

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

Appeal No. 104-04

DECISION

IN THE MATTER OF THE APPEAL OF:

RAMON RODRIGUEZ

Appellant,

vs.

DENVER ZOOLOGICAL FOUNDATION,

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

I. INTRODUCTION

Mr. Ramon Rodriguez (Appellant) appeals his suspension for three weeks without pay, beginning June 21, 2004, from the Denver Zoo (Agency), for violation of Career Service Rules. He filed his appeal on June 25, 2004. A hearing concerning the appeal was held on November 3, 2004 before Hearing Officer Bruce A. Plotkin.

The Agency was represented by Mindi Wright, Esq., with Ms. Leslye Bilyeu serving as the Agency's advisory witness. The Appellant was represented by Nora Nye, Esq.

Agency exhibits numbered 1-8 were admitted without objection. The Appellant's exhibit A was admitted without objection.

The Agency presented the following witnesses: the Appellant, Mr. Jaime Carrillo, Ms. Karen Kielpikowski, and Ms. Leslye Bilyeu. The Appellant testified on his own behalf and also presented Mr. Bruce Springer.

II. ISSUES

The following issues were decided on appeal:

A. Whether the Appellant violated Career Service Rules (CSR) §§16-50 A. 1), 7), 13), 20), and 16-51 A. 2), 3), 10), and 11).

B. If the Appellant violated any of these rules, whether the sanction of a three week suspension without pay was reasonably related to the seriousness of the offense(s) in light of the Appellant's past record.

III. FINDINGS AND ANALYSIS

A. Background

The Appellant is a Maintenance Technician at the Denver Zoo (Agency). The Agency assessed a three-week suspension against the Appellant on June 16, 2004 for violation of Career Service Rules. The Agency claims the discipline followed the Appellant's continuing pattern of excessive absences and tardiness from February through May, 2004. The Appellant replied almost all the absences were medically excused, and that he relied on the leave information on his pay stubs in taking his medical leave. With respect to the Agency's allegations of tardiness, the Appellant claimed he was only minutes late, that his tardiness did not disrupt the work of other employees, and that other dates on which he was late or absent were for personal or family emergencies, each of which was explained.

The Agency served its Contemplation of Discipline letter on the Appellant May 18, 2004, and then held a pre-disciplinary meeting on June 9, 2004 with the Appellant and his representative. After the meeting, the Agency served its Notification of Suspension letter on the Appellant June 17, 2004. The Appellant subsequently filed his appeal on June 25, 2004.

B. Jurisdiction

Jurisdiction was not challenged at hearing. The Hearing Officer finds the subject of suspension is properly before him under the Career Service Rules. The jurisdictional filing dates were properly met by the parties.

C. Career Service Rules Violations

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

"Gross negligence", under CSR 16-50 A. 1), means negligence which is flagrant or beyond all allowance, or showing an utter lack of responsibility. In Re Keegan, 69-03, In Re Daneshpour, 88-03, p.10. A willful neglect of duty, under 16-50 A. 1), transcends any form of negligence and involves conscious or deliberate acts. In Re Keegan, 69-03.

The Agency offered the following evidence in support of its contention that the Appellant violated CSR 16-50 A. 1). Jaime Carrillo is the Appellant's immediate supervisor. He testified the Appellant's work week extends from Sunday through Thursday, with Friday and Saturday off. [Carrillo testimony]. His work hours are 6:00 a.m. to 2:30 p.m. in the summer, and from 7:00 a.m. to 3:30 in the winter. *Id.* Carrillo stated the Appellant was excessively absent or tardy

on the following dates:

Sunday	2/1/04	Called in sick
Monday	2/2/04	Called in sick
Tuesday	2/3/04	Called in sick
Monday	2/23/04	Called in sick
Tuesday	2/24/04	Called in sick
Wednesday	3/10/04	Called in sick
Thursday	3/11/04	Called in sick
Tuesday	3/30/04	At 6:30 a.m. (30 minutes after you were scheduled to report to work), you called your supervisor and reported that you were going to be late to work because you had overslept. You arrived at work more than an hour after your scheduled start time.
Monday	4/12/04	tardy
Sunday	4/25/04	tardy
Thursday	4/29/04	called in sick
Saturday	5/15/04	called in sick
Sunday	5/16/04	called in sick

[Exhibit 1, p.2].

Carrillo stated the reason he cited the Appellant under this rule was for his excessive absences. [Carrillo testimony]. Carrillo stated he had informal discussions "probably fifteen times" with the Appellant during the above-referenced period concerning his absences and tardiness. "I told him he needed to improve his excessive absences. Without him, we're already short of people on our staff, and that puts a burden on everyone." Carrillo also added "I told him he needs to make improvements, and if he didn't make improvements right away then this [discipline] is what was going to happen." *Id.* Carrillo stated the Appellant understood and "said he'd get it right." Carrillo also testified the Appellant's prior Performance Enhancement Plan (PEP) and his prior discipline put the Appellant on notice of his obligation to be at work in a timely fashion. *Id.*

The Appellant responded he did not recall any informal conversations with Carrillo concerning his absences and tardiness, nor did he recall his prior discipline. The Appellant showed health-care letters excusing his absences on February 1, 2, 3, [Exhibit A-1], February 23, 24 [Exhibit A-2], March 10, 11 [Exhibit A-3], April 29, [Exhibit A-4], and May 16, 17 [Exhibit A-5]. With respect to the affect his absences had on the zoo staff, Bruce Springer, a co-worker and friend of the Appellant, testified the Appellant's tardiness did not impact their work crew.

Carrillo then replied he believed the Appellant was malingering about his illnesses. As to the health-care letters, Carrillo believed they were authentic, but fraudulently obtained. "The doctors will go back and sign it for whichever days the person's missing." [Carrillo testimony]. Carrillo gave the example of April 29, when the Appellant called him at 2:30 a.m. to say he

couldn't work that day. Carrillo stated he could tell the Appellant was drunk. "You can tell when people are drunk," and "he told me he was at the bar."

The Hearing Officer finds the critical evidence as to this violation was the health-care provider letters which excused most of the Appellant's absences. Their authenticity was not questioned. Carrillo's doubt as to the validity of the Appellant's illnesses is less persuasive. The Hearing Officer agrees the timing of many of the Appellant's illnesses raises questions. For example, many of the Appellant's absences had the fortuitous effect of extending his "weekends," and the Appellant admitted he travels with a band to play at various functions, often at bars, raising some question about possible alcohol-related absences. [Appellant cross-examination]. Nonetheless, it is the Agency's burden to prove by a preponderance of the evidence that the absences were not medically related. The circumstantial evidence regarding the band and extending of the Appellant's weekends does not overcome the presumptive validity of the medical excuses.

Subtracting the days which were medically excused, there remains only the Appellant's March 30 tardiness to oversleeping, and tardiness on March 30, April 12 and 25. For both those dates the Appellant stated he was only a few minutes late, and was told he could make up the time at the end of the day. [Appellant testimony].

Even assuming the three days on which the Appellant was tardy were not excused, and even assuming the Agency previously warned the Appellant against continued tardiness and absences, his tardiness on three occasions is not so flagrant, beyond all allowance, or showing an utter lack of responsibility, that rises to the level of gross negligence. Something more is required. For instance, missing fourteen days within a six-week period without ever calling in or providing a medical excuse (In Re Trujillo, 28-04), or an employee's willful failure to complete work which was within his competency, by going out of his way not to perform his work at an acceptable level, (In Re Tennyson, 140-02, 14). The Appellant's three unexcused tardy days do not rise to the level of those cases. Therefore, the Agency fails to prove the Appellant violated CSR 16-50 A. 1) by a preponderance of the evidence.

2. CSR 16-50 A. 7) Refusing to comply with the orders of an authorized supervisor....

This rule requires the Agency present evidence the Appellant intended to refuse to comply with his supervisor's orders. See, e.g. In re Trujillo, 28-04, In re Day, 12-03. Carrillo stated he ordered the Appellant to be on time in two ways: orally and in the Appellant's PEP. Carrillo stated the oral orders were contained in the fifteen meetings between him and the Appellant, referenced above. Carrillo stated the Appellant's PEP at Priority II-D contains his written orders regarding punctuality. [Carrillo testimony]. Exhibit 3, p.3, The Appellant's February 2004 PEPR, does not contain "II-D", however, II-F reads "Ramon continues to arrive late to work. From November 2003 through the entire month of January 2004, Ramon had been late eight times, without notifying his supervisor prior to the start of this shift." Exhibit 4, p.2, his November 2003 PEPR reads "Ramon has not improved with his attendance record. In spite of the fact that he now must provide a Doctor's note when he is absent (As of May 5, 2003), he continues to miss work with no accompanying note, which has resulted in unauthorized time off."

In response, the Appellant stated he did not remember meeting with Carrillo any of the fifteen times. [Appellant testimony]. Regarding the underlying absences and late arrivals, the Appellant's evidence here is the same as above: his absences in question were medically excused, the remaining tardiness was only minutes late, and only once was he substantially late without authorization.

The hearing officer finds the Agency failed to establish a nexus between the Appellant's failure to comply with its earlier orders and any intent to refuse to go to work or be on time. Indeed, Carrillo volunteered the Appellant otherwise complies with his duties and supervisor's orders. [Carrillo testimony]. The Appellant's second-level supervisor, Karen Kielpikowski confirmed "Ramon typically is a good employee." [Kielpikowski testimony]. It seems unlikely the Appellant would intend not to comply only in the area of attendance and otherwise be a satisfactory or better employee. The Hearing Officer finds the Agency fails to prove the Appellant violated CSF 16-50 A. 7) by a preponderance of the evidence.

3. 16-50 A. 13) Unauthorized absence from work...

This violation requires the Agency demonstrate only the following: 1. the Appellant was absent on certain day(s). 2. The Appellant had no leave available for the day(s) he was absent. 3. There was no situation calling for FMLA or other exceptional leave. 4. No supervisor authorized the absence(s). The Agency need not prove bad intent.

Carrillo stated the days in question which justified citing the Appellant for violating this rule were those cited, above. Carrillo added the payroll department called him to ask if the Appellant's absences were authorized. The Appellant answered he relied on the leave information on his pay stubs, and believed he had leave available for each absence questioned by the Agency. Neither party presented information from the Appellant's pay stubs, and no other documentary evidence was presented other than the summary of absent and tardy days cited above. Thus the determination of whether the Appellant violated CSR 16-50 A. 13) turns on an evaluation of the credibility of the witnesses.

Kielpikowski testified she investigated the Appellant's claim, made at the pre-disciplinary hearing, that he had leave available. She found he did not have leave for four days. Her testimony was not challenged, and she appeared to testify truthfully.

The Hearing Officer finds the Appellant was less credible. He stated he remembered almost nothing that may have been detrimental to him – meetings with his supervisors in which he was repeatedly advised not to be late or absent without authorization, how often or where he travels with his band, past discipline – but remembered exculpatory dates and times with great precision. He also stated he relied on his pay stubs for leave information, but did not provide them, nor did he seek or present the underlying leave records which would have overcome the Agency's case against him. Given the frequency of discipline concerning the Appellant's past

tardiness and absences¹, the Hearing Officer finds it unlikely the Appellant would not be keenly aware both of his obligation to account carefully for his leave, and the means by which to acquire such information. For these reasons, the Hearing Officer finds the Agency has proven the Appellant violated CSR 16-50 A. 13) by a preponderance of the evidence.

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

The Agency offered no evidence to support its claim the Appellant was in violation of this rule. The charge is therefore dismissed.

5. CSR 16-51 A. 2) Failure to meet established standards of performance including either qualitative or quantitative standards.

Carrillo testified the Appellant violated this rule by his failure to abide by the terms in his PEP regarding absenteeism and tardiness. [Exhibit 3, p.2., 3]. The dates the Agency claims the Appellant was not in compliance were cited, above.

The Appellant did not dispute the validity of the Agency rules against unauthorized absenteeism and tardiness. He stated he did not remember his prior discipline, meetings and PEPs which advised him about those obligations. As stated previously, the Appellant's claim, that he was unaware of these multiple prior advisements, strains credulity. Moreover, it is the Appellant's obligation to inform himself of his Agency's rules and policies. Also his argument, that he simply depended upon information on his pay stubs to take leave, fails for the following reasons. The Appellant had already been disciplined at least four times in the past year for failing to meet established standards of performance regarding leave and tardiness. See discussion of CSR 16-50 A. 13), above. Also both supervisors testified they instructed him many times regarding these same matters. If the Appellant relied on his pay stub information to take leave, but continued to receive discipline over and over for the same reasons of absenteeism and tardiness, then a reasonable person would, at a minimum, investigate his pay stub information. The Appellant claims he did not know who to ask, while admitting he knew the identity of the human resources director for the zoo. [Appellant testimony]. Therefore, his pay stub defense is not credible.

Even if the Appellant provided medical statements explaining his absences for the above-referenced days, he did not have available medical or other leave for those days. Therefore, the Hearing Officer concludes the above-referenced absences and tardiness were without authorization. Finally, the Appellant claimed he was given permission on days he was late, to work later in order to make up the lost time. Both Carrillo and Kielpikowski denied such a policy. The Appellant admitted he did not remember very much about his work environment, and it is likely his memory of this stay-late policy was also faulty. The Agency has proven, by a

¹ See Exhibit 4, Below Expectations PEPR for 11/1/03, in part, for excessive absences; Exhibit 5, 12/23/03, a five-day suspension, in part, for unauthorized absences and tardiness; Exhibit 6, 9/25/03, a three-day suspension, in part, for unauthorized absences; Exhibit 7, August 18, 2003, a written reprimand, in part, for unauthorized absences and tardiness.

preponderance of the evidence, that the Appellant was in violation of CSR 16-51 A. 2).

6. 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.

Carrillo testified he cited the Appellant for violating this rule based on two matters. On April 29, he received a call from someone claiming to be the Appellant at 2:06 a.m. The caller identified himself as "Ramon" (the Appellant's first name), said he was at a bar, drunk, and would not be in that day. The following Monday, the Appellant met with Carrillo and admitted he made the call, but declared the absence was due to a personal matter concerning the pregnancy of a girl he saw at the bar. [Carrillo testimony]. The Appellant answered he was ill, and provided a medical authorization for his absence. [Exhibit A-4 and Appellant testimony]. The Hearing Officer finds the Appellant did not have any leave left on April 29, for reasons of credibility discussed, above.

The second reason Carrillo cited the Appellant under this rule was for displaying a pattern of absenteeism. Carrillo stated the Appellant's absences were always tied to the Appellant's "weekends" [Friday and Saturday], so as to create mini-vacations. [Carrillo testimony]. Carrillo also stated he did not believe the Appellant's absences were truly for medical reasons, and suspected he was either drunk or traveling with the band. Carrillo's belief that the Appellant procured medical authorizations fraudulently does not establish, by a preponderance of the evidence, the Appellant's claim of medical indisposition.

Carrillo's claim regarding the Appellant's pattern of behavior does not justify finding the Appellant in violation of CSR 16-51 A. 3). However, the Hearing Officer finds taking leave, even with a subsequently-provided medical authorization, constitutes an abuse of leave when the Appellant has used up his leave and has not obtained other authorization from his supervisor for his absence. The Agency therefore, has proven the Appellant violated CSR 16-51 A. 3) by a preponderance of the evidence.

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

The Agency did not present any additional evidence to support its contention the Appellant violated this rule. The Hearing Officer infers its evidence is the same as for the above "Refusing to comply" violation, CSR 16-50 A. 7). The analysis for this violation differs from CSR 16-50 A. 7) in that the Agency needn't show evidence of the Appellant's intent in order to prove the violation. All that is required is the Appellant's action or failure to act and the action or inaction results in a rule violation, regardless of intent.

The Hearing Officer has concluded there were two: the fifteen meetings between Carrillo and the Appellant, and the Appellant's PEP, exhibit 3, p.2-3. These instructions were that the Appellant was to arrive on time, to present medical authorization for his sick leave, and to call in ahead of time if he was late. [Carrillo testimony, Exhibit 3].

The Appellant responded he did not recall any of the meetings with Carrillo; that he provided medical authorization for most of the absences; that as to three unauthorized absences he had valid reasons; that two of his three tardy arrivals were less than seven minutes, and the remaining late arrival was due to oversleeping. [Appellant testimony].

The Hearing Officer finds the instructions to the Appellant were clear and unambiguous. Both Carrillo and Kielpikowski repeatedly counseled him regarding his excessive absences and tardiness. His PEP recites his past failures with respect to unauthorized absences and tardiness, and impresses upon him the urgent need to improve in those areas. The Appellant has admitted to at least three tardy violations between January and May, 2004. Those alone, are enough to find the Appellant failed to comply with the instructions of an authorized supervisor. The Agency therefore has proven the Appellant violated CSR 16-51 A. 10) by a preponderance of the evidence.

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

The Agency presented no evidence regarding this rule. This claim is therefore dismissed.

IV. CONCLUSION

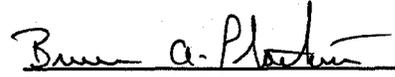
The Agency proved the Appellant was in substantial violation of the Career Service Rules. What remains is the propriety of discipline. The purpose of discipline is to correct inappropriate behavior or performance. CSR 16-10. The degree of discipline depends upon the seriousness of the offense, taking into consideration the employee's past record. *Id.*

If the Appellant's absences and tardiness between January and May 2004 were a first violation, the imposition of a three-week suspension would undoubtedly be a harsh punishment. This Appellant's history is crowded with prior discipline for absenteeism and tardiness as cited, above. Moreover, he has been repeatedly counseled and cautioned that any continued violation would be met with discipline up to termination. Given the Appellant's past repeated violations for absenteeism and tardiness, the repeated warnings from his supervisors, and his failure to learn from previous discipline, the Hearing Officer finds the Agency was amply justified in assessing the three-week suspension without pay against the Appellant.

V. ORDER

The Agency's suspension of the Appellant for three weeks without pay beginning June 16, 2004 is hereby AFFIRMED.

Dated this 9th day of November, 2004.



Bruce A. Plotkin
Hearing Officer for the
Career Service Board