

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

Appeal No. 24-07

DECISION

IN THE MATTER OF THE APPEAL OF:

SHEILA ROBERTS,
Appellant,

vs.

DENVER COUNTY COURT,
and the City and County of Denver, a municipal corporation,
Agency.

The hearing in this appeal was held on July 16, 2007 before Hearing Officer Valerie McNaughton. Appellant Sheila Roberts was present and represented herself in this appeal. The Agency was represented by Assistant City Attorney Joseph Rivera, and the Agency's advisory witness was Suzanne Razook. Having considered the evidence and arguments of the parties, the following findings of fact and conclusions of law are entered herein.

I. INTRODUCTION

Appellant Sheila Roberts has worked for the City and County of Denver for about twenty years. This is a direct appeal of a one-day suspension imposed on May 7, 2007 for failing to obey her supervisor's order to submit a doctor's note regarding her use of sick leave on April 9, 2007. Agency Exhibits 1 - 10 and Appellant's Exhibit A were admitted without objection.

II. ISSUES

The issues in this appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules, and

2) Did the Agency establish that a one-day suspension was within the range of penalties that could be imposed by a reasonable administrator in compliance with the Career Service disciplinary rules?

III. FINDINGS OF FACT

Appellant is a Court Technical Clerk for Denver County Court who was assigned to Courtroom 124D at the time of this suspension. On April 9, 2007, at 5:40 a.m., Appellant left a message for her supervisor Terrie Cooke that she was having a bad reaction to medication and was not able to come to work. A few minutes later, Appellant left a message for Division Manager Ron Trujillo that she would not be in. County Court employees are required by Agency rule to call in if sick at least an hour before their report time. Appellant's report time is 7:30 a.m.

Mr. Trujillo retrieved the message left for him at 7:08 a.m. from his home. He immediately called Appellant and asked her what was going on. Appellant informed him that she had restless leg syndrome, and had taken medication the night before which caused her to sleepwalk all night. Appellant stated she had emptied out her closets and cabinets the night before, and the contents were scattered around the house. Mr. Trujillo asked if there was any way she could come in, as they were short-handed that day in her assigned courtroom, and he may be able to let her go once things were in order. Appellant responded that the medication was taken the night before, so she felt she could get herself together and come to work. [Exh. 5.] Mr. Trujillo then informed Ms. Cooke that Appellant would be coming in.

After her phone call to Mr. Trujillo, Appellant showered and tried to get ready for work. She noticed that the longer she was up, the more unsteady she became. At 7:25 a.m., Appellant left Mr. Trujillo a message that she did not feel safe to drive and would not be in. After receiving this message, Mr. Trujillo asked another clerk who had requested sick leave to come in so the courtroom would be staffed. That clerk agreed to come to work.

At 10:15 a.m., Mr. Trujillo related these conversations with Appellant to Ms. Cooke. The circumstances sounded strange to her, especially the fact that Appellant kept changing her mind about whether she would come to work. Ms. Cooke was aware that Appellant had been disciplined for attendance problems in 2004. She decided to require Appellant to submit a statement from her physician about the illness. At noon, Ms. Cooke left Appellant a message that she would need to bring in a doctor's note as soon as she reported back to work. Appellant left a return message shortly thereafter that she would try to get into compliance with that.

In response to her supervisor's order, Appellant called Denver Health Medical to obtain an appointment, but the automatic voice message stated the

office was closed from 12 to 1 p.m. Appellant admitted that by the afternoon, she felt well enough to drive herself to the doctor. Appellant left a message for the Denver Health triage nurse between 4 and 5 p.m. The next day, April 10th, Appellant left a second message for the nurse asking for a note that she was okay to return to work after a one-day's absence. Neither message was returned.

Appellant returned to work on April 10th at her usual report time. At 10:31 a.m., Ms. Cooke asked Appellant by email if she had the doctor's note. Appellant responded, "No, I do not have a Dr.s note." Ms. Cooke asked her why. At 3:10 p.m., Appellant replied, "Why do I need one? And why is one being requested of me now? I followed County court rules and called in well before an hour of my shift. If I was able to drive to the Dr. I would have been able to come to work and would not have needed to stay home." [Exh. 6-1.]

Appellant testified that she later discussed the order to bring the note with a friend, who is a supervisor for another city agency. The friend said she did not think Appellant's supervisor could require Appellant to bring a doctor's note unless the supervisor had given her notice she had been abusing sick leave. Appellant also testified that she herself did not believe her supervisor had the authority to order the note, as it was her understanding that only police officers could issue lawful orders. Appellant also believed her supervisor's noon message did not give her enough time to get a doctor's appointment on the day of her illness.

On April 12th, Ms. Cooke served Appellant with a notice of contemplation of discipline based on her failure to submit the doctor's note as directed. [Exh. 3.] Appellant told Ms. Cooke she did not understand what she had done wrong. Ms. Cooke replied that, as appointing authority, she could request a doctor's note from her. Later that day, the Denver Health office manager returned Appellant's call, and Appellant asked her for a doctor's note that she could return to work. The office manager told her the medical staff does not sign notes without seeing a patient, and that she could have an appointment for next Wednesday, April 18th. Appellant declined, explaining that the sickness lasted only a day, and she had already received a disciplinary letter regarding the matter.

The pre-disciplinary meeting was held on April 23, 2007. Appellant came into the meeting feeling angry because she assumed the Agency thought she was not sick on April 9th. Appellant explained she had taken a previously prescribed pain medication the night before, and did not feel she could drive herself to work or the doctor the next day.

After consulting with Agency Human Resources Manager Suzanne Razook, Ms. Cooke submitted to Court Administrator Matthew McConville her recommendation of a one-day suspension. Ms. Cooke based this recommendation on Appellant's lack of effort to obtain the doctor's note, her

defensive attitude at the pre-disciplinary meeting, and her past disciplinary history, which included two suspensions and previous attendance issues. Mr. McConville approved the recommendation. On May 7th, Appellant was suspended for one day for violating CSR § 16-60 J, failure to comply with a lawful order given by a supervisor. The charge of leave abuse made in the pre-disciplinary letter was withdrawn as unfounded. [Exh. 2.] Appellant filed this appeal of the discipline on May 17, 2007.

IV. ANALYSIS

1. Career Service Rules

Jurisdiction is proper under CSR § 19-10 A. 2. In this de novo hearing on the appropriateness of the discipline, the Agency has the burden to show by a preponderance of the evidence that Appellant violated the asserted disciplinary rule, and that a one-day suspension was within the range of penalties that can be imposed under the circumstances. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975).

The Agency contends that Ms. Cooke had the discretion as appointing authority under CSR § 11-36 c) to order Appellant to submit a doctor's note upon her return to work, and that Appellant failed to obey that order, in violation of CSR § 16-60 J.

Appellant admits that she did not submit a doctor's note as ordered, but argues that 1) only police officers can issue lawful orders, 2) the order was improper because Appellant had been given no notice of leave abuse, 3) Appellant was not given adequate time to comply, and 4) Appellant made reasonable efforts to obtain a doctor's note.

The Career Service Rules give employees notice that discipline may be imposed for, among other violations, "failing to comply with the lawful orders of an authorized supervisor". CSR § 16-60 J. The phrase "lawful order" in this rule is intended to exclude orders that may be improper, for example, an order that is beyond the authority of the supervisor. If Appellant believed the order was improper, her recourse would be to comply with the order and file a grievance thereafter. See e.g., Jefferson v. U.S.P.S., 2006 MSPB LEXIS 1120 (2006); Simien v. U.S.P.S., 99 M.S.P.R. 237, 253 (2005).

Ms. Cooke properly exercised her discretion to issue an order for a doctor's note based upon the unusual circumstances surrounding Appellant's request for sick leave. Appellant first stated she was sleepwalking the night before because she took pain medication, adding that she removed the contents of her cabinets and closets and scattered them around the house. When asked the next morning if she could now come to work, Appellant agreed she could. Twenty minutes later, Appellant called back and stated she would not be coming

in because she did not feel safe to drive. When coupled with Appellant's previous discipline over attendance issues, Ms. Cooke reasonably concluded that the circumstances raised questions that justified investigation into the use of leave under CSR § 11-36. [Exhs. 7, 8.]

While Appellant testified she believed a lawful order could only be issued by a law enforcement officer, she admitted that she nonetheless attempted to comply with her supervisor's order. Moreover, Appellant did not communicate this interpretation of the rule to her supervisor in an attempt to explain her noncompliance. Under these circumstances, Appellant's actions were not consistent with her stated belief.

Appellant's next argument is that the order was unauthorized without some prior notice of leave abuse. That interpretation would prevent an Agency from investigating a first offense of apparent abuse of leave even under the most egregious circumstances. The rule does not state that only second offenses may be investigated, and that requirement would be inconsistent with the plain meaning of the rule. "Appointing authorities may investigate the alleged illness of an employee absent on sick leave. False or fraudulent use of sick leave shall be cause for disciplinary action and may result in dismissal." § 11-36 b). "An appointing authority may require [a doctor's] statement or proof for an absence chargeable to sick leave of any duration." § 11-36 c).

Finally, Appellant argues that she did attempt to contact her doctor's office for a note, and therefore her failure to comply was not intentional. Appellant testified that she first left a message for the nurse at 4 p.m. on the day of the request, and that she was then physically able to drive to the doctor's office. Appellant does not explain why she did not call as soon as the doctor's office opened after lunch. The next day, Appellant left another message, in which she asked for a doctor's note that she was okay to return to work. This is a request for a medical statement on her fitness to return to duty, rather than leave abuse. At the same time, Appellant expressed to her supervisor friend that the order was intended to investigate possible leave abuse. Two days later, Appellant refused an offer of a medical appointment because she was no longer sick and believed the point was moot, having received the contemplation of discipline letter. Appellant never informed her supervisor of her efforts to comply with the order. Further, Appellant testified that she did not believe she should be required to comply with the order. She conveyed that same belief to her supervisor on April 10th in their email exchange. The evidence indicates that Appellant's efforts to obtain the note were not reasonably calculated to comply with the order.

The Agency established by undisputed evidence that supervisor Terrie Cooke communicated a lawful order to Appellant to submit a doctor's note covering the April 9th absence as soon as Appellant returned to work. Appellant admitted she did not do so. Appellant's explanation that there was insufficient time to comply was not proven by her evidence, in light of Appellant's

unexplained failure to call the doctor until four hours after the order was given, or to contact her supervisor in an effort to achieve compliance.

Further, Ms. Cooke testified credibly that discipline may not have been imposed if Appellant had communicated her efforts to comply with the order. Appellant did not do so because she believed the order itself was improper. A subjective belief that a supervisor's order is improper does not justify a failure to comply.

The Agency established that Appellant failed to comply with her supervisor's lawful order, in violation of CSR § 16-60 J.

2. Penalty

The Agency contends that the one-day suspension was reasonable based on Appellant's defensive attitude when reminded to submit the note, her failure to offer any explanation for her failure to comply, and her past disciplinary history. Appellant's one- and three-day suspensions in 2004 for unauthorized absences were considered in determining the appropriate penalty. The Agency mitigated the penalty to a one-day suspension in consideration of the fact that it had been two years since any previous discipline.

Appellant testified that the Agency did not take into consideration how her anemia has exacerbated her physical condition. Appellant stated she did not defy her supervisor's order, but her circumstances made compliance difficult.

The Agency has an important interest in assuring compliance with the orders of its supervisors. While Appellant did not openly defy the order in question, the actions she took were belated and inadequate. Once the contemplation of discipline letter was delivered, Appellant ceased all efforts to obtain a doctor's note. In the absence of any communication from Appellant, the Agency reasonably concluded that Appellant ignored the order because she disagreed with it. Under those circumstances, discipline more serious than a written reprimand was warranted. In light of Appellant's 2004 suspensions for similar misconduct, a one-day suspension is consistent with the principles governing discipline under CSR § 16-20.

ORDER

Based on the foregoing findings, it is hereby ordered that the Agency's personnel action dated May 7, 2007 is affirmed.

Dated this 16th day of August, 2007


Valerie McNaughton
Career Service Hearing Officer