

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

Appeal No. 123-05

DECISION

IN THE MATTER OF THE APPEAL OF:

YVETTE GARCIA,
Appellant,

vs.

DENVER SHERIFF'S DEPARTMENT, DEPARTMENT OF SAFETY, and the City and
County of Denver, a municipal corporation,
Agency.

The hearing in this appeal was held on January 12, 2006 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Eric James, Esq. The Agency was represented by Assistant City Attorney Joseph A. DiGregorio. Captain Michael Horner served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the following findings of fact, conclusions of law and order are entered herein.

I. INTRODUCTION

Appellant Yvette Garcia is a Deputy Sheriff with the Denver Sheriff's Department within the Department of Safety (Agency), and is assigned to the Pre-arraignment Detention Facility (PADF), also known as the Denver City Jail. Appellant appeals her suspension for five days imposed on October 18, 2005. The parties stipulated to the admissibility of Agency's Exhibits 1 – 12 and Appellant's Exhibits A, B and D, which were admitted into evidence.

The issues presented herein are as follows:

- 1) Did the Agency establish that Appellant violated the cited section of the Career Service Rules (CSR), and
- 2) Was a five-day suspension justified under the Career Service Rules governing discipline?

II. FINDINGS OF FACT

The Agency suspended Appellant based upon its claim that Appellant's absences from September 2004 to September 2005 violated a number of Career Service and Sheriff's Department rules. This appeal asserts that Department Order (D.O.) 2053.1 violates the collective bargaining agreement (CBA), and permits discipline for legal use of leave permitted under the Family Medical Leave Act (FMLA), 29 USCS § 2612. Appellant also argues that the suspension disciplines her again for past absences which are the subject of previous discipline.

Michael Horner, Captain of Internal Affairs and Civil Liabilities Bureau, testified that PADF is a 24-hour facility that requires staffing for five shifts. After the city budget office determined the Sheriff's Department's annual sick leave use per employee was three hours above the city average, costing an additional \$322,585 for sick leave and overtime per year, he was instructed to bring the department's sick leave and overtime under control.

As a result, Capt. Horner recommended and obtained passage of D.O. 2053.1, which subjects department employees to a verbal reprimand after eight occurrences of absence within a twelve-month period, a written reprimand after nine such absences within the same period, and more severe disciplinary action after ten such absences. "Occurrences of absence" is defined in the order as an unplanned absence of more than two hours, excluding planned absences, authorized leave without pay, family medical leave, leave taken because of work-related injuries, funeral or military leave, and jury duty. Sick leave requires 21 days' advance notice in order to be considered planned. Capt. Horner testified that notice of this length was required because the roster assignments go to the supervisors for approval 21 days in advance of the schedule. [Exh. 10.] Over the first eighteen months, D.O 2053.1 saved the department \$497,624.

Capt. Horner also testified that there are three methods to avoid having an absence considered an occurrence of absence under the order: 1) obtain your supervisor's approval to have the absence deemed a pre-authorized absence, 2) arrange to exchange shifts with another employee, or 3) trade a day off with your supervisor's permission. Supervisors have been empowered to grant planned status to an absence even if it is requested within zero to twenty days from the date of absence if it would not occasion overtime and it was called in within two hours of the start of the shift. The leave slips now contain a check-off box for the employee to indicate whether the leave was planned, also known as pre-authorized. Capt. Horner testified that approximately nine hundred employees are now using pre-authorized leave.

Manager of Safety Alvin J. LaCabe testified that the order was designed to serve notice on the employees of the need to minimize their use of unscheduled sick time, and to give employees who need sick leave an opportunity to plan other methods of obtaining time off, thus lifting some of the burden off staffing personnel. It was a

compromise that was intended to preserve the four-day workweek for the benefit of officers working at the stressful atmosphere of the jail.

Capt. Horner presented his calendar and excerpts from the department's Absence Category Report in support of his testimony that Appellant had called in sick without advance notice on Sept. 15, 30, Oct. 16, Nov. 10, Dec. 15 and 17 in 2004, and on Jan. 5, Mar. 17, Apr. 28, June 1, July 6 and 22, and Sept. 1 in 2005, a total of thirteen absences within that twelve-month period. As a result, the department paid 48 hours of overtime to obtain officer coverage on six of those occasions. [Exhs. 7, 8.]

Appellant was given a preliminary designation of FMLA leave for absences from Dec. 29, 2005 to Jan. 15, 2005. [Exh. 3.] When Appellant did not provide the required certification within the fifteen-day deadline, the preliminary designation was rescinded, and absences during that period were not covered by FMLA. On April 14, 2005, Appellant gave Capt. Horner a certification for FMLA leave from mid-February until Feb. 28, 2005 to care for her pregnant daughter. [Exh. 4.]

As Human Resources Manager for the department, Capt. Horner reviewed the pre-disciplinary letter initiated after Appellant's fourteenth occurrence of absence within the twelve-month period from Sept. 2004 to Sept. 2005. At the pre-disciplinary meeting, Appellant explained that her daughter had given birth prematurely in February, and that she had requested FMLA leave in April for two weeks in late February to care for her. As a result, a Feb. 16th absence listed in the pre-disciplinary letter was removed from the list of occurrences subject to discipline under the order. [Testimony of Capt. Horner.]

As defined in D.O. 2053.1, an absence is unauthorized if an employee fails to call in two hours before the start of the shift, unless there is a emergency or extenuating circumstances, or (2) an employee leaves work without notifying the supervisor. [Exh. 10, p. 1.] The parties stipulated that none of Appellant's absences were unauthorized.

III. ANALYSIS

In this de novo hearing on the appropriateness of the five-day suspension, the Agency has the burden to show by a preponderance of the evidence that Appellant violated the disciplinary rules as alleged, and that the discipline was within the range of discipline that can be imposed under these circumstances. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.); In re Gustern, CSA 128-02, 20 (12/23/02).

A. FMLA Certification

Appellant concedes that her April 14, 2005 certification was an untimely request for two weeks of family medical leave to end on Feb. 28, 2005. Such leave must be requested in advance of need, or as soon as practicable after an emergency. CSR § 11-153. Appellant presented no evidence that any other relevant absence had been or should have been approved as family medical leave, and therefore the Family Medical

Leave Act does not apply to the issues raised in this appeal.

B. Violation of Career Service Disciplinary Rules

Appellant claims the Agency failed to prove that her absences violated the rules cited in the disciplinary letter. The Agency bears the burden to prove these violations by a preponderance of the evidence. In re Roberts, CSA 179-04, 3 (6/29/05.)

1. CSR § 16-50 A. 13), Unauthorized absence from work

The Agency asserts that it looked at Appellant's absences and her notice of the department's rules relating to attendance, and concluded from that information that Appellant was in violation of this rule.

As defined in D.O. 2053.1, an absence is unauthorized if 1) an employee fails to call in two hours before the start of the shift, unless there is an emergency or extenuating circumstances, or 2) an employee leaves work without the supervisor's permission. [Exh. 10, p. 1.] C.S.R. § 16-50 A. 13) contains three illustrative examples of unauthorized leave: 1) an absence after a leave request has been denied, 2) leaving work without permission, and 3) unauthorized breaks. Since the parties stipulated that none of the listed absences were unauthorized under either rule, I find that Appellant did not violate this disciplinary rule.

2. CSR § 16-51 A. 3), Abuse of sick and other leave

An abuse of leave requires some evidence that Appellant knowingly took paid leave to which she was not entitled under CSR Rule 11. In re Edwards, CSA 21-05, 7 (2/22/06). Appellant testified that either she or a family member was in fact sick on the days in question, and that her use of leave was therefore proper under CSR § 11-32. The Agency did not contradict that evidence. The Absence Reports indicate that Appellant's absences were paid, which indicates the use of earned sick leave. In addition, the Agency presented no evidence that Appellant requested or used the leave in an unauthorized or improper manner. Therefore, I conclude that the Agency has not established an abuse of leave within the meaning of this rule.

3. CSR § 16-51 A. 5), Failure to observe departmental regulations

The Agency asserts that Appellant's thirteen absences violated three departmental rules and D.O. 2053.1, as follows:

i. 100.1: Absence without leave

The only evidence presented on this issue was the Agency's Absence Report, which indicates that each of the absences at issue was paid as accrued sick leave. Thus, the evidence does not support a finding that Appellant was absent without authorized leave.

ii. 100.2: Compliance with orders regarding requests for leave

This rule requires deputies to comply with special orders and procedures “relating to calling in sick, providing doctor’s excuses, reporting their movements while on sick leave or periodic checks by authorized personnel.” Rule 100.2. The evidence related solely to Appellant’s use of excessive sick leave as defined in D.O. 2053.1. There is no evidence that Appellant failed to comply with orders regarding any of the four matters listed in the rule. Therefore, the evidence did not establish a violation of this rule.

iii. 200.12: Disobedience to lawful order of supervisor

The Agency presented no evidence that Appellant failed to obey an order communicated by a supervisor. Therefore, the allegation that this rule was violated has not been established.

iv. Department Order 2053.1: Employee use of sick leave

This order sets limits on the number of times an employee can use earned sick leave over a period of twelve months unless the leave is planned, authorized leave without pay, leave for a work-related injury, FMLA leave, or leave taken for funerals, military service, or jury duty. [Exh. 10, p. 2.]

At the outset, a department or agency has an indisputable right to control the attendance of its employees in order to allow it to plan for staffing to accomplish its work. CSR § 11-36; In re Martinez, CSA 52-02 (5/15/02); Hubble v. Dept. of Justice, 6 M.S.P.R. 659 (1981). The Hearing Office has enforced such regulations unless they are inflexibly applied in a manner that deprives an employee of the use of accumulated sick leave under any conditions. In re Martinez; supra; In re Espinoza, CSA 30-05 (1/11/06).

Here, the order itself excepts seven types of absences. In addition, both Capt. Horner and Manager of Safety LaCabe testified that an employee may avoid serious discipline even after the ninth occurrence by a number of methods, including trading shifts or days off, obtaining the supervisor’s permission to take it as planned leave, or using less than two hours in a shift. Capt. Horner testified that supervisors have been given the authority to grant planned status to leave if it was properly requested and would not cause overtime, even if it was not requested within 21 days. It is abundantly clear that the rule is designed and implemented to provide predictable staffing for an important public safety function and to allow employees to control their own leave by arranging other work times. This stands in stark contrast to the evidence in the Espinoza appeal, in which it was admitted that, upon the eighth absence, the rule was automatically enforced regardless of the circumstances.

Appellant argues that D.O. 2053.1 is unenforceable because it improperly

interferes with the contractually negotiated right to take paid leave under the collective bargaining agreement (CBA). D.O. 2053.1 was effective May 12, 2004, several months before the effective date of the CBA between the City and County of Denver and the Fraternal Order of Police, and yet the contract contains to language asserting an employee's right to take all accrued leave without limitation by departmental regulation. [Exh. 10.] Therefore, the CBA does not restrict the right of the department to establish reasonable limitations on employee requests for sick leave.

I find that D.O. 2053.1 is a reasonable regulation that addresses the legitimate agency need to control its staffing, budget and use of overtime. It was implemented in this appeal in a manner which does not burden an employee's right to use accrued sick leave, and encouraged employees to use leave in a manner consistent with the department's need to control staffing and costs. I also find that Appellant violated this order by taking thirteen unplanned absences over a twelve-month period, despite notice of the various methods to avoid further accumulation of discouraged absences. Appellant failed to communicate any request for an exception to application of the policy, even after imposition of both a verbal and written reprimand for her eighth and ninth unplanned absence.

Finally, Appellant argues that the rule improperly permitted her to be punished in some cases three times for the same absences because of its use of a "rolling" twelve-month period for measuring the number of absences. That argument is without merit for the same reasons that permit progressive discipline: each instance of employee misconduct occurs in a context, and that context includes whether the employee had ever committed that offense in the past. The existence of past violations indicates that an employee failed to conform his conduct to the rules, and that past discipline has not succeeded in bringing about an improvement. The Career Service Rules permit the imposition of more severe discipline for repetitions of misconduct under CSR § 16-10, and D.O. 2053.1 is consistent with that approach.

C. Appropriateness of Penalty

The Agency proved that Appellant violated the departmental order prohibiting ten or more occurrences of absences over the course of a twelve-month period. The final issue is whether the Agency's imposition of a five-day suspension was in conformity with the Career Service Rules regarding progressive discipline. CSR §§ 16-10, 16-20.

Mr. LaCabe testified that he considered Appellant's work and disciplinary history, including the fact that a number of Appellant's absences extended her weekend. The Agency concedes that Appellant's four-day week increases the chances that any one absence will occur near a weekend. An examination of the thirteen absences reveals that less than half of them fell on the day before or after a non-work day. [Exh. 8.]

Mr. LaCabe also testified that his assessment of a five-day suspension was intended to penalize Appellant by the number of sick days she took over and above the average number taken by city employees. I find that this is within the range of penalties

that may be applied by a reasonable manager.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer AFFIRMS the Agency action dated October 18, 2005.

Dated this 27nd day of February, 2006.


Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing it in the U.S. mail, postage prepaid, this 28th day of February, 2006, addressed to:

David R. Osborne, Esq. & Eric James, Esq.
Hamilton and Faatz, A Professional Corporation
1600 Broadway, Suite 500
Denver, CO 80202

Ms. Yvette Garcia
5780 W. Warren Avenue
Denver, CO 80227

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing it in interoffice mail this 28th day of February, 2006, addressed to:

Joseph A. DiGregorio
City Attorney's Office
Litigation Section
201 West Colfax Avenue Dept. 1108
Denver, CO 80202

Mr. Alvin J. LaCabe, Jr.
Department of Safety

Mr. Fred J. Oliva
Denver Sheriff Department