

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

Consolidated Appeals Nos. 56-03 and 57-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEALS OF:

STEVEN ESSES and MICHAEL FUHRIMAN, Appellants,

Agency: DENVER HEALTH AND HOSPITAL AUTHORITY.

Hearing Officer Joanna Lee Kaye held a hearing in these matters, consolidated for hearing, on August 4 and 18, 2003 in the Career Service Hearings Office. Mark Wiletsky, Esq. represented the Denver Health and Hospital Authority (DDHA or Agency). Denver Public Health Nursing Operations Manager James Bock served as advisory witness for the Agency. Steven Esses was present and was represented by Cheryl Hutchison of the American Federation of State, County and Municipal Employees. Michael Fuhriman was present and represented himself.

MATTER APPEALED

Mr. Esses and Mr. Fuhriman (Appellants) are Denver Health and Hospital Authority employees under the CSA personnel system. They challenge the Agency's decision to deduct hours lost because of the clinic's closure on the day of the Blizzard of March 19, 2003 from their vacation leave banks.

For the reasons set forth below, the Agency's action is REVERSED.

ISSUE

1. Whether the Agency properly applied PP #4-124, when it charged Appellants' vacation leave banks for hours lost due to the clinic's closure during an unprecedented snowstorm.
2. If not, whether CSR 10-14, requiring "other time off" when employees are excused from work because of inclement weather, applies to the facts of these cases.

FINDINGS OF FACT

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

1. DHHA entered an operational agreement with the City and County of Denver in 1997. When this contract was formed, existing CSA employees had the choice to remain under the CSA personnel system, or transfer to DHHA's personnel system.
2. Appellants Steven Esses (Esses) and Michael Fuhriman (Fuhriman) were both employees at the time DHHA and the City entered the operational agreement. Both opted to remain under the CSA personnel system. They retain the same grievance and appeal rights as other CSA employees.
3. DHHA comprises the main hospital, and several Denver Public Health clinics located throughout the Denver Metro area. One of those clinics is the Denver Health Clinic located at 605 Bannock Street (clinic). The clinic is at a location separate from the main hospital. The clinic opens at 8:00 a.m. The clinic provides services to patients with human immunodeficiency virus (HIV), Acquired Immune Deficiency Syndrome (AIDS) and other infectious diseases.
4. Franklin Judson, M.D. (Judson) has been the Director of the clinic since 1987. Judson has never closed the clinic for any reason with the exception of the events leading to these consolidated appeals.
5. James Bock (Bock) is Nursing Operations Manager for the clinic. Judson is Bock's supervisor.
6. Brandy Feuss (Feuss), Nursing Program Manager for the clinic, is Esses' direct supervisor. Cornelius Rietmeijer M.D. is Fuhriman's direct supervisor. Bock supervises Feuss and Rietmeijer.
7. Esses is a Medical Technician in the Sexually Transmitted Diseases laboratory of the clinic. He does medical microbiological work such as reviewing slides and evaluating cultures, including immediate evaluations for HIV/AIDS and other communicable diseases. Esses also sees and evaluates patients.
8. Fuhriman is a Senior Clinical Care Associate. As a lead counselor he sees patients, performs tests and gives test results to patients, and provides HIV/AIDS counseling.
9. DHHA issues Employee Principles and Practices (PP's) which are applicable to employees under both the CSA and the DHHA personnel systems. PP #4-124 (Exhibit C) is Denver Health's inclement weather policy. As a medical services organization, under PP #4-124 all employees are considered "essential" for purposes of attendance "and Denver Health is always open. All employees are expected to report to work." Paragraph 1 of PP #4-124 applies to employees eligible for overtime. Paragraph 1. A.

states that employees who appear two hours late on an inclement weather day are allowed a two-hour period after the beginning of the shift to report to work. Under paragraph 1. D., employees who fail to appear at work during inclement weather days are required to submit leave requests for the entire shift not worked.

10. Appellants are both "non-exempt employees" and are therefore eligible for overtime under CSR Rule 1.
11. Under PP #1-100 (see, Exhibit 6), only the Chief Executive Officer and Medical Director of Health has authority to make exception to the Principles and Practices. At the time of the incidents in this case, both roles were filled by Patricia Gabow, M.D.
12. Under PP #1-100 (Exhibit 6), "It is the responsibility of each individual responsible for supervision, including all Executive Staff to uphold and administer the Principles and Practices detailed herein as presented."
13. During the day of March 18, 2003 the City of Denver began receiving an unprecedented amount of snow. By that afternoon City agencies began receiving requests from employees to leave early due to concerns about the ability to get home because of the depth of the snow.
14. Bock sent out an agency-wide e-mail at 3:03 p.m. on March 18, 2003 titled "Inclement Weather Policy" (Exhibit 3). This e-mail restated relevant portions of PP #4-124, requiring all employees to report to work during inclement weather days (see, Exhibit C).
15. Bock's e-mail of 3:03 p.m. on March 18, 2003 (Exhibit 3) was sent out before anyone in the chain of command anticipated closure of the clinic the following morning.
16. By the early morning hours of March 19, 2003 there were several feet of snow on the ground throughout most of the Denver metro area. Snow continued to fall throughout the day.
17. Bock began making and receiving telephone calls at about 4:30 a.m. on March 19, 2003. Bock sought advice about his attempts to get to work, and what to advise other employees to do. He also telephoned his employees, who advised they were having trouble getting out of their homes to get to work. Bock spoke with Administrative Operations Supervisor Karen Martinez, and told her that employees were stranded at home and could not get to work.
18. Feuss called Esses at home at 6:30 a.m. Esses was digging snow away from his car trying to get out. Feuss asked Esses if he could come to work, and he told her he could not. Esses told Feuss that he did have reculture plates and quality assurance reports to do at the clinic if he could get to work. Feuss told Esses if it was not safe for him to try and make it in then he should not come in. Esses continued to dig snow out from around his car.

19. As 8:00 approached, Bock determined there were eight employees in the building out of 168 total employees at the Bannock Street location. He advised Martinez of this. Martinez eventually relayed that she had been in contact with Judson, who concurred the clinic would be closed due to insufficient staff. At 8:00 a.m. Bock called Feuss and relayed this information to her.
20. Feuss began calling her employees to relay that the clinic was closed. She called Esses at home again at around 8:30 and told Esses not to come in. At that time Esses abandoned his efforts to get to work.
21. Fuhriman lives within walking distance of the clinic, and walked to work on the morning of March 19, 2003. He arrived at 8:00 a.m. There were no patients at the clinic, which left Fuhriman with little to do. He began helping with answering telephone calls from other employees.
22. At 9:00 a.m. Marybeth O'Neil, Nursing Program Manager for the Tuberculosis facility at the clinic, told Fuhriman that Bock told her the clinic was closed because there were not enough staff to operate it. She asked Fuhriman to post signs on the entrance doors that the clinic was closed, and told him and the other employees to go home. Fuhriman posted the signs and went home.
23. The main hospital remained open on March 19, 2003. Neither Esses nor Fuhriman were told by anyone to go to the hospital and offer their assistance at any time. There is no standing directive for employees to report to any other location, or take similar action, when a clinic is closed. Fuhriman later learned that a co-worker with the same title as his went to the main hospital to see if they needed his help, and they told him they did not.
24. Neither Esses nor Fuhriman were offered any opportunity to make up the time they lost on March 19, 2003.
25. Esses was instructed to bill eight hours' vacation time for March 19, 2003 (see, Exhibit 10). Esses' grievance and appeal apply to those eight hours.
26. Fuhriman was given credit for the two hours he was at the clinic on March 19, 2003, and two hours for the time it would have taken for him to get there (see, Exhibit C). Bock and Judson instructed him to allot the remaining 4 hours as vacation time (see, Exhibits E, 9). Fuhriman's grievance and appeal apply to the four hours' vacation time.
27. On March 24, 2003 Mayor Wellington Webb circulated a memo to "Payroll Clerks" throughout the City and County of Denver. In this memo, Webb instructed payroll clerks to treat March 19 as "other time off. No leave slips or posting into ASPEN Leave is required." The memo further states: "Essential employees who were required to work, including Denver Health, will be paid in accordance with the applicable rules." (Exhibit A.) Darlene Ebert, Acting Head of Human Resources for DHHA as of March 19, 2003, received a copy of this memo.

28. Appellants timely grieved and appealed the Agency's action in requiring them to submit vacation leave slips for the disputed hours on March 19, 2003.

DISCUSSION

1. Jurisdiction.

The hearing officer finds she has jurisdiction to hear these consolidated appeals as grievances pursuant to CSR 19-10 b), which states as follows in relevant part:

Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

...d) Grievances resulting in rules violations: Any grievance which results in an alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career Service, or the Career Service Personnel Rules...

Under DHHA's operational agreement with the City, as CSA employees Appellants possess the same rights to access the grievance and appeal processes as other CSA employees. The hearing officer finds she has jurisdiction to consider issues raised in Appellants' grievances arising from alleged violations of DHHA and CSR rules.

2. Burden of Proof.

The City Charter, C5.25 (4) and CSR 2-104 (b) (4) require the hearing officer to determine the facts of the case "*de novo*." This means that she is mandated to make independent determinations of the facts and resolution of factual disputes. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.) In *de novo* administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence*. This means that the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

An employee who files a grievance alleging an agency has violated a rule bears the burden of proving such an allegation by a preponderance of the evidence.

3. Appellants have shown the Agency improperly applied PP #4-124 to the facts of these cases.

Appellants posit that the Agency's requirement that they take vacation leave for the hours lost on March 19, 2003 is inconsistent with the purpose of the governing rule. For the following reasons, the hearing officer agrees.

As other City agencies have done, DHHA has promulgated its own internal regulations, to which all its employees are subject. DHHA is responsible for providing medical services. Because of this, it has a very strict attendance policy for all circumstances, including inclement weather. PP#4-124 (Exhibit C) states as follows in relevant part:

Principle:

All Denver Health employees are considered essential and Denver Health is always open. All employees are expected to report to work. If employees fail to report to work, the following practices will apply when the CEO and Medical Director has officially announced that the day(s) shall be considered inclement weather days.

Practice:

1. Employees Who Are Eligible For Overtime¹

- A. Late arrival to work due to inclement weather conditions will be excused for up to two hours without being charged leave.
- ...C. Employees who arrive after the two hour limit will be required to submit a leave request for the balance of time remaining between the two hour amount and the actual time they report to work.
- D. Employees who do not come to work for the entire day will be required to submit a leave request for the entire shift that they did not work.²

* * *

The Agency argues that the motivation behind the "essential" attendance requirement is to assure that all personnel report at all times, or face the sanctions set forth in the relevant rules if they do not. They posit that PP #4-124, governing inclement weather situations, is the rule relevant to this case. The Agency insists that under PP #1-100 (see,

¹ Under CSR Rule 1, DEFINITIONS, a non-exempt employee is: "An employee who is entitled to overtime pursuant to these (CSR) rules." Appellants are both non-exempt employees. Therefore, this is the portion of PP #4-124 that applies to them.

² The rule does not specify which leave bank will be charged for the lost time. This is because DHHA employees are only granted one type of paid time off for both vacation and sick leave, unlike CSA employees, who earn vacation and sick leave in separate banks.

Finding 11, *above*) the only way to avoid the application of PP #4-124 is the granting of an exception by DHHA's CEO/Medical Director, who was Dr. Gabow at the time of the blizzard of March 19, 2003. However, Dr. Gabow did not do so in this case.

Words and phrases in regulations should be construed according to their familiar and generally accepted meaning. Harding v. Industrial Commission, 183 Colo. 52, 515 P.2d 95 (1973). In PP #4-124 all employees are considered "essential." The stated rationale for this is in the rule itself; that "Denver Health is always open." The rule therefore *presumes* that Denver Health is always open.

In this case, it is indisputable that the clinic was *not* open. Once the clinic was closed and Appellants were told to go or stay home, the reason behind the rule was eliminated. The "essential" nature of their presence was rendered meaningless for purposes of PP #4-124. Therefore, the rule no longer applied.

Under PP #1-100 (Exhibit 6), "it is the responsibility of each individual responsible for supervision... to uphold and administer" the PP's. Management made the decision to close the clinic, not Appellants. It is irrelevant whether any one administrator with the authority to make an exception to the "essential" portion of PP #4-124 did so or not. The clinic's closure itself was an exception to the rule, and made the entire rule inapplicable to the facts here. Once inapplicable, no exception to the "essential" portion of the rule was necessary.

Appellants have earned their accrued paid leave and have a right to that leave. The Agency cannot take away paid leave except as provided under the applicable rules. The Agency presented no other PP relevant to the facts of this case, under which it has the right to take accrued leave from Appellants. The absence of any relevant PP means the case must be decided under the rules and edicts governing CSA employees.

CSR 10-14, Interruption of Work, which reads as follows in relevant part:

An employee who is excused from work for the day or any part of the day when the work program is interrupted (e.g. because of weather) shall be considered to have worked the number of hours included in his regular daily schedule.

Under this rule, Appellants are entitled to be treated as having worked the hours in dispute. This conclusion is underscored by Mayor Webb's Memo of March 24, 2003 (Exhibit A). In that memo he states that "Essential employees *who were required to work*, including Denver Health, will be paid in accordance with the applicable rules." Since the clinic was closed on March 19 and management released Appellants, they were not *required to work*. Therefore, numbered paragraph 1 of the memo more appropriately applies to their situation: "Treat March 19... as other time off. No leave slips... [are] required." (See, Exhibit A.)

The hearing officer concludes that the Agency must restore the leave hours Appellants were charged for March 19, 2003 and treat the time lost on that day as "other time off."

CONCLUSIONS OF LAW

1. The hearing officer has jurisdiction to hear these cases and render a decision.
2. PP #4-124 does not apply where management closed the clinic and released Appellants from work.
3. In the absence of a more specific governing agency PP, CSR 10-14 applies to these cases. Under that rule, Appellants are entitled to "other time off" for the interruption of their work caused by the clinics' closure.

ORDER

Based on the Findings and Conclusions set forth above, the Agency's decision to charge Appellants' vacation leave banks for time lost on March 19, 2003 is REVERSED.

The Agency is ordered to restore the respective amounts of vacation time subtracted from Appellant's leave banks for March 19, 2003 to their vacation leave banks, and grant Appellants DHHA's equivalent of "other time off."

Dated this 26th day of August, 2003.


Joanna Lee Kaye
Hearing Officer for the
Career Service Board