

DECISION

IN THE MATTER OF THE APPEAL OF:

PRISCILLA GARCIA, Appellant,

vs.

DEPARTMENT OF EXCISE AND LICENSE,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, Priscilla Garcia, appeals her one-day suspension assessed by her employer, the Denver Department of Excise and License, (Agency), for violation of a Career Service Rule (CSR). A hearing concerning this appeal was conducted on November 22, 2010, by Bruce A. Plotkin, Hearing Officer. The Agency was represented by Franklin A. Nachman, Assistant City Attorney, and the Appellant was represented by Michael O'Malley, Esq. Agency's exhibits 1-11 and Appellant's exhibits A and B were admitted into evidence.

The Agency initially claimed the Appellant violated CSR 16-60 S, for an unauthorized absence, and CSR 16-60 T, for late reporting. Following a pre-hearing conference, the agency withdrew its claim under CSR 16-60 T, and the hearing proceeding on the agency's remaining claims under CSR 16-60 S. For reasons which follow below, the Appellant's one-day suspension is AFFIRMED.

II. ISSUES

The two issues presented for decision are whether the Appellant violated Career Service Rule 16-60 S., and if so, whether the Agency's decision to assess a one-day suspension was excessive.

III. FINDINGS

Ms. Garcia is employed by the Agency. Her immediate supervisor for the past 2 years has been Charlotte Ayeni. Garcia acknowledged that, at all

times pertinent to this appeal, agency regulations and the Career Service Rules required sick leave absences to be authorized.¹ In order to obtain sick leave authorization, Agency employees who have not converted to the present paid time off system are required (1) to have sick leave available in their leave bank; (2) to notify their immediate supervisor or designee in advance, if possible; (3) if the reason for sick leave was unforeseeable, to notify their immediate supervisor or designee no later than two hours after the beginning of the shift, and (4) in Ms. Garcia's case, to provide a doctor's letter excusing her sick-leave absences. [Exhibit 10-1; Garcia cross-exam].

Garcia had a history of attendance issues. Her 2008-2009 work review (PEPR) stated "[s]he must make every effort to be present at work..." and "[e]mployee could benefit from a class in time management skills...." [Exhibit 3-6]. In February 2010, she was placed on a Performance Improvement Plan (PIP), in part, for attendance issues. [Exhibit 10-1].

This case stems from Garcia's two successive absences, for the second half of Garcia's work day on July 6, 2010, and all of July 7, 2010. Garcia obtained authorization to take three hours vacation time on July 6, 2010, from the beginning of her shift at 8:00 a.m., until 11:00 a.m., so that she could take her car for repairs. The Agency acknowledged Garcia could have taken a lunch break from 11:00 to 11:30, so she was expected at work at 11:30. When Ayeni was informed that Garcia was still not at work at 1:30 p.m., Ayeni telephoned Garcia at 1:33. Garcia answered and told Ayeni she was still at the repair shop and it would likely be another hour before she could be at work. Later that afternoon, Garcia called Ayeni to announce she was feeling too ill to go to work.

The following day, July 7, 2010, Garcia did not appear at work all day. However, the following work day, she gave Ayeni a signed doctor's letter which excused Garcia from work for both July 6 and July 7. [Exhibit 7].

The Agency issued a letter in contemplation of discipline on July 7, 2010. [Exhibit 2]. A pre-disciplinary meeting was held on July 14, 2010. Garcia attended and gave a statement. On July 16, 2010, the Agency served its notice, informing Garcia she would serve a one-day suspension on July 29, 2010. [Exhibit 1]. This appeal followed timely on July 30, 2010.

¹ Career Service employees hired after December 29, 2009, and those hired before who opted into the current paid time off rules, are no longer required to request authorization for sick time, as sick time and vacation time have merged. CSR 10-22; compare former CSR 11-27 A., page issuance date 10/10/08. Career Service employees hired on or before December 29, 2009, could opt out of converting to a paid time off model. Under the previous system authorization was required for use of leave in a separate sick leave bank.

IV. ANALYSIS

A. Jurisdiction and Review

Personal jurisdiction: As an employee of the Department of Excise and License, Garcia is a member of the Career Service personnel system, and may appeal discipline under the Career Service Rules. Charter, §§ 9.1.1. E.(vi), 9.8.2.(A); CSR § 19-10 A.1.a.

Subject matter jurisdiction is proper under CSR §19-10 A.1.b., as the direct appeal of a suspension. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated CSR 16-60 S, and to prove its decision to suspend Garcia for one day was not excessive.

1. The July 6 absence.

The Agency granted Garcia vacation leave from 8:30 a.m. to 11:30 on July 6 to take her car for repairs. Thus, only her absence from 11:30 to the end of her shift on July 6 was at issue. The Agency claimed Garcia's absence after 11:30 was unauthorized. [Exhibit 1; Ayeni testimony]. Garcia replied she fell ill while at the car repair shop, but still intended to go to work. Then, while on her way to work, she felt too ill to go to work and telephoned Ayeni to let her know. Garcia argues she had banked sick leave at the time, her illness was unforeseen, and she provided notice within two hours, so that she complied with Agency rules and the Career Service Rules for requesting sick leave. [Garcia testimony].

At least part of Garcia's claim does not add up. Garcia testified it was at least an hour after her first call with Ayeni until she left the repair shop, and at that point she still intended to go to work. [Garcia response to Hearing Officer questions]. She also testified she felt too ill to go to work only when she left the repair shop and was driving toward work. *Id.* If Garcia felt too ill to work only after Ayeni's 1:33 p.m. call then, even according to Garcia's own testimony, she failed to seek authorization for her absence between 11:30 a.m. until she felt too ill to work sometime after 1:33 p.m.

Garcia replied she lost track of time and did not realize it was after 11:30. While Garcia's credibility was not questioned, her response, even if true, does not excuse her absence, since Garcia's earlier PEPR and PIP, both put her on notice to pay close attention to her absences and timekeeping issues. Moreover, even if Garcia did lose track of time, her intent, or lack thereof, is relevant only to the degree of discipline and not to the establishment of a violation under CSR 16-60 S. Garcia also argued that Ayeni did not call her at 1:33, but likely some time earlier, so that her (Garcia's) call to Ayeni occurred within two hours in compliance with the Agency's requirement. However, Garcia had no basis for her belief, and Ayeni was very specific about her observation of the time when she made the call. For these reasons,² Garcia's absence from 11:30 a.m. to the end of her shift on June 6, 2010, was unauthorized in violation of CSR 16-60 S.

2. The July 7 absence.

Garcia acknowledged she was absent all day on July 7, 2010. She claimed she had a pre-scheduled medical procedure on July 7 for which she had submitted a sick-leave request to her supervisor on July 1 through the KRONOS time-keeping system. She also claimed she spoke with Ayeni about it the following day, July 2. Ayeni denied receiving any such KRONOS request and denied speaking with Garcia about the matter on July 2.

The most convincing evidence was Exhibit A, which purports to be Garcia's KRONOS sick leave request on July 1. Ayeni testified it appears to be the correct form for a leave request, and she had no reason to doubt its authenticity. Ayeni also stated that if she had received such a request she likely would have granted it. [Ayeni responses to Hearing Officer questions]. The Agency did not call any witness from IT, payroll, or otherwise, to rebut the authenticity of the document, although it would logically seem a straightforward matter to track a sick time request or show none was made for a certain employee on a certain date. From the evidence presented, it is unknown if it was likely or even possible for someone to submit a proper KRONOS request which is not received by the intended supervisor.

The Agency claimed Exhibit B does not comply with the Agency's requirement to present evidence of a medical appointment, since it does not clearly state Garcia was actually seen by a doctor on July 7. The

² The unacknowledged elephant in the hearing room was Exhibit B, a doctor's letter which appeared to have excused Garcia for medical reasons on July 6 as well as July 7, but which neither side addressed for that purpose. Since Garcia did not rely on Exhibit B for the purpose of excusing her absence on July 6, [See Garcia testimony, cross-exam, and responses to Hearing Officer questions], I did not weigh it for that purpose. Even if Garcia had relied on Exhibit B as a medical justification for her July 6 absence, it still would not have justified her absence between her expected presence at work at 11:30 a.m. and when she said she felt too ill to report, sometime after Ayeni's 1:33 p.m. call.

preponderance of the evidence indicates she was. Garcia testified, credibly about her medical condition that required a medical procedure and, more convincingly, the plain language of Exhibit B gives every indication it was signed by the doctor on the day of the procedure – July 7. "...the diagnosis of Pelvic pain/cramping, as determined by medical care sought on 7/7/2010." I find, from a plain reading of Exhibit B, Appellant's testimony, and the Agency's failure to rebut Garcia's claim, that Garcia sought advanced approval to take sick leave on July 7, 2010, that for reasons unknown, but not attributable to Garcia, Ayeni did not receive Garcia's request, and that Ayeni would have authorized Garcia's request for sick leave on July 7 had she received the request. In light of these findings, the Agency failed to meet its burden to prove Garcia violated either the Agency's sick leave policy, [Exhibit 6-16], or CSR 16-60 S. on July 7, 2010. To find otherwise would set an impermissible precedent, penalizing employees for violations without wrongdoing, in violation of the purpose of discipline under the Career Service Rules. "The purpose of discipline is to correct inappropriate behavior or performance if possible," CSR 16-20.

V. DEGREE OF DISCIPLINE

The Agency based its one-day suspension upon two violations, only one of which was proven by preponderant evidence. What remains, then is to determine if the Agency's one-day suspension was justified based only upon Garcia's unauthorized absence on July 6.

As previously stated, the purpose of discipline is to correct inappropriate behavior if possible. To that end, appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

A. Severity of the proven offense.

It is a fundamental tenet of the Career Service that pay is based upon merit-based performance of duties. CSR 2-11 A.; CSR 8-20 C.; CSR 13-20 purpose statement; and CSR 13-20 B. That principle is undermined by an employee's failure to show up at work without an authorized reason. Thus, Garcia's failure to provide justification for her unauthorized absence on July 6 was a serious offence.

B. Past Record

The Agency referred to a similar violation nine years ago. Unless a nine-year-old violation constitutes part of a continuing pattern of misconduct or poor performance, it carries little weight in determining the appropriate penalty for a

present violation. What is significant here is Garcia's PIP earlier in the year for performance issues that specifically addressed sick-leave abuse. [Exhibit 10-1]. She also received written reprimands twice, for unrelated reasons, within the past year. [Exhibits 8 and 9].

C. Penalty most likely to achieve compliance.

Garcia has not had an unauthorized leave problem since the assessment of discipline in this case four months ago. That provides some indication the suspension was successful in achieving compliance.

In view of the seriousness of the proven offense, two recent, albeit unrelated penalties, a continuing performance deficiency, and the abatement of that deficiency after discipline, the Agency's choice to assess a one-day suspension was neither clearly excessive nor based substantially upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), *citing* In re Delmonico, CSA 53-06, 8 (10/26/06).

VI. ORDER

The Agency's decision, on July 16, 2010 to suspend the Appellant for one day is **AFFIRMED**.

DONE November 24, 2010.



Bruce A. Plotkin
Hearing Officer
Career Service Board