Brett had any direct complaints about negative interactions with Leslie. Herrera submitted an email regarding the "behavior of Bonnie Leslie towards my co-worker Harry Brett." [Exhibit 24-26]. Brett also complained to Mancuso that Leslie, who regularly arrived early to receive hand-off information before starting her shift and sometimes engaged in normal conversation with Brett, walked away from him to clock in. Brett perceived it as an affront. [Mancuso Testimony]. Mancuso testified Brett was the only employee he supervised who ever complained about Leslie. Mancuso considered Leslie an exceptional employee who interacted very well with the team. [Mancuso Testimony].

C. Leave

Leslie was authorized to take intermittent FMLA leave to care for her mother's serious health condition, pursuant to a medical certification provided by her mother's medical provider. The physician estimated Leslie's mother would need care on an intermittent basis from one to three times per month with a duration of 1-24 hours each episode. [Exhibit 14-15]. Leslie was scheduled to work four ten-hour shifts during the week of November 7-14. [Exhibit 20-30]. Two of those shifts overlapped the November 11 Veteran's Day holiday. On the first shift, Leslie worked nine hours, from 9:53 p.m., on November 10, to 6:55 a.m., on November 11. Because the Comm. Center was calm and appropriately staffed, Leslie requested to leave one hour early. Her supervisor, Randy McNees, granted the request. [Leslie Testimony].

After Leslie left that day, her mother suffered an incident from her serious health condition. Leslie took her mother to the emergency room. Her mother remained hospitalized for several days. Leslie called to notify her supervisor she needed FMLA leave to care for her mother. Despite Leslie's request, the agency coded her 10-hour shift for November 11-12 as eight hours holiday leave, and two hours FMLA leave. [Leslie Testimony; Exhibits G-2, G-4, 20-30]. Leslie worked her next shift, November 12-13, while her mother was hospitalized.

When Leslie's mother was discharged from the hospital on November 13, Leslie called to notify the Agency that she required leave for her upcoming November 13-14 shift to provide care for her mother. [Leslie Testimony; Exhibit G-2]. The Agency deemed Leslie had already used three "incidences" of FMLA leave during the month of November and coded her November 13-14 shift absence as 10 hours of unauthorized leave without pay. Leslie attempted to remedy the misunderstanding with respect to the coding of her leave, but the Agency rejected her request. Leslie had no sick leave banked to use, and the Agency also denied her request to substitute banked vacation leave in lieu of sick leave. [Leslie Testimony; Exhibits 20-30, B-1 – B-3].

D. Grievance against Culverhouse

Although Culverhouse was Leslie's team leader, they did not work the same shift, so most of their communication was by email. On October 13, 2010, at 1:20 p.m., Culverhouse sent an email to all Communications Center personnel, notifying them of two AED overtime shifts becoming available in two weeks. When Leslie began her shift that evening, she emailed Culverhouse that she was available to cover both shifts. On October 21, Leslie emailed Culverhouse asking why she was not granted the overtime. Culverhouse responded later the same day that two other employees requested the overtime shifts before Leslie. [Exhibit D-8]. Leslie replied by return email:

Diane you made the request for volunteers at 1:21 p.m. on Wednesday and I came in for my shift and replied at 10:13 p.m. of that same day, I was unaware that there was a time constraint for the overtime request that is five days in advance. I was under the understanding that when overtime is posted that volunteers were requested and then assigned by seniority per the Aviation department policy and procedures. If this is no longer the case I would appreciate a copy of the rule so that I can follow that policy and procedure.

Respectfully, Bonnie

Leslie attached Department of Aviation Standard Policy and Procedures 2011.1 regarding overtime assignments, which states:

- IV. Overtime Assignments (Excluding Mandatory Overtime)
 - A. In the event that the need for overtime assignments is necessary, supervisors will attempt to adhere to the following procedure.
 - 1. Ask for volunteers
 - 2. Notify volunteers on a rotating basis with the most senior volunteer contacted first.
 - 3. The next time overtime is required, the supervisor will ask for volunteers in the order of seniority, starting at the place on the list where he or she left off.
 - 4. If there are not enough volunteers, employees shall be contacted based on seniority, with the last employee contacted first.

[Exhibit D-11.2]. Culverhouse answered by email the next day:

Honestly Bonnie I'm tired of the way you address me as your supervisor. It has been in a disrespectful manner in the last several emails you have sent me. I try to be as fair as possible to all employees. If you don't like the way I handle the overtime please file a grievance. I no longer am going to have these types of email conversations with you.

[Exhibit D-12]. The following day, Saturday, October 23, Leslie forwarded the above-referenced email chain to Sarah Bruton, along with an explanation that she did not intend to be disrespectful. Leslie requested guidance from Bruton about how to proceed. [Exhibit D-13].

Bruton scheduled a meeting with Culverhouse and Leslie on November 5, 2010. Leslie and Culverhouse agreed their emails were miscommunicated and misunderstood. They agreed to move past it. During the meeting, Leslie requested Bruton to issue a letter retracting Culverhouse's accusation that Leslie had been disrespectful. Bruton agreed to provide such a letter the following day. [Exhibit D-7].

When the retraction letter was not provided to Leslie, she filed a complaint and grievance on November 13. [Exhibits D-1 – D-27]. On November 17, Bruton emailed back to Leslie her conclusion that the meeting resolved the conflict with Culverhouse. [Exhibit D-29]. On November 24, 2010, Bruton denied Leslie's grievance. [Exhibit D-33].

While Bruton considered the November 5 meeting to have resolved the issues between Leslie and Culverhouse, Culverhouse evidently did not consider the matter settled. Four days later, on November 9, Culverhouse met with AED Jeremiah Smith, to ask him if he had heard any complaints about Leslie. Smith later stated "I was very confused by this question because I had not noticed any such behavior." He also stated Leslie "knows the AED side very well, and does not hesitate to correct people when they are doing things improperly." [Exhibit D-32]. Culverhouse also asked Leslie's other co-workers to report any complaints they had about her. [Exhibit D-32].

Two months after Bruton denied Leslie's grievance, the Agency notified Leslie, on January 26, 2011, that it was contemplating discipline against her for a variety of incidents over the past year. It was the Agency's first notice to Leslie regarding several of the more significant incidents.³ [Exhibit 2; also, see above re Miller and Brett]. After holding a pre-disciplinary meeting, the Agency notified Leslie of her dismissal on February 16, 2011. Leslie filed this appeal timely on February 24, 2011.

IV. ALLEGED CAREER SERVICE RULE VIOLATIONS

The Agency terminated Leslie based on her alleged violations of Career Service Rules related to deficiencies in performance, interpersonal relationships, and

³ This was the first notice regarding interpersonal relationship allegations, and of the incidents on 12/11/10 and 1/9/11. Leslie had been counseled regarding the lav. truck incident [Exhibit 10-1], and signing of training acknowledgement [Exhibit 10-2]. The leave issue was addressed on an ongoing basis by emails between Leslie, HR, and Culverhouse.

attendance. The first set of rule violations analyzes Leslie's alleged performance deficiencies.

A. CSR 16-60 A. Neglect of Duty

This rule is violated where an employee neglects to perform a duty that the employee knows she is supposed to perform. In re Abbey, CSA 99-09, 6 (8/9/10). The Agency's evidence did not establish what important duty Leslie failed to perform (as opposed to the careless performance of a duty, below), and none of the incidents cited by the Agency may reasonably be construed as a failure to perform a duty. Since the connection between Leslie's conduct and this rule violation was not made by the Agency, and the connection is not apparent from the evidence, the Agency did not establish a violation under this rule.

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

A violation under this rule occurs for performing an important duty poorly, and is distinguished from CSR 16-60 A., for which a violation entails the utter failure to perform an important duty. In re O'Meallie, CSA 92-09, 4 (6/18/10). The duty must have been communicated in such manner as would make a reasonably astute employee aware of its requirements. In re Mestas et al., CSA 64-07, 61-07, 62-07, 67-07, 16 (5-30-08),

1. Lavatory truck incident, March 12, 2010. Leslie coded the incident as a routine medical call, instead of asking the appropriate questions to make an accurate determination that the incident was an auto accident with injuries. She acknowledged she failed to denote the correct type of emergency, and failed to dispatch all required responders pursuant to standard operating procedures. Leslie testified she can and will correct this type of mistake. Leslie's acknowledgement establishes a violation of this rule for the lavatory truck incident.

2. Untimely signing of training acknowledgment. Leslie explained the reason she had not signed the acknowledgement of training form was she did not know the revision, for which the training was offered, affected the AEDs, only the AORs. Once counseled by Sykes, Leslie agreed to and did sign the form.

After Leslie's question about the applicability of the training for AED's, Sykes had to check with Bruton to determine whether AEDs were also required to sign, indicating that even supervisors were unsure of the policy. Further, Culverhouse was also late in signing.

The Agency offered three other training acknowledgement forms from 2010 as evidence of general compliance with the signing requirement. However, each form revealed from one to seven employees who signed after the due date, none of whom was Leslie. Moreover, the Agency did not offer into evidence the period during which employees were to complete the assigned trainings and sign the acknowledgement form. On the fourth training acknowledgement form, employees signed and dated it between May 30, 2010 to June 24, 2010 - almost a four-week span. That form shows Culverhouse was the last to sign by almost a week. [Exhibit 19].

Based on the foregoing, the Agency failed to establish that it made Leslie, or any of its employees, reasonably aware of the duty to sign the training acknowledgment or to do so by a deadline. In addition, the laxity of signing by others, including a supervisor, Culverhouse, indicates it was not considered to be an important duty. This violation is, therefore, not established by a preponderance of the evidence.

3. Bus on a barrier, December 11, 2010. The Agency asserts Leslie was careless in failing to dispatch the Denver Fire Department, pursuant to SOP 80-9. That procedure requires AEDs to dispatch police, fire and medics for fire and medical emergencies, including "motor vehicle accidents, with unknown, known, or possible injuries." Leslie replied that Jeremiah Smith, who received the call in the Comm. Coordinator position, confirmed twice that the incident was non-injury accident, and that he provided that information to Leslie. For that reason, she dispatched only DPD.

After Leslie and her supervisor, Mancuso, jointly observed the bus driver involved in the accident on CCTV, and collectively determined the bus driver may have injuries they sent medics. Leslie received notice of the driver's injury after she had already dispatched medics. Then she changed the incident code from a non-injury accident to an accident with injuries. Most importantly, Mancuso directed Leslie not to send DFD.

Although SOP 80-9 requires AEDs to dispatch DFD where there are unknown or possible injuries, Leslie followed her supervisor's instruction not to send them. Had she sent DFD, she would have been in the impossible situation of violating another rule for disobeying the lawful order of a supervisor, CSR 16-60 J. Obedience to a direct, legitimate instruction must always trump a more general duty. Accordingly, Leslie did not act carelessly when she followed her supervisor's explicit direction in contravention of an Agency standard operating procedure.

4. Bus rollover January 9, 2011. Here, the Agency claims Leslie was careless in that she: (a) failed to obtain the caller's name, telephone number, or how he was involved; (b) failed to determine the correct location of the accident; (c) incorrectly documented an injury in CAD as a broken leg, instead of a an injured arm; and (d) failed to follow SOP 80-9 in order when she dispatched DFD before DPD.

a. Caller ID. Leslie responded the Agency's priority is to determine the location of an emergency in order to dispatch appropriate resources as quickly as possible. Therefore, she did not request the caller's name, number, or exact involvement beyond that he was obviously in the bus that rolled over, since that information was not as critical as determining a location to deploy resources.

b. Location, Location, Location. Since the caller told Leslie twice he did not know where they were, Leslie stated her priority was to confirm the location of the accident from other Comm. Center sources. To that end, Leslie consulted with both AORs and the other AED on duty to determine the location of the bus, and received corroborating information from both AORs that the bus was at 78th Avenue heading to Snake Road.

Leslie further contended that, although she knew there was a snow alert, she had not received notification that buses were changing routes, and that such information would have caused her to decide the location differently. Leslie also claimed that, after she corrected the location on CAD and handed off her duties at 7:59 a.m. to her relief, Ken Chaulk, he failed to log in with his own ID. Consequently, when he incorrectly entered injury information, the mistake was attributed to her. Finally, Leslie claimed SOP 80-9 is a guideline for dispatching resources, but the Agency did not require the checklist to be followed and completed in precise sequence.

Bruton and Culverhouse testified dispatchers are supposed to obtain as much information as they can, and if some of the SOP information is not gathered, it is due to the dispatcher's failure to ask the right questions. However, Leslie, Miller, Elkins, Peter Smith, Brett, and Mancuso all testified it is not always possible to obtain all necessary information from the caller, irrespective of the dispatcher's efforts. Neither side rebutted the testimony of the other. Consequently, it falls to reason that, once it becomes clear the caller has given all of the information he can or will give, other resources must be engaged to obtain missing information. Indeed, Culverhouse testified the most important task for an AED taking a call is to obtain the location of the incident, since most of the 53 square miles of airport property do not have a street address.

In light of the above, it was reasonable for Leslie to make her priority the correct location of the bus rollover, instead of asking the caller for information such as his name and phone number. In support of her decision, Leslie testified she could hear the other Comm. Center positions receiving communications regarding a bus rollover at the time she was on the phone with the caller, so she reasonably concluded they would have determined at least as accurate, or better, location information.

Finally, with respect to the snow alert affecting the bus route, Bruton, Culverhouse, and Leslie all testified the Comm. Center Supervisor on duty usually disseminates information regarding the existence and levels of snow alerts to the rest of the Comm. Center. It would seem that, if Comm. Center employees had been alerted to a change of bus route, the Agency could have presented testimony of the supervisor or other employees who were so alerted during that shift, but that evidence was absent, and no other evidence affirmed the naked assertion by Culverhouse and Bruton that Leslie knew, or should have known, about the route change.⁴

c. An arm or a leg. Leslie testified that, after her 7:59 a.m. CAD entry, in which she noted the change in location of the bus roll-over, she logged out of CAD but her relief failed to log in, so that the rest of the CAD entries were entered using Leslie's ID, including the inaccurate entry attributed to her regarding the nature of the female's

⁴ Bruton testified Leslie "should have been aware of it [the bus route change]" because, when DIA has a "snow event," the Comm. Center supervisor will share with other Comm. Center employees when notified of a change in bus route. There was no testimony the Comm. Center was alerted of the bus route change that day, or that Leslie was alerted. Culverhouse testified she did not speak to anyone else in the Comm. Center about the incident, either.

injury. The Agency failed to present evidence rebutting her claim, such as the testimony of the relief worker, Ken Chaulk.

d. Standard Operating Procedure. With respect to the assertion that Leslie did not follow SOP 80-9 in sequence, the careless result, according to the Agency, was Leslie dispatched fire department personnel before police. Leslie countered the Agency never notified Communications Center employees of a policy requiring AEDs follow SOP 80-9 in order. Moreover, Agency witness Miller testified convincingly "dispatching is a lot like learning math, where there are many ways to get to a solution, and people may take different ways to get there, but you all end up at the same solution, with the same answer." [Miller testimony]. Peter Smith is an AOR who is tri-qualified, meaning he works all of the Comm. Center positions. When asked if he automatically would dispatch the fire department in a reported non-injury bus accident, as the Agency alleged Leslie should have done, Smith immediately said no. He explained, as did Miller, that AEDs may modify the SOP checklist, and dispatch resources, based on the circumstances of the incident, or based upon the order information is received. [Smith testimony 5/3/11].

The testimony of Miller, Smith and Leslie was as logical and convincing as that of Culverhouse and Bruton. Thus, the Agency failed to establish that it is an important duty to follow SOP 80-9 in order. None of the four bases for the Agency's finding of carelessness in the bus rollover incident was proven by preponderant evidence.

C. CSR 16-60 K. Failure to meet established standards of performance

Under this rule, the mere recitation of wrongdoing will not suffice to prove a violation. The Agency must cite a specific qualitative or quantitative standard Appellant failed to meet, such as the standards one would find in a performance evaluation. In re Mestas et al., CSA 64-07, 19 (5/30/08). Consequently, broad policy statements are generally unenforceable because they fail to provide notice of the measures used to enforce compliance. In re Valdez, CSA 90-09, 6 (3/1/10). Here, the Agency cited the Agency's Purpose and Unit Goal, which are broad policy statements, and are, therefore, unenforceable. No violation is found under this rule.

D. CSR 16-60 L. Failure to observe written departmental or agency rules, policies, or guidelines

An agency's written policies are enforceable under this rule if they are clear, reasonable, and uniformly enforced. In re Cady, CSA 03-10, 5 (4/22/10); In re Norman-Curry, CSA 28-07, 50-08, 5 (2/27/09). The Agency asserted Leslie violated SOP 80-9 in three incidents.

1. Lavatory truck incident.

As with its claim under CSR 16-60 B., above, the Agency asserted Leslie failed to ask the correct questions regarding the nature of the accident with the lav. truck, on March 12, 2010, claiming she miscoded the accident as a routine medical call instead of an auto accident with injuries, and also failed to dispatch DFD, as called for by

standard operating procedures. Here, as above, Leslie acknowledged her failure to follow SOP 80-9 in this incident, and therefore, a violation of this rule is also established.

2. Bus on a barrier.

As stated above, under CSR 16-60 B., the Agency asserted that, on December 11, 2010, Leslie failed to follow SOP 80-9 when she did not dispatch DFD to the location of an injury accident where a bus straddling a barrier with injuries. As analyzed above, the Agency did not establish that Leslie violated this rule, since she was following her supervisor's instruction not to send DFD. When in conflict, a direct, lawful instruction by a supervisor takes precedence over a standard operating procedure. No violation is established here.

3. Caller ID.

The Agency, as stated above, under CSR 16-60 B., claimed Leslie violated this rule on January 9, 2011, for her failure to obtain the caller's name, telephone number, or involvement in the bus-rollover. The Agency failed to establish that Leslie violated this rule for the same reasons her conduct was not a violation of 16-60 B: the testimony of other AEDs corroborated Leslie's statements regarding prioritization of information, and their testimony was equally convincing as that of the Agency, such that no violation is proven by a preponderance of the evidence. The next set of rules analyzes the second group of violations alleged by the Agency: poor interpersonal relationships.

E. CSR 16-60 M. Threatening, fighting with, intimidating, or abusing employees or officers of the City or the public

The Agency asserted Leslie frequently intimidated, bullied, and behaved inappropriately to other employees. Intimidation is an unlawful threat intended to coerce another. Abuse is defined as "to violate; to defile; to treat harshly; to use insulting, coarse, or bad language about or to; to revile." In re D'Ambrosio, CSA 98-09, 8 (5/7/10); In re Owens, CSA 69-08, 6 (2/6/09). Miller and Brett claimed Leslie "made it sound like [they] didn't know what they were doing;" however, this conduct, even if true, does not rise to the level of a violation under this rule.

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

Not every slight, annoyance, or affront will constitute a violation under this rule. The action must (a) be severe enough to cause harm, viewed from the perspective of a reasonable person, not as viewed by the affected individual, or (b) have a significant impact on their working relationship, also when viewed objectively, rather than from the perspective of the affected individual. Thus, the Agency's assertion – that Leslie violated this rule by intimidating, bullying and inappropriate behavior toward Miller and Brett in the following incidents - is weighed by those objective standards.

1. Who is Juanita? During a shift change on September 29, 2010, Miller gave Leslie handoff information regarding a call from an airport security guard named Juanita. Leslie responded to the CAISS position's inquiry for more information that she did not

know who Juanita was, and that she was not told any additional identifying information.

The Agency contended Leslie was rude and inappropriate because Miller viewed her as "irritated for no apparent reason" causing two co-workers who overheard the exchange to reassure Miller that she was doing a great job, not to worry about it, and "it was just Bonnie." Further, Miller asked to work a different shift in order to minimize her contact with Leslie. [Exhibit 25]. Miller also testified that she was just completing on-the-job training that evening, and at that point in her career at DIA as an AED, "you're doing everything you can, and when you hear someone make a comment [like that], you don't feel very successful." Leslie testified she did not know she had offended Miller, and that neither Miller nor management ever brought the matter to her attention before issuing the contemplation letter in this case.

Although Miller testified Leslie's conduct made her look like she didn't know what she was doing she, conversely, told Culverhouse, "I let it go," when Culverhouse requested complaints about Leslie. Apparently, however, Miller did not "let it go" because she subsequently requested a shift transfer to avoid Leslie. [Exhibit 25]. While it could be argued Miller was a new employee making mistakes who simply resented being corrected, or that the incident was minor, her credibility was not significantly challenged, and her asking for a shift change in order to avoid ongoing snide remarks by a co-worker is a significant impact in a workplace that depends upon close communication between its employees. In addition, two other, new co-workers felt compelled to reassure Miller that "it's just Bonnie" after overhearing the remark.

Leslie's alleged actions toward Miller are consistent with a pattern of failing to maintain satisfactory co-worker relationships. In 2004, a previous supervisor assessed a verbal reprimand against Leslie for failing to maintain satisfactory co-worker relations, [Exhibit 13]; she received a "needs improvement" rating in 2006 under the category of co-worker relationships; and in March 2010 Leslie was reprimanded for bad-mouthing management and co-workers during a live radio call to Denver Police. [Exhibit 11-2, 11-3]. That incident involved supervisors prior to Culverhouse and Bruton, negating Leslie's argument that Culverhouse, Bruton or both were motivated by some wrongful prejudice. Based on Miller's credibility and Leslie's history, this instance of failure to maintain satisfactory co-worker relations is established by a preponderance of the evidence.

2. Are you going to leave again? The Agency contended Leslie failed to maintain a satisfactory working relationship with Brett on October 16, 2010, based on her asking if he was going to leave his station again that night. Leslie countered she was joking with Brett and the rest of the Communications Center the day before, and that she did not intend to be rude.

Brett testified that, on October 16, 2010, immediately prior to Leslie beginning her shift at 10:00 p.m., Herrera and he were handling a call regarding a vehicle that broke through a tollgate arm, struck another vehicle, and was left abandoned. According to Brett, when Leslie started her shift, she asked Brett if he was going to stay for the last hour of his shift, inferring her disapproval of his departure the night before to get dinner.

Brett found her comment was rude, and he “could tell by the undertone in her voice that she was not joking.” Herrera reported the next day she found the comment was out of place. In her pre-disciplinary meeting written response, Leslie stated October 15, 2010 was a slow night, and the midnight shift crew was in a good mood, making jokes and comments regarding frequency of one of the crew’s restroom breaks, when she made a similar joke to Brett about getting up to take a break to eat dinner.

While Brett’s complaint could be attributed to an overly sensitive, new employee feeling defensive about his mistakes, the addition of Herrera’s vindication of Brett’s observation, and the consistency of the allegation here when compared with Leslie’s history of sarcastic comments, prove this violation by a preponderance of the evidence.

3. Doesn’t play well with others. Another piece of evidence the Agency found to constitute a violation under this rule was Leslie’s alleged admission that she told Brett she did not want to work with anyone because she does not get along well with others. Leslie denied making this statement in her pre-disciplinary response and at hearing. Neither was more convincing than the other. The Agency did not provide any corroborating evidence, nor did Brett mention the incident at hearing. The testimony of Peter Smith tipped the scales toward Leslie. Smith has been an AED for two years, and worked frequently on the night shift with Leslie. When asked “did she [Leslie] seem like she didn’t want to work with other people?” Smith did not hesitate, responding, “[t]he opposite. She works very well with everybody, and she tried to keep people aware of changing trends, and policy and procedure, and [was] very useful and helpful.” Smith’s testimony was unchallenged. Under this rule, when equally credible testimony of the actors offset, then, in the absence of corroborating evidence for the agency, and where the only independent testimony tended to rebut the agency’s allegation, a violation remains unproven.

4. Unnamed accuser. The Agency asserted that, on January 3, 2011, “Supervisor Culverhouse was approached by an employee who expressed concerns regarding [Leslie’s] behavior. The employee felt that [Leslie] was treating some of the new employees, Brett in particular, unfairly, unkind[ly], and may be singling them out. The employee stated they had approached you regarding this behavior, expressed their concern and asked for you to be understanding with the new employees.” [Exhibit 1-5]. Leslie denied being approached by anyone concerning any recent incident before the Agency’s contemplation letter, and the Agency failed to introduce the speaker, or any additional evidence in support of these allegations.⁵ This evidence lacks sufficient indicia of reliability and specificity to find Leslie violated CSR 16-60 O.

5. What kind of sex assault? The Agency asserted Leslie failed to maintain a satisfactory working relationship with Miller on November 5, 2010 when, in response to

⁵ Exhibit 26 is a letter from Ashley Herrera to Diane Culverhouse, evidently written in response to Culverhouse’s widespread inquiry for possible negative incidents involving Leslie. Herrera’s letter describes Leslie’s behavior toward Brett on one occasion, but the Agency did not allege Herrera was the mystery employee. In addition, Herrera’s letter, dated November 9, 2010, predates the mystery employee’s complaint by nearly two months..

Mancuso's question, she stated she didn't know what kind of sex assault it was, and that no one provided further identifying information. Miller, overhearing Leslie's statement, repeated her previous statement "they did not say what kind of sex assault it was, verbal or physical." Leslie countered she did not misrepresent the information provided, and passed on accurate information from her briefing with Miller. She also denied that she was trying to get Miller in trouble with Mancuso.

Bruton testified she based her decision to assess discipline under this rule "on how the employee feels and how they felt they were being treated." The standard for analyzing a violation of CSR 16-60 O., is objective and is not defined by the feelings of the affected individual. Thus, an employee violates CSR 16-60 O., vis-à-vis a co-worker, by conduct the employee reasonably should know would be harmful to the coworker, or reasonably should know the conduct would have a significant, negative impact on the employee's working relationship with the co-worker. Stated another way, would a reasonable person standing in the place of the employee have known her conduct would be harmful to the co-worker, or have a significant impact on her working relationship with that co-worker? In re Burghardt, CSB 81-07A., 2, 3 (8/28/08), reversing In re Burghardt, CSA 81-07, 5 (3/28/08).

In view of this standard, although Miller felt that Leslie's statement conveyed that she (Miller) didn't know what she was doing, Miller's feelings do not establish a violation. Leslie repeated to Mancuso, almost verbatim, what Miller told her. There was conflicting testimony about Leslie's tone. Without more, it is not possible to determine Leslie's statement would have apprised a reasonable employee that her statement would have a negative impact on Miller or damage their relationship. This incident does not establish a violation of CSR 16-60 O.

G. CSR 16-60 S. Unauthorized Leave

This rule is violated by an absence that is unauthorized under a departmental or career service rule. In re Dessureau, CSA 59-08, 8 (1/16/08). Since this rule is intended to prevent patterns of absenteeism and leave abuse, the Agency may consider all unauthorized absences in determining whether there has been a violation of this disciplinary rule. In re Salazar, CSA 66-08, 7 (12/26/08).

The Agency asserted Leslie violated this rule when she requested intermittent FMLA leave to bring her mother home from the hospital on November 13, 2010. The Agency found she had already exhausted the physician's estimate of one to three FMLA absences per month for November, including (1) her absence on November 3; (2) her one-hour absence at the end of her shift November 10-11; (3) and her entire shift on the night of November 11-12 when she took her mother to the emergency room. According to the Agency, her request on November 13, for FMLA leave to take her mother home and care for her, would have been an impermissible fourth instance of intermittent FMLA leave during one month.

The Agency further found Leslie had exhausted her sick leave bank, and refused her alternate request for emergency leave because she failed to provide documentation of a qualifying emergency. Consequently, the Agency coded Leslie's

November 13 absence as 10 hours (1 shift) of unauthorized leave. There are significant problems with the Agency's position. First, even assuming the limitation of intermittent FMLA leave to three days per month was proper, the Agency's count was inaccurate. Second, and with more profound ramifications, the Agency's limitation of intermittent FMLA leave to the number of estimated instances is an incorrect application of law. The next paragraphs discuss those issues in turn.

1. The November 2010 count of FMLA-related incidents.

Subject to a supervisor's approval and appropriate staffing, the Career Service Rules permit employees who are required to work on City holidays to take eight hours paid leave on another day during the same week as the holiday. [CSR 10-54 A]. Thus, Leslie was within her rights to request one hour of holiday leave at the end of her shift ending November 11. [CSR 10-52 B; 10-55 B.4.] The Agency may have assumed Leslie's request was FMLA-related, in light of her other requests for FMLA leave that month, but the Agency's evidence did not contradict Leslie's testimony that her request for one hour leave on November 11 was not FMLA-related, and the circumstances, described above, support her assertion. Consequently, the propriety of the Agency's coding of Leslie's absence as FMLA-related for the morning of November 11 was not proven.

Even assuming the propriety of the Agency's limitation of FMLA leave to three instances per month, Leslie's request for FMLA leave on November 3 was her first request, her request for absence from her November 11-12 shift, to take her mother to the emergency room, was her second request, and her request for FMLA leave on November 13, to take her mother home and care for her, was her third request, and not her fourth, as alleged by the Agency. The consequence of the mistake must be held against the Agency, not Leslie. "Leave granted under circumstances that do not meet FMLA's coverage, eligibility, or specified reasons for FMLA-qualifying leave may not be counted against FMLA's 12-week entitlement." Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 96 (2002).

Moreover, Leslie's supervisor did not testify, and the Agency otherwise failed to rebut Leslie's assertion that her request to leave one hour early was unrelated to her intermittent FMLA. Had Leslie's supervisor believed her request was FMLA-related, the supervisor could have inquired further to determine if the reason was FMLA-qualifying, but he did not, and the Agency failed to investigate further.

2. The Agency's limitation on intermittent FMLA leave.

More importantly, the Agency's limitation of intermittent FMLA leave to the number of estimated instances, was flawed. The form provided by the Agency to physicians, in which the physician estimates the number and duration of FMLA-qualifying absences is just that: an estimate. The Agency's apparent reliance on the estimate as establishing an absolute limit was misplaced under the FMLA for the following reasons.

First, some background. The Career Service Rules regarding FMLA policy do not address intermittent leave in detail, but the Rules provide that leave policy "is intended to comply with and be interpreted consistent with the FMLA and its corresponding

regulations. To the extent an issue is not addressed herein, the FMLA and its corresponding regulations shall govern." CSR § 11-150. The relevant law governing intermittent FMLA leave follows.

First, "it is the employer's responsibility to determine when FMLA leave is appropriate, to inquire as to specific facts to make that determination, and to inform the employee of his or her entitlements." Xin Liu v. Amway Corp., 347 F.3d 1125, 1134 (9th Cir. 2003)(emphasis added). The regulations governing application of the FMLA provide, in pertinent part, that leave may be taken intermittently, when medically necessary, to provide care for a covered family member, whether for planned or unanticipated treatment of a serious health condition. 29 CFR 825.202(b). By definition, "intermittent leave" is FMLA leave taken in separate blocks of time due to a single qualifying reason. 29 CFR 825.202(a).

When the employee's covered family member has a chronic health condition, for which the employee's intermittent leave is approved, leave commences upon the occurrence of the first absence caused by that condition, and it extends to cover every other absence caused by that condition during the same twelve-month period. Further, a series of absences, separated by days during which the employee is at work, but all of which are taken for the same medical reason, subject to the same notice, and taken during the same twelve-month period, comprises one period of intermittent FMLA leave. Davis v. Michigan Bell Telephone, 543 F.3d 345, 350-51 (6th Cir. 2008). Therefore, an employee who is entitled to take intermittent FMLA leave to provide care for a covered family member may take leave consistent with the physician's estimate of care that will be required, up to the twelve-week limit within a twelve-month period.

The FMLA also permits an employer to require an employee to provide subsequent re-certifications, in connection with an employee's absences, "on a reasonable basis." 29 U.S.C. § 2613(e). The Regulations further define what constitutes "reasonable" in requiring recertification, as follows:

(a) 30-day rule. An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) apply.

(b) More than 30 days. If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies... In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent...leave for a period in excess of six months (e.g., for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

(c) Less than 30 days. An employer may request recertification in less than 30 days if: (1) the employee requests an extension of leave; (2) circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications)...; or

(3) the employer receives information that casts doubt upon the continuing validity of the certification...

29 C.F.R. § 825.308(b)(2) and (c)(1)(2) and (3)).

An employer may satisfy any doubt regarding the validity of an employee's absences for their FMLA-qualifying reason, as part of a request for recertification, where the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern. 29 CFR 825.308(e).

Applying these standards in the present case, even if Leslie was absent three times during November for qualifying reasons, the Agency was required to approve additional reasonable requests, as long as she had not exhausted her twelve-week entitlement in its entirety, under her current certification. As described above, an agency is limited as to the frequency with which it may request recertification, by the duration and circumstances of the leave certified. Since the medical certification was not in evidence, the specified period covered by the certification for Leslie's intermittent FMLA leave was unclear, making it impossible to determine if the Agency could have requested a recertification based on the estimated duration of her mother's medical condition. The Regulations allow an employer to request recertification, regardless of the minimum duration of the condition, where 1. the employee requests an extension of leave, 2. there is a significant change in circumstances, or 3. there is new information regarding validity of certification.

The Agency did not request recertification, nor could it have, under the circumstances. First, Leslie did not request an extension of leave, where her certification allows her to take leave intermittently, based on her mother's needs. Intermittent leave is a single twelve-month period of leave containing a series of absences. Second, even if Leslie had been absent for FMLA-qualifying reasons three times before November 13, it would have been unreasonable for the Agency to request recertification, where the frequency and duration specified on the certification form is an estimate. The difference between three and four incidences in one month is not significant enough to allow the Agency to request recertification. Third, the Agency did not assert it had received any information regarding the validity of any of Leslie's FMLA-qualifying absences.

Since the Agency's only evidence of Leslie's allegedly unauthorized leave was her absence on November 13, 2010, but Leslie fully rebutted the Agency's claim, and the law on FMLA otherwise supports Leslie's request, the Agency failed to establish a violation of this rule.

V. DEGREE OF DISCIPLINE

Under the Career Service Rules, an agency is bound to assess discipline in a manner designed to correct inappropriate behavior if possible. CSR 16-20. In that regard, the measures used by the agency to determine the appropriate level of discipline consist of: the severity of the offense; the employee's past record; and the penalty most likely to achieve compliance with the Rules. *Id.*

The Hearings Office is the first level of appellate review of matters specified by, and pertaining to, the Career Service Rules. In matters of discipline, hearing officers first review whether the agency met its obligation to prove, by a preponderance of the evidence, that the appellant breached any of the Career Service Rules cited by the agency. If a hearing officer finds the appellant breached one or more cited Rules, then, in reviewing the degree of discipline assessed by the agency, a different level of review is required, and has been stated as follows. The hearing officer must not disturb an agency's determination of the degree of discipline unless the decision was clearly excessive or based substantially on considerations which are not supported by the preponderance of the evidence. City and County of Denver v. Weeks, No. 10CA1408, at *11 (Colo. App. Oct. 13, 2011)(*add'l citation omitted*). Under the watchful eye of the clearly excessive/unsupported evidence standard, we turn to the measures governing the Agency's determination that termination was the appropriate level of discipline.

A. Severity of proven offenses

The Agency terminated Leslie for her present and past deficiencies in performance, interpersonal relationships, and attendance. Bruton, who was the decision maker in the termination of Leslie's employment, did not state she found one of those three areas to be more egregious than the others. Thus, I consider the Agency's view of the alleged violations was approximately equal.

Under the category of performance, the Agency proved one of four incidents of carelessness under CSR 16-60 B., and one incident of failing to follow written Agency guidelines under CSR 16-60 L. Both violations were based upon the same event, the lavatory truck incident, for which Leslie admitted responsibility. Even though Leslie failed to code the incident correctly as an auto accident with injury, the violation was not egregious since she dispatched needed medical help. None of the other rule violations were proven, including CSR 16-60 A., three incidents under 16-60 B., 16-60 K., or three incidents under 16-60 L. The lav. truck incident, alone, was not sufficiently egregious to justify termination.

In the category of interpersonal relationships, the Agency failed to prove a violation under the more inherently egregious CSR 16-60 M., threats, fighting, intimidation, or abuse. Under CSR 16-60 O., failure to maintain satisfactory working relationships, the Agency proved two of the five incidents in question. The proven violations involved two new employees, Miller and Brett. Neither incident was termination-worthy and, but for the need for close communication in the Comm. Center, the incidents may not have constituted any rule violation in another setting. In that regard, it is important to note neither Miller nor Brett mentioned their hurt feelings to Leslie or to a supervisor at the time of the incidents. Also, once Culverhouse asked for and received complaints about Leslie's interactions with Brett and Miller, the Agency took no action from the time it received the complaints - between October 2010 and January 2011, - until its contemplation letter in May. [Exhibits 24; 25; 26]. These facts indicate Brett, Miller, and even the Agency, when notified, did not consider the incidents sufficiently egregious to justify acting on them at the time.

Regarding Leslie's allegedly unauthorized leave, the Agency failed to prove Leslie violated any attendance rule. To the contrary, it appears the Agency prevented Leslie from asserting her right to legitimate leave under the Career Service Rules.

Finally, but significantly for purposes of the degree of discipline, Bruton and Culverhouse testified at hearing that, with respect to the "what kind of sex assault" incident, [pp.14-15, above], Leslie was being dishonest because she was notified about the nature of the assault, yet claimed, by her remark, that she was not notified. Bruton stated she considered this "dishonesty" in assessing discipline, [Bruton testimony], yet, dishonesty was not alleged as a CSR violation. Alleging misconduct, in the absence of an underlying violation, is an impermissible use of the disciplinary process under the Career Service Rules. Such a practice fails to notify an employee what conduct was considered by the Agency in assessing discipline, thus depriving the employee of the opportunity to defend against the allegation. Consequently, no weight was lent to that evidence for any purpose.

B. Past record

Leslie's prior disciplinary history includes the following:

1. a written reprimand in March 2010 for careless performance and failure to maintain satisfactory relationships;
2. a verbal reprimand in 2005 for failure to maintain situational awareness;
3. a verbal reprimand in 2004 for failure to maintain a satisfactory relationship with a co-worker.

The evidence in the present case established that careless errors occur frequently in the Communications Center, particularly when, as frequently happens, the caller provides inaccurate or insufficient information, but Agency employees work to correct those errors as quickly as possible. Leslie's errors do not appear to have exceeded the kind or frequency of errors made by her peers. Her work reviews have stated "Bonnie dispatched utilizing SOP's and prioritizes emergencies well" and that she "excels at taking calls and asking appropriate and relevant questions to gather all pertinent information," as well as being "an efficient dispatcher." [Exhibit J-3].

With respect to interpersonal relationships, Leslie's work history includes several recorded incidents over the past 7 years. She was also "written up" and counseled on several occasions. While the record contains a pointedly-familiar complaint about Leslie, that she berates new employees, [Exhibit 10-11], that incident occurred in 2004, and therefore does not indicate a persistent pattern of such conduct. Notably, Leslie's record of past counseling,⁶ is otherwise devoid of incidents other than those already discussed above, thus the Agency's claim that it has counseled Leslie "constantly" over the years, is not indicated by its evidence. Nonetheless, Leslie's failure, over time, to rein in her condescending communications, when she perceives someone else to be in error, is significant, and deserving of progressive discipline, but not termination.

⁶ The written record of verbal counseling is now known as Supervisor's Situation Record (SSR), while they were previously designated as "contact notes." [Exhibit 10].

C. Penalty most likely to achieve compliance

This final component of discipline, while often the most difficult to ascertain, infers two weighty questions which underlie all discipline under the Career Service Rules: was the proven violation so egregious as to merit dismissal regardless of other factors? If not, can this employee reasonably be rehabilitated into compliance? [See CSR 16-20]. The proven violations, for reasons as stated above, were not so egregious as to merit termination. The most serious proven violations were relatively minor communications style issues that have not been corrected.

Leslie testified, with apparent sincerity, that she understands her communication style shortcomings and can and will correct them. On the other hand, her counseling and disciplinary history suggest she has not corrected this shortcoming. Bruton properly asserted that an AED is required to work as part of a team, and needs to have open and honest communication because, if communication is lacking, it prevents Agency employees from performing their job duties to the best of their ability to maintain public safety when managing safety events at DIA. The evidence concerning Leslie's 12-year tenure at DIA shows she was, overall, a very proficient AED with an occasional tendency toward undue sarcasm, the full consequences of which she has not yet assimilated.


Given the failure of the Agency to prove most of the equally-weighted violations, and its failure to determine Leslie is incapable or unwilling to change her communication style with co-workers, the Agency's choice of discipline was based substantially on considerations which are not supported by the evidence, and was therefore excessive.

Previous discipline, at the level of a written reprimand, failed to correct, permanently, the improper behavior, but the present violations, both in communication and performance, were relatively minor. In the absence of more egregious circumstances, no more than a short suspension can be supported in the current case by the progressive discipline model.

VI. ORDER

The Agency's decision to terminate Leslie's employment on February 21, 2011 is MODIFIED TO A FIVE-DAY SUSPENSION.

DONE December 5, 2011.



Bruce A. Plotkin
Career Service Hearing Officer