

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 77-07

DECISION

IN THE MATTER OF THE APPEAL OF:

MARILYN MUNIZ, Appellant,

vs.

DEPARTMENT OF HUMAN SERVICES, and the City and County of Denver, a
municipal corporation, Agency.

I. INTRODUCTION

The Appellant, Marilyn Muniz, appeals her dismissal from employment with the Denver Department of Human Services (the Agency) for violation of specified Career Service Rules. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on April 22, 2008. The Appellant appeared with her attorney, Michael O'Malley, Esq. The Agency was represented by Niels Loechell, Assistant City Attorney. Agency Exhibits 1-13 and Appellant Exhibits A-C were admitted. The Agency presented witnesses Mike Roque, Kevin Patterson, Geraldine Magill, and Leah DiMarco. The Appellant testified on her own behalf.

II. ISSUES PRESENTED FOR APPEAL

- A. Whether the Agency violated CSR 5-84 by failing to engage in an interactive process.
- B. Whether the Appellant violated any of the following Career Service Rules: CSR 16-60 A; 16-60 B; 16-60 K; 16-60 L; or 16-60 Z.
- C. If the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss the Appellant conformed to the purpose of discipline under CSR 16-20.
- D. Whether the Agency's discipline was based upon unlawful discrimination.

III. FINDINGS

The Appellant was employed as a Security Officer by the Agency beginning in 2000. Her last assignment was the Montebello Office. At all times pertinent to this

appeal, Mike Roque was the Appellant's second-level supervisor, and final decision-maker in her dismissal. [Roque testimony].

On June 20, 2007 and June 21, 2007, the Appellant fell asleep while on duty at the lobby Security Desk in view of clients. (Ex. 9). The Agency conducted a pre-disciplinary meeting on August 3, 2007 concerning these incidents. The Appellant acknowledged responsibility for the incidents. [Exhibit 9]. On August 9, 2007, the Agency assessed the Appellant a written reprimand, due to the June sleeping incidents. *Id.*

After her written reprimand, the Appellant took two weeks of vacation leave to consult a physician about her sleeping problems. [Appellant testimony]. On July 25, 2007, the Appellant's physician wrote a letter which stated the Appellant had a low oxygen level which "may be the cause of her daytime sleepiness and need for frequent naps." [Exhibit 11-2]. The physician recommended tests to determine the extent of the Appellant's oxygen deficiency, and recommended sleep apnea testing. Her sleep apnea testing was delayed due to the Appellant's thyroid problems. [Appellant cross-exam; Exhibit 12]. Kevin Patterson, Deputy Manager of the Agency, received the physician's July 25 letter at the Appellant's pre-disciplinary meeting on August 3, 2007, prior to his issuance of the written reprimand on August 9. [Patterson cross-exam].

When the Appellant returned to work, she was seen asleep while on duty August 17, 2007. A pre-disciplinary meeting concerning this incident was convened on August 30, 2007. Prior to the meeting, the Appellant presented Patterson a second letter from the Appellant's physician, dated August 29, 2007. [Patterson cross-exam]. The physician determined as follows.

Excessive daytime sleepiness and falling asleep on the job are probably related to her low oxygen levels [sic]. Please make necessary accommodations to allow her to use oxygen at work.

[Exhibit 11-1].

Following the August 30, 2007 pre-disciplinary meeting, the Agency issued a three-day suspension beginning September 5, 2007. [Exhibit 8]. The notice of suspension acknowledged that the Appellant stated she may have medical issues causing her excessive daytime sleepiness, [Exhibit 8; Patterson cross-exam], however, the Agency did not initiate an interactive process. Instead, the Agency believed it was up to the Appellant to do so. [Roque testimony; Patterson cross-exam; DiMarco testimony].

Patterson directed DDHS Personnel Analyst Leah DiMarco, to provide the Appellant with information concerning disqualification and the interactive process. A series of email exchanges, September 27 through October 4, 2007 ensued between the Appellant and DiMarco, [Exhibit 10]. DiMarco emailed the Appellant copies of CSR 5-84, the rule on reasonable accommodations for those with disabilities and CSR 14-20 regarding disqualification. DiMarco also telephoned the Appellant to explain the interactive process. During her email exchanges with the Appellant, DiMarco asked the

Appellant for updated information about her medical condition. The Appellant replied on October 4, 2007, that her physician had not yet obtained test results, but promised to provide that information as soon as it was made available to her. [Exhibit 10].

On September 19, 2007, the Appellant again was found sleeping while on duty. [Ex 7]. The Agency convened a pre-disciplinary meeting on October 23, 2007. The Appellant again described medical issues that may be causing her to fall asleep on the job. She provided a lab report concerning her depleted oxygen levels. [Exhibit 13]. Roque acknowledged receiving the document but did not understand what was indicated in the report and did not seek to contact the Appellant's doctor or any other authority to determine the significance of the document. The Agency did not undertake an interactive process and made no determination regarding whether the Appellant may have had a disability which may have qualified for accommodation under CSR 5-84.

On October 26, 2007, the Agency dismissed the Appellant for CSR rule violations, all of which related to her sleeping while on duty. This appeal followed on November 9, 2007.

IV. ANALYSIS

A. Jurisdiction and review

Jurisdiction is proper under CSR §19-10 A. 1. 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

This case contains a mixed burden of proof. The Agency retains the burden of persuasion, throughout the case, to prove Appellant violated one or more cited sections of the Career Service Rules, and to prove its disciplinary decisions complied with the purposes of discipline under the Career Service Rules. CSR 16-20. The Appellant retains the burden of persuasion, throughout the case, to prove the Agency engaged in unlawful discrimination or violated Career Service Rule 5-84. The standard by which the moving party must prove each claim is by a preponderance of the evidence.

The Agency may not bring disciplinary action against the Appellant if the action violated the Agency's obligation to engage in an interactive process under Career Service Rule 5-84. The key to the Appellant's claim is whether the Appellant's communication of her potential medical problem, and the doctor's letters she provided, should have triggered a formal interactive process under CSR 5-84 E.

C. CSR 5-84 Reasonable Accommodations for Individuals with Disabilities Policy

The Appellant claims the Agency violated its obligation to investigate her disability claim. I agree. The pertinent language of CSR 5-84 reads as follows.

- E. 1. If an employee (1) provides notice that the employee needs a reasonable accommodation to perform the essential functions of the employee's position; or (2) the agency or department has actual or constructive notice that an employee may have a disability for which the employee needs reasonable accommodation, the agency or department shall initiate an interactive process within twenty (20) calendar days...

CSR 5-84 E. 1. [emphasis added].

Thus, under this rule, once an agency receives any form of notice that should apprise the agency of an employee's potential need for a reasonable accommodation to perform her essential work duties, the agency has no choice but to initiate an interactive process. The Agency responded it was not obligated to engage in an interactive process for the following reasons.

(1) Roque, the final decision maker in the Appellant's dismissal, [Roque testimony; Exhibit 7], stated the Appellant failed to ask for a reasonable accommodation. (2) Patterson, the final decision maker in the Appellant's prior discipline for sleeping on duty, stated the physician's assessment, that the Appellant's sleeping on duty was "probably" related to oxygen deprivation was insufficient notice of the need for accommodation. [Patterson testimony]. (3) DiMarco, HR professional for the Agency, stated the Appellant never used the words "interactive process." [DiMarco testimony].

First, the doctor's letters from the Appellant were sufficient actual notice of the Agency's obligation to engage in an interactive process under CSR 5-84 E. Further, the Agency acknowledged in its dismissal letter that the Appellant provided information "that you may have medical issues that are causing daytime sleepiness." This acknowledgement is sufficient notice under CSR 5-84 E. to trigger the Agency's obligation to engage in the interactive process in order to determine whether the Appellant has a qualifying disability under the Americans with Disability Act, and if so, whether her disability may be reasonably accommodated.

Second, the Appellant did ask for a reasonable accommodation - to use oxygen at work - at her pre-disciplinary meeting. "My doctor would like me to wear the oxygen at work, you know just, all the time until they really see what's going on and can, you know, pinpoint, you know, cause I'm not getting enough oxygen. She says that will help." [Exhibit 12].

Third, the Appellant is not required to utter specific words when requesting a reasonable accommodation under CSR 5-84 E. Smith v. Midland Brake Inc., 180 F. 3d 1154 (10th Cir. 1999) (*citing* 29 C.F.R. §1630.2(o)(3)). The Agency may not claim the Appellant should have tried harder to force it to engage in the interactive process. EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 16 A.D. Cas. (BNA) 1761 (7th Cir. 2005). The Agency, as well as the Appellant, is obligated to initiate an interactive process,

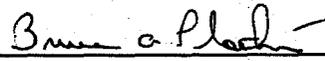
when it has sufficient information to be reasonably apprised of an employee's potential need for reasonable accommodation.

Both the doctor's letters, and the Appellant's statement about the possible need for accommodation at her pre-disciplinary meeting, were sufficient notice to the Agency that it was obligated to engage in the interactive process within 20 calendar days. Its failure to do so violated CSR 5-84 E. Because the Agency had notice of the Appellant's potential disability, the Agency may neither discipline nor disqualify the Appellant without first engaging in an interactive process pursuant to CSR 5-84 E.

V. ORDER

The Agency's dismissal of the Appellant is REVERSED. The Appellant shall be restored to the classification and pay-grade she occupied at the time of her dismissal, with restoration of pay, benefits, and status, in compliance with this order.

DONE July 21, 2008.



Bruce A. Plotkin
Career Service Hearing Officer