CAREER SERVICE BOARD

CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 09-12A

ORDER ON PETITION FOR REVIEW

IN THE MATTER OF THE APPEAL OF:

CATHERINE MARTINEZ,

Petitioner-Appellant,

vs.

DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,

And the City and County of Denver, a municipal corporation,

Respondent-Agency.

Catherine Martinez is a Deputy Sheriff employed by the Denver Sheriff's Department (DSD). On February 14, 2012, she became angry at another deputy, slamming a telephone, cursing at the other deputy, and leaving her post, slamming the door behind her. Deputy Martinez's supervisor gave her some time to cool down, called her into a meeting, and asked her to explain her actions. In the meeting, Deputy Martinez vented her frustration with her co-worker, and then calmed down.

The incident was reported to Major Koonce. She believed, despite having no firsthand knowledge of the incident, that Deputy Martinez needed to be sent for a fitness for duty evaluation (FFDE). Deputy Martinez was told to report to Internal Affairs the next day, at which time she would be formally referred for the FFDE.

Deputy Martinez underwent the evaluation. It was determined that she was not fit for duty. On February 17, 2012, Deputy Martinez was placed on unpaid leave, requiring her to use her own sick and vacation time should she want to be paid. She was placed on leave under the federal Family and Medical Leave Act[1] until such time as it was determined that she was once again fit for duty.

Deputy Martinez objected to these developments and filed a grievance. In that grievance, she alleged that the DSD violated its Departmental Order (DO) 2052.1 and Career Service Rule (CSR) 11 for

[1] The actual allegation is that Appellant was placed on "constructive" FMLA leave. But just as the law considers a constructive discharge a discharge, for purposes of our analysis and consideration of any remedy, we discern no difference between being placed on FMLA leave and constructively being placed on FMLA leave.

placing her on FMLA leave. She further alleged that DSD violated its DO 2053.1B and CSR 10 by requiring her to use her sick leave when she was not sick.

The grievance was denied in its entirety and Deputy Martinez appealed to a Hearing Officer. At hearing, the Hearing Officer considered the following issues:

1. Whether requiring the Appellant (Deputy Martinez) to submit for a fitness for duty evaluation violated DSD DO 2730.1F;
2. Whether DSD's placement of Appellant on unpaid leave violated CSR 16-50B3, 16-70 and 16-73;
3. Whether the DSD's placement of Appellant on FMLA leave violated DSD DO 2052.1A, CSR 11-150, or CSR 11-151;
4. Whether the DSD's deduction of sick leave from Appellant's leave bank violated DSD DO 2053.1(D) or CSR 10-33;
5. If DSD did violate any rules or orders, whether Appellant's pay, benefits or status was negatively impacted;[2] and
6. If there was any violation, what is the appropriate remedy.

The Hearing Officer determined that the issues raised in Appellant's grievance negatively impacted her pay, benefits or status, thereby giving her the right to appeal the denial of the grievance pursuant to CSR 19-10A2bi, and thereby giving him jurisdiction to hear the appeal. Regarding the substance of the grievance, the Hearing Officer determined that DSD had violated its DO 2730.1F by sending Appellant for a fitness for duty evaluation. He also determined that the DSD violated DO 2052.1A, CSR 11-150, and CSR 11-151 by involuntarily placing her on FMLA leave and forcing her to use her accrued benefit time to get paid for the time she was improperly not permitted to work. Finally, the Hearing Officer determined that Appellant failed to prove that DSD violated DO 2053.1D and CSR 10-33.[3] As a remedy, the Hearing Officer ordered the Agency to remove its reference of Appellant for the FFDE from its files, and further ordered the Agency to return to Appellant time she was forced to use while on involuntary unpaid leave.

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[2] The Hearing Officer needed to undertake this analysis independently of what was contained in the actual grievance. If the Hearing Officer had found against the Appellant on this issue, Appellant would have had no right to file an appeal in the first instance.

[3] The Hearing Officer also dismissed Appellant's allegation of a violation of CSR 19-10A1b, finding that she did not have standing to assert such a claim.

DSD filed a timely appeal of the Hearing Officer's decision. Deputy Martinez did not file a cross appeal. For the following reasons, we affirm the Hearing Officer's decision.

Fitness For Duty Evaluation

The Agency first claims that the Hearing Officer misinterpreted Departmental Order 2730.1F which pertains to FFDEs. This DO states in part:

> Employees may be required by their supervisors to report for medical tests or for a special physical or mental examination. If the supervisor believes that an employee cannot perform the duties of the position in an acceptable manner due to medical problems or disabilities, a fitness for duty examination may be required.

In his decision at page 6, the Hearing Officer interpreted this provision by reading the word "reasonably" into the second sentence, so that the supervisor, before sending an employee for an FFDE, must "reasonably"[4] believe an employee cannot perform his or her duties due to a due to medical problems or disabilities. We do not disagree with this interpretation, as this DO was not intended to allow a supervisor to send an employee for an FFDE out of spite or on a whim, or, as in this case as found by the Hearing Officer, without sufficient information to form a reasonable belief that mental or physical issues, or disabilities, were preventing an employee from performing his or her job in an acceptable manner.

The Agency cites federal regulations promulgated under the ADA in support of its argument that the Hearing Officer misinterpreted DO 2730.1F. While regulations promulgated under the ADA do not necessarily define DSD Departmental Orders, the regulation cited by the Agency (at pages 13-14 of its brief) fails to support the Agency's argument. To the contrary, the federal regulations support the Hearing Officer's interpretation of the Departmental Order. Specifically, 29 C.F.R. § 1630.14(c), also contains a "reasonableness" requirement:

> An employer's request that an employee undergo a medical examination (including fitness for duty exams) must be supported by evidence that would cause a reasonable person to inquire whether an employee is still capable of performing his/her job.

The Hearing Officer concluded that the supervisor who sent the Appellant for the FFDE, Major Koonce, had insufficient information or evidence to form a reasonable belief that the FFDE was justified. The Agency's claim that the Hearing Officer had insufficient evidence to support this conclusion lacks merit. Although a supervisor is not required to witness an event before he or she may properly send an employee for an FFDE, the Hearing Officer found Major Koonce had no reasonable basis for her conclusion that Appellent had experienced a "breakdown." Yet, the Major testifed that this "breakdown" was her justification for sending Appellant for the FFDE. The record reflects that Appellant

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[4] To be grammatically correct , the inserted word would actually be "reasonably."

never experienced a "breakdown"and that no one told Major Koonce that Appellant had experienced a "breakdown." In addition, the Hearing Officer found that once Appellant had calmed down, her direct supervisor, Sgt. Christine Martinez (who had personally witnessed the incident), would have sent Appellant back to work at another post, rather than sending her home. Testimony of another supervisor, Sgt. Heinrichs, echoed Sgt. Martinez's conclusion that Appellant was not having a "breakdown."

We overturn a Hearing Officer's factual findings for insufficiency of evidence under CSR 16-61(D) only where the Hearing Officer's factual findings are "clearly erroneous." A factual finding is clearly erroneous when it is unsupported by substantial evidence in the record considered as a whole; that is, where the factual finding has no support in the record. *In the matter of the Appeal of: Ryan Murphy and the Department of Safety*, No. 09-11A. Here, the record amply supports the Hearing Officer's findings that Major Koonce lacked sufficient information to form a reasonable belief that: (1) Appellant was incapable of performing her duties in an acceptable manner; or (2) Appellant's incapacity was caused by medical problems or disabilities. Consequently, the Hearing Officer's findings are not clearly erroneous.

The Agency further asserts that Appellant's actions, even if not evidence of a "breakdown," were evidence that Appellant acted inappropriately. While we do not condone Appellant's actions, the question before the Hearing Officer and, therefore, the question before the Board in this appeal, is whether management possessed sufficient information to reasonably conclude that Appellant's inappropriate behavior prevented her from performing her job in an acceptable manner ***and*** was due to medical problems or disabilities. Lacking said information, we believe management faced a disciplinary issue, not a medical issue. To hold otherwise would be to allow every act of inappropriate conduct to be met with an order for an FFDE.

The Agency's argument that this Board should defer to DSD management decision making is eqaully misplaced. Even assuming arguendo we were to afford the requested deference, deference cannot replace evidence and cannot replace the requirement that management have sufficient information to form a reasonable belief that an FFDE is justified. As such, the Hearing Officer did not err in finding that the Agency violated DO 2730.1F when it required Appellant to undergo an FFDE.[5]

We also do not agree with the Agency's assertion that upholding the Hearing Officer's decision sets bad precedent. Our holding does not require the Agency to tolerate inappropriate behavior. Nor does it require an agency to sit idly by while a dangerous condition may exist. The Agency remains free to deal with unsatisfactory behavior and free to rectify dangerous situations. Our decision does not prohibit management from disciplining an employee for bad behavior. It does not prohibit management from correcting or putting a stop to bad or inappropriate behavior, wherever it might occur. All our decision requires is that before an employee is sent for an FFDE, management has sufficient information

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[5] We do not hold that the Agency violated the ADA in sending Appellant for an FFDE. As part of his decision on this issue, the Hearing Officer, on pages 7-9 of his decision, analyzed the accuracy of the report resulting from the FFDE conducted on Appellant. First, we find that analysis wholly unnecessary to the resolution of the issues before him and unnecessary for purposes of our ruling. In addition, we note the Hearing Officer , at the bottom of page 7 of his decision, essentially invoked the "fruit of the poisonous tree" doctrine. We believe this doctrine has no applicability in our administrative setting and is reserved for criminal matters only. See, e.g., Dalcour v. Gillespie, 2013 WL 2903399 (D. Colo. 2013)(The "fruit of the poisonous tree" doctrine is an exclusionary rule applicable to criminal proceedings for deterrence purposes, but it is not generally applied in civil proceedings to extend a person's constitutional rights. Townes v. City of New York, 176 F.3d 138, 145–46 (2d Cir.1999); see also Snider v. Pekny, 899 F.Supp.2d 798, 816 & n.5 (N.D.In. 2012) (citing cases).")

to form a reasonable belief that the employee cannot perform his or her job due to a medical condition or disability.

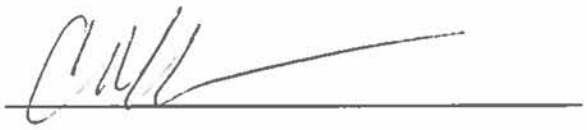
The Hearing Officer made additional findings and conclusions which have not been challenged by the Agency in its Petition For Review or its briefs to this Board. Any objection to those findings and conclusions, therefore, have been waived or abandoned.

We fully acknowledge the difficult task the Agency has in running its prisons. We also fully acknowledge the importance fitness for duty evaluations may play in the safe and efficient operations of the Agency's detention facilities. Our decision today is not meant to discourage the use of this valuable tool, but rather to stress the importance of first having a reasonable basis for concluding an employee cannot perform the duties of the position in an acceptable manner due to medical problems or disabilities.

For all of the above reasons, the Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on April 18, 2013, and documented this day of August, 2013.

BY THE BOARD:



Chair (or Co-Chair)

Board Members Concurring:

Colleen M. Rea, Esq, Chair

Patti Klinge, Co-Chair

Michelle Lucero, Esq.

Derrick Fuller

Bob Nogueira