

ORDER ON APPELLANT'S MOTION FOR DISCOVERY

IN THE MATTER OF THE APPEAL OF:

CATHERINE MARTINEZ, Appellant,

vs.

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

The Appellant filed a motion for discovery in this appeal. The Agency responded, objecting to some of Appellant's requests, and conceding others. Upon review of the motion, response, pleadings, and exhibits, the following findings and order enter.

Nature of appeal and discovery requests

The Appellant is a deputy sheriff in the Denver Sheriff's Department. The Agency suspended her for what it deems were violations of specified Career Service Rules revolving around her use of leave for alleged illness. Appellant requests the following discovery:

Interrogatories

1. Please state where in the Career Service Rules it states that an individual may not substitute vacation time and/or compensatory time in lieu of sick time when that individual has exhausted his or her sick time and is legitimately ill?

The Agency objects to Interrogatory 1 on the basis that the Career Service Rules are available to Appellant for her review on-line in their entirety, including Rules 10 and 11 on leave. The Appellant's request is DENIED, as the Rules are available for the public, including Appellant, on-line at:
<http://www.denvergov.org/humanresources/RulesandPolicies/tabid/432517/Default.aspx>

2. Please state where in the Denver Sheriff's Department's rules, regulations, and/or orders it states that an individual may not substitute vacation time and/or compensatory time in lieu of sick time when that individual has exhausted his or her sick time, is legitimately ill, and has not obtained authorization for a "planned" absence? As the Agency does not object to this request it is GRANTED.

3. What is the recourse for an individual who has exhausted his or her sick time, is legitimately ill, is not aware of potential coverage under the Family Medical Leave Act ("FMLA"), and has not predicted the need for time off and therefore has not requested an authorized "planned" absence?

The Agency objects, stating the leave for which Appellant was disciplined is still deemed "unauthorized" and is not considered FMLA, therefore, any requests related to FMLA issues are irrelevant where Appellant and her counsel both affirmed that the leave was not FMLA related. The issue here is the compound assumptions underlying Appellant's discovery request, rendering the question unduly vague. Counsel may inquire at hearing to establish his underlying assumptions. This request is DENIED.

4. Please describe the training and information that the Denver Sheriff's Department ("Department") provides to supervisors and to deputy sheriffs regarding FMLA. In so doing, please answer the following:

- a. What information does the Department provide to supervisors regarding what conditions, circumstances, or illnesses may qualify an employee for FMLA leave?**
- b. How does the Department train supervisors to handle a situation in which it is likely that a deputy sheriff may qualify for FMLA leave but is unaware of that fact?**
- c. How are deputy sheriffs made aware of all of the conditions and circumstances that may qualify them for FMLA leave and of the restrictions of such leave?**

The Agency objects to this interrogatory for the same reasons as stated above, i.e. Appellant and her attorney both previously stated Appellant's request for leave was not FMLA-related and therefore inquiry regarding FMLA is irrelevant. However, the Appellant's claim is the Agency should have notified her that FMLA leave was available to her. The Career Service Rules (CSR) provide for the procedure for requesting FMLA leave. CSR 11-150 *et seq.* Notably, the Rules place an affirmative duty upon agencies to notify employees their requests may qualify for leave under the FMLA where the agency has reason to know the request may qualify as such. CSR 11-153. The Appellant claims even though she did not ask for FMLA leave expressly, the Agency should have provided that information. Thus, the request meets the discovery standard of appearing "reasonably calculated to lead to the discovery of admissible evidence." CRCP Rule 26(b)(1). Appellant's Interrogatories 4 is GRANTED as four separate interrogatories.

5. Is it the Department's policy that if an individual has exhausted his or her sick time but is legitimately ill, that the individual should work his or her shift despite any of the debilitating conditions he or she is suffering because of the illness?

The Agency objects to Interrogatory 5 as unduly broad because the Appellant failed to define "legitimately ill" or "debilitating conditions" or whether the two terms are interchangeable. While the question may have some relevance to an issue in the

case, Appellant has not provided good cause for granting more than five interrogatories as presumptively limited by CSR 19-45 A. The Request is therefore DENIED. Counsel may easily inquire into this matter at hearing.

Appellant's Requests for Production of Documents

1. Please provide all documentation regarding the basis for the Department's policy that an individual may not substitute vacation time and/or compensatory time in lieu of sick time when that individual has exhausted his or her sick time and is legitimately ill.

a. For the purpose of this request, "all" documentation includes but is not limited to internal memorandums and notes; briefs and/or other legal pleadings; articles; transcripts of hearings and/or policy discussions; and correspondence.

Departmental Order. The Agency consents to the request for production of the Denver Sheriff Departmental Order related to leave. Therefore, Appellant's request as to the Departmental Order is GRANTED.

Career Service Rules, Decisions and appeals to the CSB. The Agency objects to the request for the production of Career Service Rules and decisions because they are available on-line. Because the Career Service Rules and Career Service Hearings Office and Board's decisions are equally available to Appellant as they are to the Agency, this request is DENIED.

Internal memoranda, policies, correspondence etc. The Agency also objects to Appellant's request for internal memoranda and notes, policy discussions, and correspondence as work product, attorney client privilege, and deliberative process. Finally, the Agency objects to the remainder of RFP 1a. as unduly broad and burdensome.

The Agency SHALL DISCLOSE all internal memorandums and notes, policy discussions, and correspondence insofar as they provide notice that an individual may not substitute vacation time and/or compensatory time in lieu of sick time when that individual has exhausted her sick time and is legitimately ill. To the extent that any of these materials contain the mental impressions, conclusions, opinions, or legal theories of the Agency's counsel concerning this appeal, it is not discoverable, and to that extent, the request is DENIED.

2. For the purpose of this request, "all" documentation relates to documents prepared for and/or received and reviewed by any individual affiliated with the following: the Department; the Career Service Board; the Human Resources department of the Career Service Authority; the Employee Relations Department of the Career Service Authority; the Colorado Chapter of the Fraternal Order of Police; and Lodge 27 of the Fraternal Order of Police.

The Agency objects to the request for production of documents 1b. as unduly broad and burdensome. Further, the Agency objects on the basis that the Career Service Board, the Human Resource Department of the Career Service Authority, the Colorado

Chapter of the Fraternal Order of Police, and Lodge 27 of the Fraternal Order of Police are not parties to this appeal, and therefore, any requests for production from these entities must be served on the entities, as the Denver Sheriff's Department and the Denver City Attorney's Office are not custodians of records for those entities.

This request is DENIED as overly burdensome. The Appellant must serve requests for production to the entities themselves.

Order

- 1) Interrogatory 1 is DENIED.
- 2) Interrogatory 2 is GRANTED.
- 3) Interrogatory 3 is DENIED.
- 4) Interrogatory 4 is GRANTED as four separate interrogatories.
- 5) Request for Production 1a. is GRANTED IN PART and DENIED IN PART, as described, above.
- 6) Request for Production 1b. is DENIED.

DONE January 5, 2011.



Bruce A. Plotkin
Career Service Hearing Office

Certificate of Delivery

I certify that, on January 5, 2011, I delivered a correct copy of this Order to the following, in the manner indicated:

Ms. Catherine Martinez, cpmartinez80236@hotmail.com	(via email);
Marcy McDermott, Esq., mmcdermott@fostergraham.com	(via email);
Dan Foster, Esq., Danny@fostergraham.com	(via email);
Lori Uhlberg, Esq., luhlberg@fostergraham.com	(via email);
City Attorney's Office at Dlefilng.litigation@denvergov.org	(via email);
Ms. Lili Tran, HR., Lili. Tran@denvergov.org	(via email).

