THE MATTER OF THE APPEAL OF:

KRISHNA COLQUITT, Appellant,

v.

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

The hearing in this appeal was held on September 15, 2015 before Hearing Officer Valerie McNaughton. Appellant was present and represented herself. Assistant City Attorney Andrea Kershner represented the Agency. The Agency called Maria Lujan and Larraine Archuleta as witnesses, and Appellant testified on her own behalf.

I. STATEMENT OF THE APPEAL

Krishna Colquitt appealed a three-day suspension imposed July 1, 2015. Appellant also filed claims of discrimination and retaliation for her use of family medical leave. Agency Exhibits 1 and 3 were admitted as evidence. Appellant's Exhibit C was also received into evidence.

II. FINDINGS OF FACT

Appellant was hired by the Agency in 2005, and has served as an Eligibility Technician II with the Family and Adult Assistance Division since 2008. The challenged three-day suspension was imposed for missing mandatory overtime scheduled for May 16, 2015 from 8 am to 2 pm. It also alleges that Appellant's two explanations for her absence were contradictory and therefore dishonest. [Exh. 3.] Appellant admits she missed work on that date, but challenges the conclusion that she was dishonest in her explanations about her absence.

The Family and Adult Assistance Division handles claims for food and other public assistance to low income households, and must do so under strict deadlines or risk monetary penalties from the state. In prior years, mandatory overtime was used to finish applications that had passed the processing deadline. In the spring of 2015, the Agency ordered overtime to handle backlog rather than late applications. The May overtime was scheduled to process supplemental benefit redeterminations, called RRRs. Employees were given a choice of working either May 9th or 16th. [Archuleta, 9:30 am.]

In early May, Appellant's uncle died. His funeral was initially set for May 9th, the date Appellant had selected to work her overtime. With her supervisor’s permission, she
rescheduled the overtime for May 16th. At the last minute, the funeral was postponed until May 16th. On Monday, May 11th, Appellant informed supervisor Maria Lujan that she could still work four hours of her overtime, but would leave at noon to attend the 1:30 pm funeral. Later that week, Appellant’s partner Donald was diagnosed with diabetes. On Friday, Appellant took family medical leave to receive her periodic iron infusion for a chronic condition. She was not feeling well on Saturday morning, and Donald was also sick. Appellant went to her truck to leave for the overtime session, and found she had a flat tire. She concluded that if she took the bus, she would arrive only in time to do a few hours of work before she had to leave for the funeral. The flat tire was the last straw, and Appellant went back to bed, forgetting to call work to report that she would not be in. Appellant attended her uncle’s funeral at 1:30 pm that day. [Exhs. 1, C.]

The following Monday, May 18th, Appellant told her other supervisor, Brian Yauk, that she was not at work on Saturday because she had a flat tire, was dealing with a death in the family, and was not feeling well. The next day, Yauk told Lujan about his conversation with Appellant regarding her absence. Lujan immediately met with Human Resources to discuss the possibility of discipline. On Wednesday, May 20th, Lujan met with Appellant to ask about her failure to work overtime. Appellant told Lujan that when she went outside to go to work, she found a nail in her tire. Donald was sick, and Appellant went back to bed. Lujan reminded Appellant that overtime was mandatory, and said there may be discipline. The following day, Appellant brought Lujan a doctor’s note that said Appellant was unable to work on Saturday because of illness. [Exh. 3-3.] Based on that note, Lujan believed Appellant was offering conflicting reasons for her absence, and began the disciplinary process. [Lujan, 8:54 am.]

At the pre-disciplinary meeting, Appellant stated that she is aware that mandatory overtime is important, and has “worked plenty of them.” She had not thought to call in on Saturday because she had a flat tire, was dealing with a death in the family, and was not feeling well. The next day, Yauk told Lujan about his conversation with Appellant regarding her absence. Lujan related that her uncle’s funeral was re-set for 1:30 pm that day, but she agreed to work four hours from 8am to noon. Her partner was diagnosed with diabetes, and he was sick on May 16th. Appellant was still feeling unwell from her iron infusion administered the previous day. Appellant then discovered the truck had a flat tire. Out of frustration, Appellant returned to the house and went back to bed, forgetting to call work and report her absence. Appellant stated that she later went to her uncle’s funeral, and produced the funeral notice. She added that she totally understood that the overtime was important, but hoped her supervisors would consider the circumstances she faced that day, and not impose discipline for the absence. [Exhs. 1, C.]

Ms. Lujan testified that Appellant had not mentioned being ill when they first talked. She felt that Appellant’s two statements presented “different scenarios.” Lujan described Appellant as one of her biggest producers. “I do have faith in Krishna. When she’s asked to produce, she does.” When she didn’t call in, “I did lose a little confidence in Krishna.” [Lujan, 9:05 am.]

The average redetermination takes 30 to 45 minutes to complete. Thus, eight to ten families could have been impacted to some extent if Appellant had worked six hours that day. [Exh. 3-2; Lujan, 9:02 am.] However, Appellant was scheduled to work only four hours that day because of her uncle’s funeral. Her need to take the bus to work and the funeral would have further reduced Appellant’s work time.
Division Director Lorraine Archuleta was the decision-maker in this case. Archuleta found that Appellant's absence was unauthorized, and that she did not follow the policy requiring employees to call in if they miss work. Archuleta determined that Appellant neglected her duty to perform mandatory overtime, failed to obey an order, and failed to perform work, in violation of CSR §§ 16-60 A and J. She also concluded that Appellant failed to meet standards of performance in her Performance Enhancement Plan (PEP) as well as the handbook’s directive to work her assigned overtime, in violation of §§16-60 K and L. Archuleta deemed Appellant’s absence to be unauthorized under §16-60 S, a failure to maintain satisfactory work relationships under §16-60 O, and conduct prejudicial to the Agency under §16-60 Z.

Finally, Archuleta found that Appellant’s explanations for her absence were dishonest, in violation of §16-60 E.3. [Archuleta, 9:25 am.] In Archuleta’s opinion, Appellant gave various inconsistent reasons for her absence: an issue with her car, her boyfriend's inability to help because of his illness, her uncle's funeral, and her own illness. These were dishonest because “her story kept changing.” [Archuleta, 9:24 am.] The Deputy Director testified that there could have been harm to families whose benefits may have been delayed, harm to the Agency's credibility, and/or an increased burden on her co-workers arising from her failure to work that Saturday. She considered Appellant’s past discipline: a written reprimand ten years ago and a temporary reduction in pay in 2008 for misuse of email and the internet. Archuleta considered termination, but imposed a three-day suspension based on Appellant’s long and successful history as a top producer for the Agency. [Archuleta, 9:34 am.]

Appellant testified that she has worked for the Agency for ten years, and performed all mandatory overtime except the one scheduled for May 16th. She is recognized as a fast and efficient technician who worked late hours and extra overtime to enable the Agency to increase its compliance rate with state performance measures. That Saturday, an emotional week caught up with her when her uncle’s death, her partner’s diabetes diagnosis, her own reaction to a medical injection and a flat tire caused her to give up and go back to bed without calling her supervisor. She decided not to take the bus to work, since she was only scheduled to work until noon because of the funeral. [Appellant, 9:49 am.]

Appellant believes the discipline should have been no more than a written reprimand based on her failure to report to work. Appellant testified that she does not make much more than her public assistance clients, and the loss of three days' pay caused real suffering to her family. Appellant denied she was inconsistent in her explanations, maintaining that all of the events she reported actually occurred, and all contributed to her decision to miss work. The Agency’s conclusion that she was dishonest, disrespectful and unprofessional led Appellant to believe that, the Agency does not reciprocate her loyalty when she experiences problems, despite her long history of good work. As a result of this discipline, Appellant declared, "I don't want to work in a unit where they don’t trust me." [Appellant, 9:49 am.]

III. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and to show that a three-day
suspension was within the range of discipline that can be imposed under the circumstances. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Appellant has the burden of proof on her retaliation and discrimination claims. In re Morgan, CSA 63-08, 9 (4/6/09) citing C.R.S. 24-4-105 (7).

1. Failure to work mandatory overtime

The Agency claims that Appellant's absence on May 16th from scheduled overtime violated seven career service rules: CSR §§16-60 A, J, K, L, O, S and Z.

Neglect is proven by an employee's failure to perform a known duty. In re Gutierrez, CSB 65-11 (4/4/13). Appellant does not dispute that she knew she was required to work one of two overtime days, and that she failed to work on her scheduled day, May 16, 2015. The Agency therefore established that Appellant neglected her duty to perform mandatory overtime in May.

The Agency claims that the same conduct violated both subsections of §16-60 J by her failure to observe the order to work overtime, as well as failing to process the RRRs scheduled for that day. The first section requires evidence that she willfully disobeyed a reasonable order: here, Archuleta's order to work overtime. Appellant's decision not to go to work on May 16th was intentional and not in conformity with that order. See In re Abbey, CSA 99-09, 8 (8/9/10); In re Rodriguez, CSA 12-10, 7-8 (10/22/10). Based on that same evidence, Appellant failed to perform the work set up for that date. Additionally, the absence proves Appellant violated the agency handbook directive to be at work as scheduled or call in an absence under §16-60 L, and was an unauthorized absence under §16-60 S.

The Agency also argued that Appellant's absence was a failure to meet her performance standards, but it presented no evidence that her failure to work that day placed her performance below those standards. The disciplinary letter cites to all of Appellant's job duties in her PEP. The evidence did not support that allegation by showing that Appellant failed to meet any of them by virtue of her absence. Her supervisors acknowledge that Appellant is one of their best technicians, and the Agency did not rebut Appellant's testimony that she easily makes up the work caused by her infrequent absences. [Appellant, 9:50 am.] The Agency failed to meet its burden to prove Appellant fell short of any specific performance standard under §16-60 K. See In re Mounjim, CSA 87-07, 13 (7/10/08).

Next, the Agency claimed but did not prove that Appellant's absence caused harm to her working relationship with others, in violation of §16-60 O. Lujan testified that she was disappointed by Appellant's absence, but she still has faith in her. Finally, it is alleged that Appellant violated §16-60 Z because her absence caused actual injury to its mission or the City's reputation. In re Jones, CSB 88-09, 3 (9/29/10). No evidence was presented of any such harm. At best, Archuleta stated there could have been harm if a family's payments were delayed. [Archuleta, 9:36 am.] As noted by the Career Service Board, if this rule were to require only potential harm without an objective standard, it "would offer City employees no guidance as to how their conduct will be measured" under this rule. Id.
2. Dishonest statements to supervisors regarding absence

An employee violates § 16-60 E by a knowing misrepresentation made in the employment context. In re Rodriguez, CSA 12-10, 7 (10/22/10). The Agency claims Appellant’s explanations for her failure to perform mandatory overtime changed from a flat tire on Wednesday to an illness on Thursday, proving dishonesty because “her story kept changing.” [Archuleta, 9:24 am.] The only evidence presented to support this charge is that Appellant did not mention feeling ill when she spoke with the second supervisor four days after her absence.

It is undisputed that on the Monday following Appellant’s absence, she told supervisor Yauk she had a flat tire, wasn’t feeling well, and was dealing with a death in the family. [Lujan, 8:51 am.] The Agency itself submitted evidence that Appellant told Yauk about her illness as soon as she returned. [Lujan, 8:52 am.] Lujan testified that she met with Yauk the next day, and he informed her about Appellant’s absence. Where Appellant has two supervisors and one is out on leave, Appellant could reasonably expect that her explanation to one of the supervisors, Yauk, would be shared with the second supervisor, Lujan. Lujan testified that Appellant told her on Thursday that she had been ill on Saturday. [Lujan, 8:57 am; Exh. 1.]

Appellant does not deny omitting a reference to her own health when she spoke to Lujan on Wednesday. She argues however that the Agency knew about her iron infusion on Friday, and that Lujan was or should have been aware that it often leaves her weak and nauseous. For the past nine years, Appellant has received regular medical injections, and experienced post-treatment symptoms for hours or days. [Appeal, Atch. 1.] She also challenges the Agency’s finding that her statements were conflicting or dishonest, since all of the events she recounted during her three conversations with her two supervisors actually happened.

The Agency did not rebut Appellant’s consistent evidence that her absence was due to a number of circumstances, and did not offer Yauk’s testimony in an effort to contradict Appellant’s evidence. The Agency also did not dispute Appellant’s statement that she has missed no other overtime sessions, or present any other support for its conclusion that a minor omission by a long-term, competent employee established intentional deception.

The Agency was on notice of Appellant’s illness as of Monday, May 18th, based on her conversation with Yauk. Appellant’s failure to repeat all of those reasons to her second supervisor two days later does not support a finding of dishonesty. Her employment history demonstrates reliability and competence. Under these circumstances, the Agency’s conclusion that Appellant was being dishonest by omitting that information in her Wednesday conversation with Lujan was unsupported by the evidence. Based on all of the evidence, I find that the Agency failed to meet its burden to prove Appellant’s statements regarding her absence were dishonest.

3. Penalty

This suspension was based on two separate acts: Appellant’s absence on May 16th and her allegedly dishonest statements to supervisor Maria Lujan. The decision-maker testified that she found Appellant’s inconsistent explanations to be
"concerning." Archuleta testified that her finding of dishonesty had "a significant impact" on the penalty imposed. [Archuleta, 9:39 am.] As determined above, the evidence did not establish that charge. Appellant engaged in no deception when she immediately told one supervisor about her illness and all other reasons for her absence, but omitted reference to her illness two days later when explaining the same circumstance to a second supervisor.

The Agency did prove that Appellant's absence violated §§16-60 A, J, L and S. However, an agency may not increase the level of discipline if the same conduct supports more than one rule violation. Since the purpose of discipline under the Career Service Rules is to correct inappropriate conduct, an agency's penalty "depends on the gravity of the offense", not the number of rules into which the offending conduct may fall. "The degree of discipline shall be reasonably related to the seriousness of the offense." CSR §16-20. In the federal merit system, it has been held that "it accords with basic notions of fairness" to "let the punishment fit the [offense]". Ward v. Brown, 22 F.3d 516, 517 (2nd Cir. 1994). See also In re Ford and Lewis, CSA 48-14, 20 (3/19/15) (penalties for conduct that violates a number of rules must run concurrently where the discipline system prohibits "stacking" penalties); and Shiflett v. Dept. of Justice, 98 MSPR 289, 292 (2005) (charges based on the same incident and essentially the same conduct should be brought as one charge). Thus, when the same conduct proves the essential elements of several charges, those charges are considered as one for purposes of gauging the seriousness of the underlying misconduct during the penalty determination. For this reason, all rule violations stemming from Appellant's absence are here treated as one violation.

The three-day suspension was also based on the Agency's finding that Appellant was unprofessional and disrespectful, and therefore threatened the Agency's mission to serve "the dire need of DHS' vulnerable clients." [Exh. 3-3.] As found above, the Agency did not prove any harm to its clients as a result of Appellant's absence. The Agency also failed to show Appellant created "an extra burden" on her co-workers, another factor given considerable weight in Archuleto's penalty analysis.

A penalty must be based on proven misconduct. Where the agency's penalty is not supported by the evidence, the penalty must be re-assessed to determine whether it is appropriate based on the proven offense and the purpose of discipline. CSR § 16-20; In re LaCombe, CSB 10-14 (7/14/15). With the failure of proof on the dishonesty claim, the penalty must be re-calibrated to fit the actual offense committed. Compare LaChance v. Merit Systems Protection Bd., 147 F.3d 1367, 1374 (Fed. Cir. 1998) (holding that in an appeal of discipline under the federal merit system, a penalty must be mitigated to the maximum reasonable penalty where not all asserted misconduct is sustained).

The Agency's penalty relied on its conclusion that Appellant had denied service to its vulnerable clients and created an extra burden on her co-workers, but the evidence did not prove the claimed harm. It found dishonesty based on evidence a reasonable person would not have considered as adequate to support that finding. It did not consider the most relevant evidence that there was no intent to deceive; the fact that Appellant had told her other supervisor about her illness as soon as she returned to work. It did not give adequate consideration to several factors relevant to the level of penalty needed to correct the misconduct. Among those factors are
Appellant’s long history of good performance, her status as one of the Agency’s top producers, her lack of either recent or relevant discipline, and her history of attending and volunteering for overtime.

The Agency acknowledges that Appellant is a dedicated and highly efficient technician in a job crucial to the success of the Agency. Her two disciplinary actions occurred seven and ten years ago. Appellant stated she understood the importance of overtime at the pre-disciplinary meeting and at hearing. She has continued to perform well for the Agency and its clients, even after this discipline. The unfortunate series of events leading to her absence certainly mitigate the seriousness of her conduct. In light of all of these relevant factors, I find that the Agency’s penalty was a clear error of judgment, and a written reprimand is the appropriate penalty for the only proven wrongdoing. See Motor Vehicle Manufacturers Assn v. State Farm Mutual Auto. Ins. Co., 463 US 29, 43 (1983).

4. Retaliation claim

Appellant argues that this discipline was imposed in retaliation for her use of family medical leave. The appeal states that Appellant has been approved for such leave since 2006, and has used it about twelve times a year since that time. [Appeal, Atch. 1.] Appellant presented no evidence that the Agency considered Appellant’s use of family medical leave in its disciplinary decision. The passage of almost ten years between her first exercise of this right and the asserted act of retaliation is highly persuasive that her use of leave was not a causal factor in the discipline. Appellant failed to meet her burden to establish that the Agency retaliated against her for exercising her rights under the Family Medical Leave Act.

5. Discrimination claim

Appellant also appears to claim that the discipline was motivated by her use of family medical leave. This does not allege a protected status such as age or disability, as needed to prove the first element of a discrimination charge. In re Owens, CSA 139-04, 9 (3/31/05), citing McDonnell Douglas v. Green, 411 U.S. 792 (1973).

Order

Based on the foregoing findings of fact and conclusions of law, the following orders are entered:

1. The three-day suspension imposed on July 1, 2015 is modified to a written reprimand.

2. The retaliation and discrimination claims are dismissed as unproven.

Dated this 30th day of October, 2015.

Valerie McNaughton
Career Service Hearing Officer