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

Appeal No. 30-05

DECISION

IN THE MATTER OF THE APPEAL OF:

RACHEL ESPINOZA,
Appellant,

vs.

DENVER SHERIFF'S DEPARTMENT,
Agency, and the City and County of Denver, a municipal corporation.

I. INTRODUCTION

The Appellant, Deputy Rachel Espinoza, appeals the imposition of a five-day suspension by her employer, the Denver Sheriff's Department (the Agency), for violation of specified Career Service Rules. The suspension was assessed on March 28, 2005. The Appellant filed a timely appeal on April 6, 2005. A hearing concerning this appeal was conducted on November 29, 2005 by Bruce A. Plotkin, Hearings Officer. The Appellant was present and represented by her attorney-at-law, Dan Foster, Esq., while the Agency was represented by Assistant City Attorney Mindi Wright, Esq., with Capt. Michael Horner serving as advisory witness throughout the proceedings.

All Exhibits for both sides, Agency's 1-16 and Appellant's A-O, were entered into evidence by stipulation. The Agency called the following witnesses: the Appellant as an adverse witness, Capt. Michael Horner, and Undersheriff Fred Oliva. The Appellant presented no additional witness.

II. ISSUES

The issues presented for appeal were:

1. whether the Appellant violated specified Career Service Rules;

2. whether the Agency's application of the Career Service Rules or its regulations

against the Appellant was arbitrary or capricious;

3. if the Appellant violated any of the specified Career Service Rules or Agency regulations, whether the Agency's choice of a five-day suspension was reasonably related to the seriousness of the offense, and took into consideration the Appellant's past record.

III. FINDINGS

The salient facts in this case were not disputed. The Appellant is a deputy sheriff at the Agency. While on duty, her work has always been exemplary. In 2000, 2001, and 2003, the Appellant took unpaid leave under the Family Medical Leave Act (FMLA). The Agency did not consider her use of FMLA at those times in its assessment of discipline in this case, except as to her prior knowledge of the FMLA and its function.

Beginning in 2003, the Agency came under pressure from the Denver Office of Budget Management to reign in its sick-leave use. In response, the Agency implemented a new regulation in May 2004 which restricted Agency employees' unplanned use of sick leave to 7 days per year without consequence. Under the new regulation, an eighth sick day, even if earned, would result in a verbal reprimand, a ninth day would result in a written reprimand, and a 10th day of unplanned sick leave would require a pre-disciplinary meeting and might result in more severe disciplinary action up to and including dismissal. The Appellant acknowledged the new regulation. [Exhibit 7-1]. The Agency strictly enforces these progressive penalties without regard to whether an eighth, ninth, or tenth use of sick leave is for legitimate medical reasons.

From July 2, 2004 through September 27, 2004, the Appellant used eleven sick leave days to care for her minor son because she had been unable to make day-care arrangements. She acknowledged that taking sick leave in lieu of day-care was an inappropriate use of sick leave. On October 15 and 18, 2004 she used two additional sick leave days to care for her son during his asthmatic attacks. As a result of the Appellant's thirteen absences, the Agency assessed a verbal warning on October 20, 2004 for abuse of leave. The Appellant then took an additional sick-leave day on November 26, 2004 to tend to her son during an asthmatic episode. The Agency assessed a written reprimand on December 27, 2004 for abuse of leave regarding the November 26 absence.

The Appellant's son has suffered from Asthma since birth. Due to the type of Asthma, a severe cough, but lacking most of the typical symptoms, the Appellant was unaware of her son's condition until it was diagnosed in February 2004. [Exhibit K, p.9]. She subsequently received training in how to treat her son's asthmatic episodes at home. The treating physician wrote that home care for the treatment of these episodes would require adult supervision, and would occur, on average, one day per month. [Exhibit 14]. No restriction was placed on the child's activities. [Exhibit K, p. 9]. During the summer months of 2004, the Appellant's son was asymptomatic during the warm weather. In the fall, his symptoms returned intermittently, in

part due to the change in weather, partly due to physical exertion from sports and other activity, and partly from stress, but onset of symptoms was, and remains, unpredictable.

The Appellant intermittently used accumulated sick leave from October 2004 through February 2005 either to care for her son's asthmatic episodes or, on two or three occasions, for her own illness. After September 2004, the Appellant no longer used sick leave for day-care issues. Most of the sick leave she took between October 2004 and February 2005, as in the summer, served to extend the Appellant's weekends. Also, as with her earlier leave, all sick leave taken by the Appellant was taken only from "banked" sick leave, so that the Appellant was never absent in excess of her accumulated sick leave. The Agency did not require the Appellant to provide medical proof for her sick leave.

On March 17, 2005, the Agency convened a pre-disciplinary meeting with the Appellant. On March 28, 2005 the Agency suspended the Appellant without pay for five days, commencing March 30, 2005 and ending April 5, 2005. This appeal followed on April 6, 2005.

B. Jurisdiction

The City Charter §C5.25(4) and CSA 2-104 b) 4) require the Hearing Officer to determine the facts in an appeal *de novo*, meaning hearing of evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975), 1975 Colo. App. LEXIS 969, (add'l citations omitted). The Hearings Officer finds the issues of whether the Appellant breached Career Service Rules, and whether the Agency's application of discipline violated Career Service Rules or Procedural Due Process guarantees, are properly before him.

IV. ANALYSIS

A. 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.

To prove a refusal to comply, the Agency must prove the refusal was intentional and willful disobedience. In re Trujillo, CSA 28-04, 9-10 (5/27/04). Undersheriff Oliva testified the Appellant violated this rule because "the departmental order [#2053.1] is an order that I issued, and I am the supervisor of the Sheriff's Department, so I feel she didn't comply with that order." [Oliva testimony].

A failure to obey a standing departmental order does not constitute a *per se* violation of CSR 16-50 A. 7), as inferred by the Undersheriff. Proof, whether direct or indirect, of the Appellant's intent, is required. Trujillo. The Agency failed to prove the Appellant's failure to comply was intentional or willful. The Agency therefore failed to prove the Appellant violated CSR 16-50 A. 7) by a preponderance of the evidence.

B. 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...

Each case must be analyzed under its own facts to determine if the Appellant violated this rule. Oliva testified the Appellant violated this rule by having more than eight absences within the past year, in violation of Sheriff's Departmental Order No. 2053.1. (hereinafter referred to as #2053.1). [Oliva testimony, Exhibit 1-4]. Unlike #2053.1, there is nothing in this Career Service Rule that places a numeric limit on absences. Also, Oliva's simple reference to violation of another rule or departmental regulation is an insufficient basis upon which to find a violation of this rule. Other than alleging the Appellant's use of sick leave was unauthorized under #2053.1, which functions under different parameters than this rule, the Agency provided no proof that her leave was unauthorized under CSR 16-50 A. 13). Therefore, the Agency failed to prove the Appellant violated CSR 16-50 A. 13) by a preponderance of the evidence.

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

The Agency identified the specific conduct described above as its basis for discipline. No other basis for discipline is found. Therefore the Hearings Officer declines to apply this rule.

D. 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.

Sick leave for Career Service employees is authorized "for necessary care and attendance during sickness, or for death, of a member of the employee's immediate family..." [CSR 11-32]. The issue here is the credibility of the Appellant's stated medical use of leave versus the Undersheriff's assumption of abuse based upon his experience.

In response to being asked why the Appellant violated this rule, Oliva stated "[a]s abuse of sick leave, the appearance, and in my opinion, she called in sick a number of times that were in conjunction with her days off, and over in my experience as Manager, when people do that it's usually because they want to extend their time off, and it is abuse, and that's how I feel about that." [Oliva Testimony]. The Agency found nineteen days during the year preceding discipline for which the Appellant used sick leave without pre-authorization. [Exhibit 1]. Fifteen of those days extended the Appellant's weekends.

The Appellant replied in detail about the nature of her son's illness, the sporadic, unpredictable nature of asthmatic episodes, and that the her son's increased physical and outdoor activities on weekends make it more likely he will suffer an attack on a Sunday or Monday. No medical evidence was offered either to prove or disprove this statement. The Appellant provided a physician's letter which surmised the Appellant's

son would experience an average of one asthmatic attack per month that would require the Appellant's attendance. In July 2004, the Appellant used two sick days, in August four, and in September, six. In October she used two sick days, in November one, and in December, three. In January 2005 she used one sick day, and in February also one day.

The Appellant explained she corrected her earlier, admitted abuse of sick leave for day care, by having her brother move in with her in October 2004, and that all subsequent leave was taken for a legitimate need to care for her son's asthma. Indeed, the correlation, predicted by the physician, between sick leave days required for care of the Appellant's son was fairly close from October on. In addition, the Appellant testified she was on a learning curve to predict, prevent and treat her son's asthma for the first several months, lending some credibility to her version of the reasons for taking leave.

The burden of proof is on the Agency to show, by a preponderance of the evidence, that the Appellant abused leave. Both sides presented a somewhat weak case for their propositions: the Agency's hunch, and the Appellant's dearth of medical evidence to sustain her contentions. Nonetheless, because the Appellant presented a credible rebuttal to the Agency's assumption as to the reason for her leave, and the Agency failed to overcome the rebuttal, the Agency failed to prove the Appellant violated CSR 16-51 A. 3) by a preponderance of the evidence.

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

The strongest claim for the Agency was its assertion the Appellant violated this rule by her violation of #2053.1 (effective 5/12/04). [Exhibit 6]. The Agency also cited Departmental Rules 100.1, 100.3, 200.12, and 300.20. Each is addressed in turn.

1. Department Order 2053.1.

Oliva instituted this order in response to a directive from the Denver Office of Budget and Management to control excessive absenteeism. [Horner, Oliva testimony]. The section of that Order for which the Agency apparently deemed the Appellant in violation reads as follows.

> **D. Occurrences of Absence**
> 2. a. Eight occurrences of absence within any consecutive twelve-month period are considered excessive and will result in a verbal warning issued to the employee. The ninth occurrence of absence in any twelve-month period will result in the issuance of a written reprimand. Ten or more occurrences of absence within a twelve-month period may result in more severe disciplinary action, up to and including termination.

Both sides acknowledged the new rule has been successful in accomplishing its dual goals of reducing absenteeism and saving money in the Agency.[1] For the Agency it is a simple matter of arithmetic to discipline an employee under this Order. *See* Oliva testimony, *infra*. After the Appellant's eighth absence, she was assessed a verbal warning on October 20, 2004. [Exhibit 1, p.3]. Her ninth absence on November 26, 2004 resulted in a written reprimand on December 28, [*id*], and her subsequent absences resulted in the suspension that is the subject of this appeal.

The Appellant views #2053.1 as a violation of the Career Service Rules. The Appellant also challenges the application of #2053.1 as an unconstitutional deprivation of a property right under U.S. Const. Amend. XIV §1. [Appellant Pre-Hearing Statement].

a. whether #2053.1, as applied, was a violation of Career Service Rules.

CSR 11-32 allows the use of accumulated sick leave, *inter alia*, for "necessary care and attendance during sickness... of a member of the employee's immediate family." On the other hand, #2053.1, by requiring progressive discipline, effectively prohibits the use of sick leave more than seven times in twelve months, whether or not that leave is accumulated, and no matter for what reason. The Appellant believes #2053.1 presumes a person who uses sick leave more than seven times is intentionally abusing sick leave and requires automatic discipline, contrary to CSR 11-32, and contrary to CSR 16-36 b) which authorizes the investigation of the alleged illness.

The Appellant's concern over the Agency's inflexible application of #2053.1 was borne out by Oliva's testimony in the following exchange.

Q: Do you have any evidence, aside from your personal hunch, that my client abused sick leave for the purpose of recreational purposes?

Oliva: No I don't.

...

Q: You believe that [the Appellant] abused the policy based upon your experience that OTHER officers abused the policy, fair enough? [emphasis in the original]

Oliva: ...Yes sir, I did.

...

Q: Do you believe that there are some who call in sick who might be sick more than eight times a year?

---

[1] In the year following implementation, 17,000 man-hours and $322,000 were saved, with even more savings expected in year 2005. [Horner testimony].

Oliva: ...yes sir, I do.
Q: And if those people called in sick on more than eight occasions, that would violate 2-0-5-3, correct?

Oliva: That's correct.

...

Q. So...even if you believed that my client used this time to care for her sick son who was having asthmatic bouts, you do not believe this case should be modified?

Oliva: No, I do not.

[Oliva cross-examination].

It was apparent from Oliva's testimony, that the rigid requirements of #2053.1 create an irreconcilable friction with Career Service Rules by leaving no room for the legitimate application of CSR 11-32. Oliva's assumption of abuse violates the legitimate medical needs of employees and their families, as addressed by CSR 11-32, for "necessary care and attendance during sickness... of a member of the employee's immediate family." The Hearings Officer therefore concludes the Agency's application of #2053.1 against the Appellant, impermissibly violated her right to take accumulated sick leave.

b. whether the Appellant was afforded due process.

To trigger the due process protections of U.S. Const. amend. XIV, a plaintiff must show that she possesses either a property or liberty interest in the benefits of which she was deprived. Pfenninger v. Exempla, Inc., 116 F. Supp. 2d 1184 (D. Colo. 2000). It was not disputed that the Appellant had accumulated sick-leave benefits as a result of her employment; nor was it disputed that such accumulated leave constitutes a property interest in the Appellant's employment.

The Agency claims the Appellant received all the process she was due, consisting of the Agency's notice of, and pre-disciplinary meeting. However, "when a hearing is mere form, where it is merely a delusive shadow without substance, there can be no due process of law." May Stores Shopping Ctrs., Inc. v. Shoemaker, 151 Colo. 100, 112, 376 P.2d 679, 685 (1962). Oliva's determination to discipline the Appellant even if he had believed her leave was legitimate, *see* Oliva testimony, *above*, rendered the Appellant's pre-disciplinary hearing meaningless, in violation of her right to be heard.

2. Department Order 100.3.

This order states: "Deputy Sheriffs and employees, after individual and specific notification, shall abide by any special orders and procedures required of them related

to calling in sick, providing doctor's excuses, reporting their movements while on sick leave or periodic checks by authorized personnel."

The Agency presented no evidence of any special order or procedure required of the Appellant regarding her sick leave. The Agency therefore failed to prove the Appellant violated Order 100.3.

3. Department Order 200.12

This order states: "Deputy Sheriff and employees will not disobey, neglect, or refuse to obey any lawful order of a supervisor. As the requirements of this rule completely mesh with those of 16-50 A. 7), above, then for the same reasons as stated above, the Agency failed to establish a violation of this order.

4. Department Order 300.20.

This order reads: "Deputy Sheriffs and employees shall not indulge in any conduct, which is contrary to Career Service Authority Rules and Regulations." For reasons stated above and below, no such violation was found.

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

In the same way that a failure to obey a standing departmental order does not constitute a *per se* violation of CSR 16-50 A. 7), above, neither does it constitute a per se violation of CSR 16-51 A. 10). Oliva stated the Appellant violated this rule for the same reasons she violated CSR 16-50 A. 7), above, i.e., each of his departmental orders, including #2053.1 is his direct order, and therefore the Appellant's failure to meet its requirements was a violation of his order. For the same reasons as cited above, the Agency failed to establish the Appellant's violation of this rule.

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

The Agency identified the specific conduct described above as its basis for discipline. No other basis for discipline is found. Therefore the Hearings Officer declines to apply this rule.

VII. CONCLUSION

The Agency had legitimate objectives in mind when it created #2053.1. The Office of Budget and Mgt. required the Agency to control an evident abuse of sick-leave within the department. Abuse of sick leave costs to the Agency included: excessive overtime pay, loss of agency morale, and increasing the duties of the deputies covering for absent colleagues. Thus, the goal of #2053.1 was to bring down the number of

unapproved sick days, something all parties agree it accomplished admirably. By giving notice that non pre-approved sick leave will result in discipline after seven absences, sick leave use has decreased substantially and the Agy has realized significant savings. Unfortunately, the application of #2023.1 conflicts with the Sheriff's collective bargaining agreement, and conflicts with Career Service Rules, which allow employees unpunished use of their sick leave as long as the leave is for a proper reason, and as long as the employee has currently-banked sick leave. The Agency in this case has not proven, by a preponderance of the evidence, that the Appellant used her sick leave improperly under the Career Service Rules, thus insofar as the application of #2053.1 conflicts with the legitimate use of CSR 11-32, it is a capricious means to accomplish a legitimate end.

This case should not be construed as a license to extend weekends improperly. The Agency is entitled to a presumption that a persistent use of leave in a manner tending to extend weekends or holidays, is improper. However, here the Appellant overcame that presumption, and the Agency did not reply other than to restate its initial presumption of abuse.

The Agency's need to have its deputies report timely for duty must be balanced with an individual's legitimate medical needs, at least up to the point where the individual fails in her duties. In balancing the Appellant's past abuse of leave, substantial progress in repairing that abuse, and her otherwise exemplary record, with the Agency's legitimate budget and staffing needs, the Hearings Officer concludes the Agency would be justified in requiring medical confirmation for each unplanned absence where the Appellant remains home to care for her son's asthma. This may require some cost to the Appellant, but would have been unnecessary without her acknowledged past leave abuse. It would also seem fair that, after some period where the Agency regains confidence in the Appellant's justification for leave, that it would rescind this requirement.

VI. ORDER

The Agency's suspension of the Appellant for five days without pay beginning March 30, 2005, is hereby REVERSED. The Agency is ordered to restore the previously-lost pay and benefits which are reinstated from this decision. The Appellant's personnel record shall be amended accordingly, and references to this suspension shall be removed.

DONE this 11th day of January, 2006.

Bruce A. Plotkin
Hearings Officer
Career Service Board

S:/Share/hearings/Decisions/Espinoza, Rachel 30-05