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

Appeal No. 28-04

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

JOSEPH R. TRUJILLO,
Appellant,

vs.

DENVER HEALTH AND HOSPITAL AUTHORITY
Agency, and
The City and County of Denver, a municipal corporation.

INTRODUCTION

"I am an alcoholic. I knew if I didn't do something about it, I was going to die." These were the Appellant's words. They embody the destructive history underlying this case and the Appellant's continuing struggle to repair the destruction to his family, to his career and to his life. For the purpose of deciding the outcome of this case, this case began in October, 2001. The sad reality, however, is that this case began 31 years ago, when the Appellant entered the service where he began to drink destructively.

I. Nature of the Appeal

The Appellant appeals his termination from the Agency. The Appellant seeks reinstatement of his position, back pay benefits, seniority, interest and reasonable attorney's fees and costs.

II. Procedural Facts

The Agency action forming the basis of this appeal was the Notice of Disciplinary Action, dated February 24, 2004. The Appellant timely filed his Appeal on February 26, 2004. A hearing concerning the Appeal was conducted on May 7, 2004, before Bruce A. Plotkin, Hearing Officer for the Career Service Board. The Appellant was present and represented by Mark S. Bove, Esq.. The Agency was represented by Neeti Pawar, Esq..

The following witnesses testified on behalf of the Agency: Ms. Norissa Stevenson, Manager of the Laundry, Denver Health Medical Center; Mr. Frank Barrett, Chief Financial Officer, Denver Health and Hospital Authority; Mr. Charles (Chuck) King, Manager of Employee Relations, Denver Health and Hospital Authority; and Ms. Linda Kostic, Benefits Representative, Denver Health Medical Center. The Appellant testified and presented the following additional witnesses' testimony: Mr. Frank Pully, supervisor of the Laundry, Denver Health Medical Center; and Dr. Caroline Corrigan, Psychologist for Denver Health and Hospital Authority.

The following exhibits were admitted into evidence: Agency Exhibits 1, 2, 3(1-6), 4 through 14; and Appellant Exhibits A, C, D, and E.

After the conclusion of the hearing, at the request of the Hearing Officer, the parties submitted written briefs on an issue concerning The Family Medical Leave Act of 1993 (FMLA or "the Act").

For purposes of these Findings and Order, Mr. Joseph R. Trujillo will be referred to as the "Appellant." The Denver Health and Hospital Authority will be referred to as the "Agency." The rules of the Career Service Authority cited will be abbreviated to "CSR" with a corresponding numerical citation.

FINDINGS AND ANALYSIS

I. Background

The Appellant was employed for fifteen years in the laundry of the Denver Health Medical Center (formerly Denver General Hospital, or DG). The laundry functions every day of the year, fully staffed by thirteen to fourteen employees, three shifts per day, and staffed by a skeleton crew on holidays. Laundry employees, including the Appellant, receive, process, and prepare for delivery, a wide variety of items from a surprisingly large number of health facilities run by the City and County of Denver. The items received include what one would expect from a hospital laundry: sheets, towels, wash cloths, and pillow cases, but also lab coats, scrub suits, thermal blankets, curtains, rags, paramedics supplies, and the infamous open-backed patient gowns. The laundry employees then clean, dry, press and fold those items, and ensure the readiness of the items for delivery back to various destinations. The destinations served include not only Denver Health Medical Center patient floors and operating rooms, but between nine and eleven outlying medical and treatment clinics such as Denver Cares, which provide short-term care for alcohol and drug detoxification and treatment.

Because the patients, and the staff and doctors who serve them, require laundry items every day of the year, the laundry staff processes a myriad of items for 7,000 to 8,000 patients per month. Down time does not exist except for a broken machine. There

is inherently enormous pressure to work quickly yet cleanly. Even fully staffed, it is difficult to keep up with the demand.

In light of this pressure one might expect a dour, even surly atmosphere to prevail. Instead, a friendly, easy environment seems to be the rule. Indeed, the word "family" was offered by the Appellant and his supervisors to describe the warm, caring regard the laundry employees hold for each other.

The Appellant worked from 7:30 a.m. to 3:30 p.m., Monday through Friday, unless he was scheduled for one of his every-other-weekend shifts. He frequently volunteered to work holidays and remained late if needed. By all counts, whenever he was there, the Appellant was an excellent worker who loved his job and the people he worked with. He hadn't missed a day of work in over a year. Then something changed.

At the beginning of November, 2003, the Appellant took two authorized sick days leave. Then, on December 1, 2003, during the Appellant's shift, his supervisor told him to remove his bicycle from the laundry, explaining the laundry is a clean environment. The Appellant took his bike out and didn't return the rest of the day. From that day to January 12, 2004, the Appellant missed fourteen work days without authorization. A few of those days he called in sick only after the beginning of his shift, on most he did not call at all.

The Appellant's supervisors convened with their superiors and advisors As a result, on January 23, 2004 the Appellant was served with a "Contemplation of Disciplinary Action." Two days later he checked into the detoxification facility "Denver Cares" for three days, reporting to them that he had been drinking for two months straight. On January 28, 2004, the Appellant was released from Denver Cares and began psychotherapy and monitored Antabuse treatment.

A pre-disciplinary hearing was convened on February 9, 2004, where the Appellant appeared, pro se. The Agency approved FMLA leave for the Appellant on February 22, 2004, retroactive to November 1, 2003. Termination of the Appellant's employment followed on February 24, 2004.

II. Issues on appeal

A. Jurisdiction: whether the Appellant has stated a claim for which the Hearing Officer has jurisdiction to provide relief;

B. Rules Violations: whether the Appellant, by a preponderance of the evidence, violated CSR 16-50 A. 1), 7), 12), 13, and 20), and CSR 16-51 A. 1), 3), 5), 10, and 11).

C. FMLA: whether the Agency termination of the Appellant failed to comply with the Family and Medical Leave Act of 1993(FMLA or "the Act") which it granted the Appellant;

D. Termination: whether, if the Appellant violated any or all of the above-reference Career Service Rules or FMLA leave, the Agency was justified in dismissing the Appellant.

E. Remedies: whether, if the Appellant's Dismissal was unjustified, he is entitled to reinstatement, back pay, benefits, seniority, interest and reasonable attorney's fees and costs.

III. Analysis

A. Jurisdiction

Jurisdiction was not challenged. The Hearing Officer finds the appeal of the Appellant's termination of employment is a matter for which the Hearing Officer has jurisdiction to provide relief.

B. Rules Violations

1. CSR 16-50 A. 1) Gross negligence or willful neglect of duty.

"Negligence" is defined as the failure to use reasonable care, or the failure to act in a reasonably prudent manner under the circumstances of the case. *See*, e.g., LaVine v. Clear Creek Skiing Corp., 557 F. 2d 730 (10th Cir. 1977). "Gross negligence" is defined as "more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences", Prosser and Keeton on the Law of Torts §34, at 212 (5th ed. 1984), and "an indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected." Altman v. Aronson, 231 Mass. 588; 121 N.E. 505; 1919 Mass. LEXIS 741

The term "willful neglect" transcends any form of negligence and involves conscious or deliberate acts. *See* Turner v. Lyon, 189 Colo. 234, 539 P.2d 125 (1976); Drake v. Albeke, 188 Colo. 14, 532 P.2d 225 (1975). In the present case no evidence was provided regarding this term, and thus no CSR violation for "willful negligence" is found.

The Agency presented the following evidence in support of its contention that the Appellant's absences constituted gross negligence within the meaning of CSR 16-50 A. 1). Three laundry employees, Ms. Stevenson, Mr. Pully and the Appellant, all testified that the hospital laundry is high-pressure, fast-paced, and has virtually no down time. It is evident the volume of work is enormous and the staff is constantly understaffed even during regular shifts. *Agency Direct Testimony of Ms. Stevenson, Appellant Direct Testimony of Appellant.* Therefore, each worker's presence and best efforts are critical to keeping up with the demand.

The witnesses all affirmed that under these circumstances even one missed work day puts additional pressures on the remaining staff. A worker who misses many days

forces not only an unfair burden on the remaining staff, but forces supervisors to pitch in, neglecting their own administrative duties. *See testimony of Ms. Stevenson.*

The Appellant recognized the importance of fully staffing the laundry. "There's not enough days in the department to finish up what we do." He also recognized the burden his absences placed on his co-workers. "I want to extend my apologies to my boss, Norissa Stevenson and to all my co-workers that were affected by my actions". *Exhibit 4/D.*

Although there was a conflict in the evidence as to the specific days the Appellant missed work without authorization, the Hearing Officer finds that between December 1, 2003 and January 11, 2004, the Appellant missed the following work days without authorization:

12/1/03	5 hours
12/3/03	8 hours
12/7/03	8 hours
12/13/03	8 hours
12/14/03	8 hours
12/15/03	8 hours
12/20/03	8 hours
12/21/03	8 hours
1/1/04	8 hours
1/3/04	8 hours
1/6/04	8 hours
1/7/04	8 hours
1/10/04	8 hours
1/11/04	8 hours
Total	109 hours

Given the nature of the work and the lack of adequate staffing in the laundry facility, these fourteen missed days placed an enormous burden on the remaining workers and on the Appellant's supervisors. Notably, the Appellant volunteered to work on New Year's Day, a skeleton crew day, where the need for the remaining worker's presence and best efforts are magnified. The Appellant did not show up that day and did not call. On some days when he missed work, the Appellant called only after the beginning of his shift, and on other days he did not call at all. Either way, the burden on the remaining staff was onerous.

It was surprising, then, that the supervisors testified kindly about the Appellant, even after his extensive missed time. Describing the quality of the Appellant's work when he is present, Ms. Stevenson, the laundry manager, offered "oh he's good" in a smiling way that left no doubt that she regards his work highly. She continued "I don't have to worry about him," and "Joe's a great person." "We need more like him." Mr. Pully, the Appellant's immediate supervisor in the laundry, also described the Appellant's work in glowing terms. "His performance is excellent...he stays late to help."

"Family" was a word used by all three laundry witnesses to describe the collegial feelings among the laundry staff.

It was thus not the quality of the Appellant's work that was at issue, but the quantity of unauthorized missed days that became the basis of his termination. Ms. Stevenson, despite her warm regard for the Appellant, was one of the committee members who recommended the Appellant be terminated from employment.

The Appellant admitted that he received two separate documents from his supervisors regarding his obligation to have a minimum of unauthorized absences: The Denver Health Employee Principles and Practices manual, exhibit 3 @ p.7, and the Materials Management manual, exhibit 3 @ p.10. The Appellant was in violation both of his obligation to notify his supervisor before missing work, and his obligation not to exceed a certain number of missed work days according the requirements of these two rules.

Given the forgoing testimony - the non-stop, high pressure nature of the Appellant's job, the need to have every laundry worker present, the burden placed on the remaining staff on Appellant's missed days, the additional burden placed on staff for missing a holiday, the failure to notify his supervisor at all or in a timely fashion for fourteen unauthorized absences, the Appellant's recognition of the burden these absences placed on the remaining staff, and his failure abide by his Agency's regulations - the Hearing Officer concludes the Appellant's missing fourteen days work in less than six weeks constitutes more than ordinary inadvertence or inattention and therefore, gross negligence by a preponderance of the evidence under CSR 16-50 A. 1).

2. CSR 16-50 A. 7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing.

The only evidence presented by the Agency to prove the Appellant refused to comply with his supervisor was that on December 1, 2003, the Appellant was already at work when his supervisor, Norissa Stevenson, saw he had brought his bicycle into the laundry. As the laundry is a "clean environment," Agency direct examination Of Norissa Stevenson, she ordered him to remove the bike. The Appellant did exactly that. He left with his bicycle. He did not return that day.

When queried by the Hearing Officer as to how the Appellant's doing exactly what he was told could constitute a failure to comply with an order, the Agency attorney astutely responded that Ms. Stevenson's order to remove the bike also implied an order to return to work thereafter. The Agency attorney argued the Appellant's "refusal" to return violated this implied order.

It is not clear from the evidence that the Appellant's failure to return was a refusal. The federal sector regulatory agencies have found that refusal requires intent. *See* MSPB, *infra @ p.10.* In the absence of some evidence of intent to refuse to comply,

the Hearing Officer cannot conclude that the Agency has met its burden to prove that the Appellant was in violation of CSR 16-50 A. 7) by a preponderance of the evidence.

3. CSR 16-50 A.12) Failure to report for assigned shift and failure to notify immediate supervisor of absence prior to start of shift (no show-no call) for three (3) consecutive work days. Such conduct constitutes job abandonment.

Proof of job abandonment requires meeting three elements: 1. did the Appellant fail to report for the beginning of his assigned shift (no-show)? 2. did the Appellant fail to notify his immediate supervisor before the start of his shift (no-call)? 3. did these two failures occur on three consecutive work days?

The Appellant admitted that he failed to report for the beginning of his assigned shift and that he failed to notify his immediate supervisor before the star of his shift. He disagreed, however, that he was in violation for three consecutive days.

The Agency presented undisputed testimony that the Appellant failed to report to work or to notify his supervisor of his intent to be absent on December 14th and 15th. The parties also agree that the Appellant failed to report on December 13, although he called his supervisor after the beginning of his shift. The Appellant disputes that December 13 was a no-call cay within the meaning of CSR 16-50 A. 12), since he did telephone, albeit after the beginning of his shift.

Since the Appellant failed to report and failed timely to notify his Agency from December 13 through December 15, the Hearing Officer concludes the three-day test is met. After initially testifying that December 16, 18 and 19 were no-show no-call days, Ms. Stevenson corrected herself under cross-examination, in that the Appellant did call prior to his shift on December 16. December 18 and 19 were approved days off. The Agency's error in claiming December 16th, 18th, and 19th were no-show, no-call days is harmless error.

Finally, the Appellant argued this rule only applies to the last three days of an employment, in other words, abandonment cannot be found if the Agency subsequently accepts the employee back to work. The Hearing Officer is unaware of any precedent, and none was provided by the Appellant, that would sustain that interpretation. Therefore, the Hearing Officer finds the Agency has proven by a preponderance of the evidence that Appellant was in violation of CSR 16-50 A. 12).

4. CSR 16-50 A. 13) Unauthorized absence from work, including, but not limited to: when the employee has requested permission to be absent and such request has been denied; leaving work before completion of scheduled work shift without authorization; or taking unauthorized breaks.

The Agency argued that the bicycle incident of December 1, 2003 also constituted an unauthorized absence from work in violation of CSR 16-50 A. 13). It also cited three consecutive days on December 13, 14 and 15 as unauthorized absences. The Appellant

offered no evidence excepting him from application of the rule. The Agency has therefore proven the Appellant violated CSR 16-50 A. 13) by a preponderance of the evidence.

5. CSR 16-50 A. 20) Conduct not specifically identified herein may also be cause for dismissal.

The evidence supporting dismissal was limited to unauthorized absences from December 1, 2003 to January 11, 2004. No other misconduct was allege or proven. Moreover, the Agency's evidence indicates the Appellant was otherwise an ideal employee. Therefore, the Agency failed to prove by a preponderance of the evidence that the Appellant was in violation of CSR 16-50 A. 20).

6. CSR 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.

1) Reporting to work after the scheduled start time of the shift.

The purpose of this rule is to allow sanctions for tardy employees. While the Agency presented multiple witnesses and exhibits regarding the Appellant's failure to go to work at all and his leaving work after his shift began, it presented no evidence that the Appellant ever reported late to work. Therefore the Agency failed to prove a violation of CSR 16-51 A. 1) by a preponderance of the evidence.

7. CSR 16-51 A. 3) Abuse of sick leave or other types of leave, or violation of any rules relating to any forms of leave identified in Rule 11 Leave.

For reasons stated below in the FMLA discussion, the Appellant was in violation of rules relating to leave under Rule 11 by a preponderance of the evidence.

8. CSR 16-51 A. 5) Failure to observe departmental regulations.

The Agency case against the Appellant under this rule was based on two documents placed into evidence, Exhibit #3 @ pp 7-9, the Denver Health Employee Principles and Practices, and Exhibit #3 @ pp10-13 Materials Management (Central Supply, Laundry, Equipment Management, Receiving Dock, and Purchasing). These documents set forth attendance requirements for employees of Denver Health Medical Center, including those assigned to the laundry. The Appellant did not dispute that both

these regulations applied to him, and he did not dispute that he was aware of both regulations.

In pertinent part, the Denver Health Employee Principles and Practices states:

> Employees in ...Laundry,...are expected to know and observe the Rules and Regulations of the department. Job expectations are based on observance of those rules.
>
> You are also responsible to become familiar with Denver Health Medical Center Policies/Procedures and the Career Service Authority Rules and Regulations.
>
> 3. Unauthorized absence or tardiness in excess of **one (1) hour per three month period** may be cause for disciplinary action. Exhibit 3 (*emphasis added).*
>
> B. Sick Leave:
>
> 1. ...Laundry employees must leave a message **one (1)** hour before their shift at 436-7797 *(emphasis added).*
>
> 2. If an employee calls in sick on a Saturday, Sunday, or holiday, in conjunction with days off, the employee must provide an attending physician's statement immediately upon returning to work. In addition, the employee should be prepared to work the following weekend.

With respect to subsection 3, unauthorized absence, there is abundant evidence the Appellant missed work without authorization fourteen days between December 1, 2003 and January 11, 2004 and therefore was in violation of this regulation.

Regarding the Agency policy *Sick Leave*, the Appellant presented no evidence that the same fourteen unauthorized days were for sick leave. Even assuming the fourteen days were for sick leave, it is evident the Appellant did not call in as required, nor did he provide a physicians statement as required. The Appellant therefore failed to observe this regulation, as required by his agency.

For reasons stated in this section, the Agency has proven, by a preponderance of the evidence that the Appellant was in violation of CSR 16-51 A. 5).

9. CSR 16-51 A. 10) Failure to comply with the instructions of an authorized supervisor.

It is important to distinguish between standards of proof required to prove the above-cited Refusing to comply with the orders of an authorized supervisor, CSR 16-50 A. 7), and this rule. Decisions in the federal sector have shown that to prove a **refusal** to

comply, the Agency must prove the refusal to obey a proper order was intentional and willful disobedience. MSPB Law and Practice, 17th Ed. 1712, *citing* Hamilton v. USPS, 71 MSPR 547, 555-56 (1996), *add'l citations omitted*. On the other hand, to prove a **failure** to comply, the Agency need prove only that proper instructions were given to an employee and the employee failed to follow them, regardless of intent. *Id*. Thus the difference between the rules lies in the intent of the employee.

As regards the bicycle incident of December 1, 2003, Ms. Stevenson specifically ordered the Appellant to remove his bicycle. He followed that instruction, so there was no failure to comply and there was no violation of CSR 16-51 A.10).

10. CSR 16-51 A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

The Hearing Officer fails to find any Appellant conduct cited by the Agency which might fall into the expansive embrace of this Rule.

C. FMLA LEAVE

1. Background

The Family and Medical Leave Act of 1993, 29 USC 2611 (1993)("FMLA" or the "Act") provides that employers must allow eligible employees up to twelve workweeks of leave in any twelve-month period if the leave is requested for one of the purposes enumerated in the statute, including an employee's "serious health condition" that makes the employee unable to perform the functions of his position. *Id* @ 2612(a)(1) (D). Thus, there are two key components to leave under the Act: the amount of time an employee may take and the purpose for which leave may be taken. In the present case, the purpose for which the Appellant took leave taken under the Act was critical.

2. "Serious Health Condition"

FMLA regulations specifically include substance abuse as a "serious health condition." 29 CFR 825.114(d). Leave taken under the Act for this particular "serious health condition" carries an important restriction.

> ...FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, **absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave**. *Id. Emphasis added.*

The Appellant's evidence was starkly devoid of reference as to how the Appellant spent his unauthorized days off, and the Hearing Officer cannot infer that he used his unauthorized days for treatment. The only evidence the Appellant submitted concerning

treatment was that he began treatment on January 25, two weeks after all his unauthorized absences. Thus, the Appellant's own evidence tends to prove that his unauthorized absences between December 2003 and January 11, 2004 were not for treatment by a health care provider or for treatment on referral from a health care provider as required under FMLA regulations.

Since the Appellant did not use his FMLA leave for health care treatment of depression or substance abuse, he was exposed to Agency discipline for his unauthorized absences. "Taking FMLA leave does not immunize an employee from discipline for ...performance problems." Bosland, A Federal Sector Guide to the Family and Medical Leave Act (2003), *add'l citations omitted.*

For these reasons, the Hearing Officer finds the Agency has proven by a preponderance of the evidence that the Appellant was in violation of the aforementioned Career Service rules, Agency regulations, and did not use his FMLA leave for an authorized purpose. What remains is the propriety of the Appellant's termination.

D. Termination

CSR 16-10 explains the factors to be considered in imposing discipline. "The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record." *Id.* The Hearing Officer finds the Agency's termination of the Appellant's employment was reasonably related to his excessive unauthorized absences and to the hardship those absences placed on the Agency. The Appellant's past record included at least one prior two-week suspension in 2001 for similar, unauthorized absences. Exhibit 8. The Hearing Officer must conclude that, given the Appellant's extensive number of unauthorized absences and his prior discipline, there was just cause by a preponderance of the evidence to terminate the Appellant from his employment pursuant to CSR 16-50 and CSR16-51.

E. Remedies

The Appellant's remaining claims for back pay, benefits, seniority, interest and reasonable attorney's fees and costs are rendered moot by his dismissal.

DECISION

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer **AFFIRMS** the Agency decision to terminate the Appellant from his employment pursuant to CSR 19-27

Dated this 27th day of May, 2004.

Bruce A. Plotkin
Hearing Officer for the
Career Service Board

POSTSCRIPT

It is a tragedy that such a good employee, who loved his work and was warmly regarded by his peers, has lost his job. The Hearing Officer fervently hopes the Appellant will continue his apparently successful ongoing rehabilitation and establish another warm family of colleagues in another place without the issues underlying and within this case.