HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 133-08

DECISION

IN THE MATTER OF THE APPEAL OF:

JOSEPH MUNIZ,
Appellant,

vs.

GENERAL SERVICES, FACILITIES MAINTENANCE AND OPERATIONS,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, Joseph Muniz, appeals a three-day suspension assessed against him on December 2, 2008 by his employer the Facilities Maintenance and Operations Division (Agency) for alleged violations of specified Career Service Rules. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on April 14, 2009. The Appellant was represented by Michael O'Malley, Esq., while the Agency was represented by Assistant City Attorney Joseph Rivera. Agency exhibits 1-9 were admitted. The Appellant offered no additional exhibits. The Agency called the following witnesses: the Appellant, Cecilia Albertson, Tony Rios, and James Williamson. The Appellant offered no additional witness. For reasons stated below, the Agency's three-day suspension is AFFIRMED.

II. ISSUES

The issues presented for appeal were as follows:

A. whether the Agency proved, by a preponderance of the evidence, that the Appellant violated one or more specified Career Service Rules;

B. if the Appellant violated any of the above-referenced rules, whether the Agency proved, by a preponderance of the evidence, that the degree of discipline was proper under CSR 16-20.

III. FINDINGS

The Agency oversees maintenance of City facilities. The Appellant is a custodian for the Agency, and has been assigned to the City and County Building for the past two and a half years.

The Appellant works the night shift on one of two cleaning crews Monday through Friday. Until recently, there were 32 night-shift custodians to clean the City and County Building along with the adjacent permit center and McNichols building. Recent budget cuts drastically reduced the night custodial staff from 32 to 13. When three members of the remaining 13 night crew custodians were transferred to another facility, there remained only 10 custodians to clean what previously required 16. Thus, in order to fulfill custodial requirements, attendance was, and remains, at a premium.

On Monday, October 27, 2008, the Appellant submitted a leave request for two days, Friday, October 31, and the following Monday, November 3, through the then-new KRONOS time-management system. Because the crew was already depleted, and because another night-shift custodian had previously (on October 9) requested and been granted leave for October 31, the Appellant's immediate supervisor, Cecilia Albertson, denied the Appellant's request for October 31 as overly burdensome on the remaining crew; however, she granted his request for leave on November 3. On October 31 the Appellant did not appear for his shift and did not call.

A pre-disciplinary meeting was convened on November 18, 2008. The Appellant attended with his union representative, Mr. Ed Bagwell, who spoke on behalf of the Appellant. The Appellant stated he submitted a first request for leave October 31 through KRONOS on October 14, but had no confirmation of that earlier request. The Appellant stated he would provide proof of his earlier request for leave, but none was forthcoming.

On December 2, 2008, the Agency assessed a three-day suspension against the Appellant, effective December 8-11, 2008. This appeal followed timely on December 15, 2008.

IV. ANALYSIS

The Agency alleged the Appellant's actions described above violated CSR 16-60 J, L., and S. The Appellant denies violating any of those rules and requests a reversal of his suspension.

A. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

In order to prove a violation of the first part of this rule, the Agency must

prove the supervisor clearly communicated a reasonable order to the employee and the employee knew or should have known of the order, but failed to comply. [*See* In re Mestas et al, CSA 64-07, 27 (5/30/08)]. The Agency claimed the denial of the Appellant's leave request constituted an implied lawful order to report for work. It is not evident the denial of leave constitutes an order to report for work, any more than any other non-leave day may be deemed an implied order to report to work. A more direct communication which may reasonably be construed as a direct order is required. Other rules deal more pertinently with the failure to report to work where a direct order is not involved. For these reasons, I find the Agency failed to prove the Appellant violated CSR 16-60 J. by a preponderance of the evidence.

B. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules...

The Agency claimed the Appellant failed to observe Facility Management Administrative Policies, pages 3 & 4. "REPORTING ABSENCES: Employees who don't call in and don't report for work (no call-no show) will be charged with Unauthorized Leave and will be disciplined in accordance with Career Service authority rules."

The Appellant did not call and did not report for work on October 31, 2008. [Appellant testimony]. The Appellant responded he attempted to procure authorization for leave on October 14, and again on October 27, however he admitted the normal procedure at that time was for the supervisor-requestee verbally to approve or disapprove the request. The Appellant testified neither approval nor disapproval was provided. [Appellant testimony], but it was clear the Appellant's supervisor denied his request within 15 minutes. [Exhibit 2].

The Appellant also claimed it was customary for leave to be granted on employee birthdays whether or not sought in advance. This testimony was directly refuted by his direct and second-level supervisors, [Albertson testimony; Rios testimony], and the Appellant was not more credible than his supervisors on this point. In addition, the Appellant based this contention upon his naked assertion that a co-worker received two days off for his birthday without advanced authorization. Albertson countered she originally denied the co-worker authorization for leave on his birthday due to staffing problems. The co-worker failed to report to work on his birthday, however, he provided a timely, complying doctor's letter which confirmed he was too ill to work on his day off. Consequently, Albertson granted sick leave after the fact. Thus, where the Appellant failed to acquire advanced authorization for his leave, failed to prove there was a standing policy that automatically approved birthday leave, and failed to prove his comparator was automatically granted birthday leave, the Appellant violated the agency's leave policy and therefore violated CSR 16-60 L. by a preponderance of the evidence.

C. CSR 16-60 S. Unauthorized absence from work...

The same facts that established the Appellant violated the Agency's no-call no-show policy, above, also establish the Appellant violated CSR 16-60 S.

V. DEGREE OF DISCIPLINE

In determining the degree of discipline, appointing authorities must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. In re Mounjim, CSA 87-07, 18 (7/10/08), *citing* In re Ortega, CSA 81-06, 16 (4/11/07). The Hearing Officer must not disturb the agency's determination unless it is clearly excessive or based substantially upon considerations unsupported by a preponderance of the evidence. In re Delmonico, CSA 53-06, 8 (10/26/06). The Appellant claimed his three-day suspension was excessive.

A. Severity of the offense. Abuse of leave may be either a minor violation or severe, depending on the circumstances of the case and the extent of prior violations. Here, the Appellant had two prior violations for leave abuse, indicating he has failed to correct this behavior. The Agency Director of Facilities, James Williamson, testified convincingly that while termination was not a serious consideration, more than a nominal penalty was called for due, in large measure, to the Appellant's history of abuse of leave.

B. Past record. On February 6, 2008, the Appellant received a verbal reprimand for failing to give sufficient notice and receive advanced authorization for administrative leave to take a test for a CSA position. [Exhibit 6]. On March 8, 2008, the Appellant was assessed a verbal reprimand for providing an inadequate medical letter to justify his sick leave. [Exhibit 7]. In that case, the Appellant presented a timely note, but his supervisor, Albertson, found it was not a medical excuse, as the letter stated only that the Appellant claimed he was ill, and the doctor did not state the Appellant was sufficiently ill to justify sick leave. Albertson gave the Appellant an additional five days to bring in a complying letter, but the Appellant failed to do so.

C. Penalty most likely to achieve compliance. The Appellant was assessed two reprimands within the past year for abuse of leave. Neither has achieved compliance. Because the present case was a third incident of leave abuse, a more significant penalty was justified.

D. Other considerations. The Appellant claimed Albertson is biased against him, but her willingness to give him additional time to provide a complying doctor's letter before assessing discipline in the March 2008 case, and her willingness to authorize the Appellant's birthday leave on short notice despite staffing problems in the present case, belie any ill-will toward the Appellant.

While the Appellant expressed confusion about leave requirements, his two previous disciplinary actions for leave abuse should have averted him to take more responsibility for insuring he had timely authorization rather than making assumptions about what is acceptable. The Appellant's supervisors testified he fulfills his normal duties admirably well, without which a more severe penalty may have been assessed. Having considered the Appellant's past violations for the same offense, his failure to correct the issue, his lack of acknowledgment of the leave abuse issue, tempered by his commendable work performance, Williamsons' determination of a three-day suspension was neither excessive nor based substantially upon considerations unsupported by a preponderance of the evidence.

VI. ORDER

The Agency's assessment of a three-day suspension against the Appellant on December 2, 2008 is AFFIRMED.

DONE May 5, 2009.

Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with CSR 19-60, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at www.denvergov.org/csa/career service rules.

All petitions for review must be filed by mail or by hand delivery as follows:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

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