HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 66-08

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

ELIZABETH SALAZAR. Appellant,

vs.

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

The hearing in this appeal was held on November 13, 2008 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing, and was represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Robert Nespor, and Cecilia Major served as the Agency advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE CASE

On August 29, 2008, Appellant Elizabeth Salazar filed this direct appeal challenging her August 18th dismissal by the Denver County Court. The parties stipulated to the admissibility of Agency Exhibits 1 – 12 and Appellant's Exhibits B – G. Appellant withdrew its Exhibit A. Exhibit 13 was admitted without objection during the hearing.

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 (CSR), and

2) Did the Agency establish that dismissal was within the range of penalties that could be imposed upon Appellant by a reasonable administrator for the violations proven under the rules?

III. FINDINGS OF FACT

Appellant Elizabeth Salazar has been working for the city since 1998. At the time of her termination, Appellant held the position of Judicial Assistant II with the Traffic Division of the Denver County Court. Her duties included providing walk-in and telephone customer service for the approximately 110,000 traffic tickets filed with the Division each year, handling mail, researching tickets, and pulling traffic dockets. Regular attendance is an important part of the job of a Judicial Assistant, since unplanned absences require other employees to be taken from their regular duties in order to assist customers at the counter, the Division's number one priority.

The Agency presented the testimony of Appellant's supervisor, Operations Supervisor Cecilia Major, who made the decision to dismiss Appellant for excessive unplanned absences that negatively impacted her co-workers and the Division. [Exh. 3.] This appeal resulted.

Appellant transferred into the Traffic Division on Nov. 20, 2006. Ms. Major assumed supervision of Appellant in May 2007. By September, Ms. Major informed Appellant that her absences were becoming "a huge problem." Appellant received a "needs improvement" rating on her 2007 Performance Enhancement Progress Report (PEPR), in part because of her use of 19 days of non-FMLA leave. "On days where Elizabeth was not at work, long lines formed at the customer service counter which left the burden to assist these customers on her coworkers . . . Elizabeth's absences disrupted the operation of the agency and also caused morale issues with her coworkers." [Exh. 8.] As a result, a Performance Improvement Plan (PIP) was issued requiring her, among other things, to "report to work." [Exh. 10.] From October 2007 to July 2008, Ms. Major and Appellant met every month for performance improvement reviews to monitor her progress on the goals established in the PIP. Those reviews showed that Appellant's performance was generally successful in all areas but coworker relations and reporting to work. [Exh. 11.]

The Division required its 65 employees to bid for their preferred vacation dates and personal holidays in January of each year. Employees were instructed to fill in a form on a blue card to request vacation leave. In addition, unscheduled vacation leave could be granted at the discretion of the supervisor. In October 2007, Ms. Major informed Appellant that she would not be permitted to use vacation leave to cover sick time based on her excessive absences. Ms. Major testified that the Division policy was to deny vacation leave in lieu of sick leave if an employee shows a pattern of leave abuse. Thereafter, Appellant was twice permitted to use vacation leave instead of sick leave after calling in sick on days for which she had preapproved vacation leave.

On February 14, 2008, Ms. Major gave Appellant a written reprimand based in part on her failure to comply with her scheduled lunch hour, and her January time sheet's claims for FMLA leave, donated sick leave, and vacation in lieu of sick leave when she was not entitled to use of those types of leave. [Exh. 6.] On March 5, 2008, Appellant was given a two-day suspension for 13 incidents of sick leave abuse over a three-month period. [Exh. 5.] On April 17, 2008, Appellant was suspended for 30 days for a continued pattern of leave abuse based on her use of 66 hours of unplanned leave without pay (LWOP) and six hours of sick leave from March 24 to April 4, 2008. [Exh. 4.]

On Monday July 21, 2008, Appellant used eight hours of sick leave, and was left with a balance of three hours of sick leave. She called in sick the following Monday July 28. The last three hours of sick leave and five hours of LWOP covered that absence. Appellant was also absent on July 29 and 30, and was given a total of sixteen hours of LWOP for those days. On August 5, 2008, she was served with notice that discipline against her was being considered for violation of Career Service Rule (CSR) § 16-60 S, unauthorized absence from work or abuse of leave. [Exh. 2.]

Ms. Major, Ms. Cooke, Agency HR Director Suzanne Razook, Appellant and her representative Joe Montoya were in attendance at the pre-disciplinary meeting. Appellant stated that the absences were caused by fibromyalgia, an illness that she could not control. She informed the Agency she was seeing a doctor and adjusting to new medications at the time of the absences. [Testimony of Ms. Major.] Appellant stated she called in sick on July 21 because of her fibromyalgia, and on July 28 – 30 because of an upper respiratory infection. [Testimony of Terrie Cooke; Exh. B-1.] Appellant submitted no medical documents, and did not request that the Agency contact her doctors to obtain additional medical information. Appellant admitted at hearing that she did not dispute at the meeting the accuracy of her sick leave balance, or the Agency's use of LWOP to cover her July absences.

Appellant's sick leave balance fell to zero twelve times in the 20 months she worked at the Traffic Division. [Exh. 12.] Forty-five percent of her absences in 2008 occurred on Mondays or Fridays, a slightly higher percent than expected if absences were equally distributed among all work days. [Exh. 13.] In 2008, Appellant used 177 hours of LWOP to cover absences after her sick leave was exhausted. [Exh. 12-11, 12-12.] The Traffic Division and its customers were adversely impacted by negative employee morale, longer customer wait times, delays in filing open and closed cases, occasional inability to prepare daily dockets, and a reduction in the amount of time available to handle customer inquiries. [Testimony of Ms. Major.]

Appellant testified that she has suffered from fibromyalgia and asthma for the past 25 years. In 2007, she was having severe symptoms related to both diseases, and informed her supervisor Ms. Major. As a result, Appellant applied

for leave under the Family Medical Leave Act (FMLA) for fibromyalgia and chronic asthma. In April 2007, her doctor submitted to the Agency a medical assessment which showed a diagnosis of fibromyalgia. Appellant also requested a referral to the Agency's interactive process pursuant to CSR § 14-21. That process continued until August of that year, and Appellant was permitted to use paid and unpaid FML leave for absences believed to be covered by the Act. [Exh. 12-3, 12-10, 12-11.] The process ended with a finding that Appellant was not disabled under the Americans with Disabilities Act of 1990 (ADA). [Testimony of Ms. Major.] No doctor has concluded that Appellant was prevented from working based on any medical condition. [Testimony of Appellant.]

At the end of 2007, Appellant checked her leave records and confirmed that her sick leave balance was 11 hours. Appellant was aware that she accrued an additional eight hours at the end of every month. Appellant and her supervisor focused on the attendance issue at every monthly performance improvement review from late 2007 to mid-2008. In the spring of 2008, Appellant told her supervisor she did not agree with the leave balances she was seeing on her pay stubs. When she came back from her 30-day suspension in June 2008, she observed that PeopleSoft and her June 13th pay stub showed the same sick leave balance. In July, Appellant noticed adjustments to her sick leave accruals that removed 13 hours of leave, and notations on the right side of the PeopleSoft leave history print-out. Appellant believed those adjustments were erroneous. [Testimony of Appellant; Exh. 12-3.]

In fact, the adjustments were made because Appellant's 30-day suspension required a pro-rated reduction in sick leave credits for April, and no credits for May, under CSR § 11-33 a). PeopleSoft showed a balance of 11 hours of sick leave as of June 30, 2008 as a result of these adjustments. At hearing, Appellant acknowledged that the adjustments were correct based on her out-of-pay status in April and May.

On July 21, 2008, Appellant used another eight hours of sick leave. When she got back to work later that week, she checked her sick leave balance. Although PeopleSoft showed the same 11-hour balance, Appellant believed she actually had an additional 13 hours removed by the recent adjustments, for a total of 24 hours. As of July 22nd, Appellant's actual unused sick leave balance was three hours, after deduction of the eight hours used on July 21st. Appellant testified that she believed her three-days' absence the following week was covered by the 24 hours in her sick leave balance.

On Aug. 5, 2008, Appellant was served with a notice that discipline was being contemplated. She checked her August 8th pay stub, which showed a sick leave balance of 13 hours. [Exh. D-2.] However, Appellant admitted that her leave slip requested LWOP to cover her July 30th absence. Since Appellant relied on the balances shown on her pay stubs rather than her PeopleSoft leave

history, she remained confused about her actual leave balances. Mr. Montoya, Appellant's representative at the pre-disciplinary meeting, testified that he reviewed her leave balances in the city's PeopleSoft personnel database before the meeting. [Exh. 12.] It showed that Appellant had exhausted her sick leave, but that she did have accrued vacation leave. Mr. Montoya affirmed that PeopleSoft is the only reliable source for accurate leave balances.

Appellant presented the medical report of John V. Wu, M.D. dated Feb. 25, 2008, which was based on his consultation with Appellant to evaluate multiple pain issues and other conditions. He concluded that fibromyalgia "is likely the diagnosis" based on a "constellation of diffuse pain symptoms". Dr. Wu advised her she would need to get FMLA time off related to this problem, and attached an article entitled "Establishing Disability Status in Fibromyalgia and Chronic Fatigue Syndrome." [Exh. C.]

Appellant argues that her supervisor could have allowed her to use vacation leave to cover the July 2008 absences. She recalled that this was done on Nov. 20, 2007, when she was given five hours of vacation leave after calling in sick, and one other time. Appellant admitted that her supervisor informed her in January and February 2008 that she would not be permitted to use vacation leave to cover sick leave requests.

In discussing the disciplinary issues following that meeting, the Agency representatives reviewed Appellant's attendance record from the Sept. 2007 PEPR to July 2008. They considered how much time she had been off work during that time, its impact on the Division's workload, and her past discipline for excessive absences. They concluded that Appellant exhibited a pattern of leave abuse that was not corrected by performance improvement plans, warnings and disciplinary actions, and that termination was the only option.

IV. ANALYSIS

The Agency bears the burden to prove that the imposition of discipline was appropriate under the Career Service Rules, and that the level imposed was within the range that could be issued by a reasonable administrator.

A. Leave Abuse

The Career Service Rules prohibit unauthorized absence from work, abuse of leave, and violation of Rule 11 related to leave. CSR § 16-60 S. An absence is unauthorized if it is taken in violation of either departmental or career service rule. In re Dessureau, CSA 59-07, 8 (1/16/08). Since it is not disputed that Appellant was sick on the days in question, and LWOP may be used to cover sick days after sick leave is exhausted, Appellant's leave was not unauthorized under the first clause of this rule. CSR § 11-34 b).

Appellant does not dispute the Agency's evidence of her attendance or disciplinary records. Appellant argues instead that her absences do not constitute leave abuse under the rule's second clause for a number of reasons. First, Appellant believes she should have been allowed to use vacation in lieu of sick leave under CSR § 11-34 c). That rule is permissive rather than mandatory. Here, the supervisor consistently enforced a policy not to grant such use where there was a pattern of leave abuse, unless vacation leave had been pre-approved. That policy was justified by the fact that unplanned absences had a strongly adverse effect on the operation of the Traffic Division. Appellant was on notice by Jan. 2008 that vacation in lieu of sick leave would not be granted based upon her excessive absenteeism and past discipline. Appellant did not request an exception from that policy at any time during her employment, and first raised this issue at hearing. The argument is not supported by any evidence that Appellant's situation presents special circumstances. Therefore, the Agency did not act unreasonably in enforcing this policy on Appellant.

Appellant also argues that her absences were caused by illness, which improved with time after adjustment of her medications. Appellant presented no evidence in support of this argument. Her doctor adjusted her medication at the end of Feb. 2008. That month, Appellant used 45 hours of sick leave and LWOP. In March, Appellant used 44 such hours. In April, Appellant was off on sick leave and LWOP for a total of 72 hours. In July, Appellant's combined sick, vacation and LWOP use was 50 hours. In addition, Appellant did not present her supervisor with any information, either before or at the pre-disciplinary meeting, that she or her doctor expected her attendance to improve based on the efficacy of her current medication regimen.

Next, Appellant contends that she was not aware of her sick leave balance, and would have used less if her pay stub leave histories had been accurate. The evidence is not disputed that Appellant kept close track of her leave balances in PeopleSoft, and that those balances were known to be, and were, accurate. Appellant also conceded that she knew how and when she accrued her additional eight hours of sick leave each month. In fact, Appellant testified that she checked her balance monthly, and spoke to her supervisor when she believed her balance was wrong. Just before taking her last three days absences, Appellant checked her PeopleSoft records. However, she relied instead on her opinion that the downward adjustment of her sick leave caused by her 30-day suspension was inaccurate. It is worth noting that Appellant then sought to use the exact number of hours of sick leave – 24 – that she believed she had in her balance.

Appellant then argues that the Agency should have talked to her doctors and considered any additional medical information they provided in making its disciplinary decision. However, the Agency concedes that Appellant was actually sick when she called in sick, and that her doctor's notes were accurate. Appellant admits for her part that she was not then entitled to protection from

termination provided by the Family Medical Leave Act, since it was concluded in Sept. 2007 that she was not disabled within the meaning of that Act. Appellant made no later application for use of the FMLA, and presented no additional medical information to her supervisor or the panel at the pre-disciplinary meeting. Appellant did not appeal the two prior suspensions based on her absences. An agency may consider the number of non-FMLA absences in determining whether there has been a violation of this disciplinary rule, which is intended to prevent patterns of absenteeism and leave abuse.

Finally, Appellant argues that she should have been offered a disqualification under CSR § 14-21. That rule permits an agency to initiate a disqualification "if a . . . physical impairment . . . prevents satisfactory performance of the essential functions of the position." Here, Appellant submitted her doctor's diagnosis of fibromyalgia and asthma, but no medical opinion that Appellant was prevented by either condition from performing the essential functions of her job. Appellant did not request disqualification, or inform the Agency at any time that she believed she was unable to fulfill the duties of her position. Absent such evidence, the Agency had no notice that disqualification may be appropriate.

The Agency proved that Appellant abused her leave by her pattern of excessive use of sick leave and LWOP from Sept. 2007 to July 2008. This leave abuse adversely affected the operation and employee morale of the Traffic Division, resulting in harm to the Agency and the customers it serves. Therefore, the Agency established a violation of § 16-60 S. by a preponderance of the evidence.

B. Appropriateness of Penalty

The Agency terminated Appellant based on the number of her absences, their negative effect on the Agency, and the failure of their substantial efforts to correct the pattern of absenteeism through performance improvement reviews and three previous disciplinary actions, including a recent 30-day suspension. At the pre-disciplinary meeting, Appellant offered the Agency no reason to believe this pattern would not continue. At hearing, Appellant stated that her conditions had improved under her current medications. However, Appellant's failure to state that to the Agency when she had that opportunity renders it less credible. More reliable is the evidence of her attendance record, which shows that her attendance did not improve, and often became worse, after the change in her medications.

Appellant failed to communicate with her supervisor or the Agency any information, medical or otherwise, that could have supported her contentions that her absenteeism was not leave abuse, or that she intended to correct her behavior. I find that termination was within the range of penalty that a reasonable administrator could impose under these circumstances.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency action dated August 18, 2008 is AFFIRMED.

DATED this 26th day of December, 2008.

Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision within fifteen days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery below. CSR § 19-60, 19-62. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed by mail, hand delivery, fax OR email as follows to:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.