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

Appeal No. 110-05

DECISION

IN THE MATTER OF THE APPEAL OF:

MARLENE VIGIL,
Appellant,

vs.

DENVER DEPARTMENT OF HUMAN SERVICES,
Agency,
and the City and County of Denver, a municipal corporation,

I. INTRODUCTION

The Appellant, Ms. Marlene Vigil, appeals the assessment of a written reprimand by her employer, the Denver Department of Human Services (Agency), on September 9, 2005. A hearing concerning this appeal was conducted on January 25, 2006, by Bruce A. Plotkin, Hearings Officer. The Agency was represented by Diane Briscoe, Assistant City Attorney, with Ms. Bernadine Padilla serving as advisory witness. The Appellant was present and was represented by Teresa Zoltanski, Esq.

Agency Exhibits 1-6, and 12 were admitted without objection, while Exhibits 7, 8, 10 and 11 were admitted over objection. Appellant's A-I were admitted without objection.

The Agency offered the testimony of the following witnesses: Bernadine Padilla, Jerry Hersey, and Tamara Tyler. The Appellant testified on her own behalf.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant violated any of the following Career Service Rules (CSR):

16-50 A. 3); 20); or CSR 16-51 A. 6); 10); or 11);

B. whether the Agency violated the Appellant's Constitutional rights under §10, Article 1 of the U.S. Constitution;

C. whether the Agency violated the Appellant's Constitutional rights under §11, Article 2 of the Colorado Constitution;

D. whether the Agency violated any of the following Career Service Rules (CSR): 5-62 1); 5-84; 11; 16-10; 16-20; 16-30; 16-54 (B);

E. whether the Agency violated Denver Charter §9.1.1 (b);

F. whether the Agency unlawfully discriminated against the Appellant;

G. whether the Appellant was disabled as defined by the Americans with Disabilities Act of 1990 (ADA), and, if so, whether the Agency violated the ADA in respect to the Appellant's disability or by failure reasonably to accommodate her disability;

H. whether the Agency unlawfully harassed the Appellant for the Appellant's complaint against her supervisor's breach of confidentiality, or for the Appellant's complaint against her supervisor's mistreatment of clients;

I. whether the Agency unlawfully retaliated against the Appellant;

J. whether the Agency violated the "Colorado Fair Employment Practices Act";

K. if the Appellant violated any of the aforementioned Career Service Rules, whether the level of discipline chosen by the Agency was consistent with the purpose of discipline as described in CSR 16-10.

III. PRE-HEARING MATTERS

The Appellant filed her "Appellant's Verified Motion to Disqualify Hearing Officer" on January 24, 2006. At hearing, the following day, the Hearings Officer denied the Motion as untimely, and for failure to state facts from which it may reasonably be inferred that the Hearings Officer has a bias or prejudice that would prevent him from dealing fairly with the Appellant. People v. Botham, 629 P.2d 589, 595 (Colo. 1981). Moreover, granting the Motion would have the effect of creating an impermissible forum-shopping opportunity for any attorney who has appealed a decision of that judicial officer.

Next, the Hearings Officer, *sua sponte*, requested clarification from the Appellant for several of her claims. The Appellant specified her CSR 11 claim was actually a CSR 11-81 claim. The Hearings Officer dismissed the Appellant's claim under CSR 11-

81 for failure to state a claim for which relief may be granted.

IV. FINDINGS

The Appellant is an Administrative Assistant IV at the Agency. Her normal work shift begins at 7:00 a.m. and, with a one half hour lunch break, ends at 3:30 p.m. On August 15, 2005, the Appellant arrived at work at 11:30. The Appellant's immediate supervisor, Bernadine Padilla, emailed the Appellant the same day, requiring her to submit all future requests for leave in advance. Subsequently, while reviewing the Appellant's time sheets, Padilla found the Appellant failed to disclose the following information: (1) on August 16, 2005, the Appellant's time sheet indicated she worked her normal 7:00 a.m. to 3:30 p.m. shift; (2) the Appellant arrived at work that day at approximately 11:00 a.m., only after a Worker's Compensation appointment; (3) the Appellant's August 19, 2005 time slip entries indicated she worked from 7:00 a.m. to 3:30 p.m., however, she had a Worker's Compensation appointment at 9:20 a.m., then after arriving at work, left again at 2:30 for a doctor's appointment; (4) the Appellant did not submit a leave slip for any of the missed time. Based on her review, Padilla assessed leave without pay for 2.5 hours, then issued a written reprimand to the Appellant on September 9, 2005. This appeal followed on October 17, 2005.

V. AGENCY CLAIMS AGAINST THE APPELLANT

A. CSR 16-50 A. 3) Dishonesty, including...false reporting of work hours...

Padilla claimed the reason she cited the Appellant for violating this rule was the Appellant's knowing failure to seek approval, or fill out an accurate time sheet, for the hours she was absent on August 16 and 19, 2005. Regarding August 16, Padilla testified the Appellant had a 9:30 a.m. Worker's Compensation appointment. The Appellant is entitled to one hour under Worker's Compensation rules, to travel to her appointments. Since her appointment was 9:30 a.m., the Appellant should have reported to work at her usual time, 7:00 a.m., and worked until 8:30 before leaving for her appointment. Instead the Appellant marked her time sheet as "in" at 7:00 a.m. and "out" at 3:30 p.m. [Padilla testimony, Exhibit 6]. With respect to August 19, Padilla testified the Appellant left at 2:30 for a Worker's Compensation appointment, but marked down 3:30 as her time out.

Padilla stated that for the previous two to three months before August 16, the Appellant developed a pattern of calling in, and not reporting to work until between 10:00 a.m. and 11:00 a.m. Padilla stated she previously warned the Appellant verbally about correcting her time sheets, and submitting leave slips for advanced approval, in order to reflect her actual time worked. [Padilla testimony]. When Padilla reviewed the Appellant's August 15 time sheet and found the Appellant failed to report her time for a Worker's Compensation appointment that day, Padilla sent an email to the Appellant the following day, instructing her both to fill out a leave slip, and to seek prior approval

for leave. The email advised that failure to do either would result in the leave being assessed as "leave without pay." [Exhibit 3]. When the Appellant failed to note her absence surrounding her August 16 appointments as described above, Padilla amended the Appellant's time sheet to reflect 1.5 hours "leave without pay." [Exhibit 6]. Padilla also changed the Appellant's August 19 entry to reflect her leaving one hour early, at 2:30 p.m. instead of 3:30 pm., for a total of 2.5 hours of leave without pay. *Id.*

The Appellant acknowledged Padilla's prior warning to fill out leave slips for scheduled work time when she is absent; however, she stated she had prior, verbal approval from Padilla for August 19 to work through lunch and leave early. Padilla emphatically denied such a conversation. "Marlene's not supposed to work through lunch; she knows that, but she does it anyway." [Padilla testimony]. The Hearings Officer concludes it would be unlikely Padilla would suddenly give verbal approval for exactly the same conduct she disapproved, criticized, and memorialized over the past several months. In addition, the Appellant's past history of arriving late and leaving early, her acknowledgment of Padilla's warning, and Padilla's credible testimony that her policy is not to grant comp. time, all make it further unlikely Padilla granted verbal leave to the Appellant.

The Appellant next claimed she was unaware of the proper way to fill out time and leave slips, however Jerry Hersey, a payroll technician at the Agency, credibly testified "there have been a number of instances where I have advised her [the Appellant] how best to fill out her time sheet, yes." [Hersey cross-examination]. Hersey's credibility was not challenged. For these reasons, the Hearings Officer finds the Appellant knew how to fill out leave and time slips, and knew on August 16 and 19, 2005, that her time sheets for those days were incorrect at the time she submitted them, on August 31, 2005. Therefore, she was dishonest within the meaning of CSR 16-50 A. 3) by a preponderance of the evidence.

B. 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.

C. CSR 16-51 A. 6) Carelessness in performance of duties and responsibilities.

To prove a violation of CSR 16-51 A. 6), the Agency must establish that the Appellant had an important work duty or responsibility, and was heedless and unmindful of that duty, with the result that potential or actual significant harm resulted. In re Owoeye, CSA 11-05 ((6/10/05). Padilla stated the Appellant violated this rule by failing to fill out her August 16 and 19 time sheets accurately. The Appellant acknowledged her responsibility to procure advanced approval for leave. [Appellant testimony]. For reasons described above, the Hearings Officer concludes the Appellant failed to obtain authorization for her leave on either August 16 or 19, 2005. Further, because she was

aware of her responsibility to seek authorization for leave, but filled out her time sheets as if she worked complete days on August 16 and 19, 2005, she was heedless and unmindful of her duty to account faithfully for her time, in violation of CSR 16-51 A. 6).

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

To prove a failure to comply under this rule, the Agency must prove proper instructions were provided and the Appellant failed to follow them, irrespective of her intent. *See* In re Trujillo, CSA 28-04, 10 (5/27/04). It was clear from Exhibits 3 and 4 that the Appellant knew Padilla required her to submit a leave slip, in advance, for all work hour absences. The issue here is whether Padilla gave advanced, verbal consent for the Appellant's absences on August 16 and 19, 2005. For reasons described in the analysis of CSR 16-50 A. 3), above, the Hearings Officer concludes it is unlikely Padilla granted verbal approval for the Appellant's August 16 and 19 leave. Therefore, the Appellant's failure to comply with Padilla's instructions in Exhibits 3 and 4 violated CSR 16-51 A. 10) by a preponderance of the evidence.

E. 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.

VI. APPELLANT CLAIMS AGAINST THE AGENCY

A. CONSTITUTUTIONAL CLAIMS

U.S. Const. Art. 1, §10. This article is entirely unrelated to any claim within this appeal. The Appellant's claim under this article is therefore dismissed.

Colorado Const. Art. 2, §11. This article is entirely unrelated to any claim within this appeal. The Appellant's claim under this article is therefore dismissed.

Due Process Claim, U.S. Const., Amdt. 14

The first inquiry in every due process challenge is whether the Appellant has been deprived of a protected interest in property or liberty. Only after finding the deprivation was of a protected interest may the Hearings Officer look to see if the Agency procedures comport with due process. In re Martha Douglas, CSA 317-01, 3 (interlocutory order 3/22/02), *citing* American Mfg. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59; 119 S. Ct. 977, 989 (1999), *citing* U.S. Const. Amd. 14, Mathews v. Eldridge, 424 U.S. 319, 332 (1976). The Appellant claims the Agency assessment of 2.5 hours leave without pay was the protected property interest that was deprived. [Pre-hearing

matters]. The Hearings Officer finds the deprivation was *de minimus,* and therefore did not fall under the purview of due process protections. *See* Gabel v. Jefferson County School Dist. R-1, 824 P.2d 26, 28 (Colo. App. 1991).

B. CAREER SERVICE RULES

CSR 5-62. The Appellant disputes the Agency had cause to discipline her. [Pre-hearing matters]. This claim is addressed above, in the Agency's rule violation claims against the Appellant.

CSR 5-84. The Appellant claims the Agency discriminated against her based upon her disability and failed to provide her with a reasonable accommodation. These claims are addressed in the Appellant's Discrimination and ADA claims, below.

CSR 11. The Appellant specified her claim falls under CSR 11-81 for assessing leave without pay as the Agency had no justification. [Pre-hearing matters]. The Appellant misconstrues the nature of CSR 11-81 which concerns the choice the Agency has whether to "grant" leave, i.e., when requested by an employee, and when the employee states good cause. The rule does not encompass whether an Agency has jurisdiction to assess leave without pay when an employee is absent. Thus, as a matter of law, this claim is dismissed.

CSR 16-10. This claim is addressed below, under "Level of Discipline."

CSR 16-20. The Appellant's claim here is the Agency failed to use progressive discipline. That matter is addressed below, under "Level of Discipline."

CSR 16-30. The Appellant claims notice and the opportunity to be heard was required and not provided, since a property right was affected, the Appellant's loss of pay. This claim is addressed under the Appellant's Due Process claim.

CSR 16-54 B. The Appellant claimed the Agency failed to provide notice of the rule violations for which it was disciplining the Appellant [Appellant Pre-hearing Statement]. First, CSR 16-54 B. concerns notice requirements following suspension, involuntary demotion or dismissal, none of which is at issue in this case. Second, the Agency provided obvious notice of what CSR violations it acted upon, as implicitly acknowledged by the Appellant in her appeal (in which she included the Agency's Notice). For these reasons, the Appellant's claim under CSR 16-54 B. fails.

C. DENVER CITY CHARTER 9.1.1 b.

The Appellant claims this provision protects employees from arbitrary and capricious actions, and requires just cause, and notice before discipline. These claims are addressed elsewhere within this Decision.

D. DISCRIMINATION

The Appellant stated the Agency's discrimination "was the written reprimand, taking away her pay, the general harassment, the different standards that were applied against her as compared to her co-workers that did not have a disability." [Pre-hearing matters]. The first three allegations are unrelated to discrimination. With respect to "differing standards, the Appellant appears to claim disparate treatment discrimination based upon her disability, under CSR 5-84 A., Disability Discrimination. [Pre-hearing matters]. The Appellant's failure to establish she was disabled, under the Appellant's ADA claim below, renders this claim moot.

E. ADA

The Americans with Disabilities Act of 1990 (ADA), U.S.C. 12101 *et seq.*, prohibits a covered entity from discriminating against a qualified individual with a disability with regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment. 42 USC 12112 (a). "Disability" is further defined as any of the following:

> (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (2) A record of such an impairment; or
>
> (3) being regarded as having such an impairment.

29 C.F.R. §1630.2 (g). The Appellant states she is disabled under all three definitions. She states her physical impairments are her insomnia, and her difficulty in breathing. [Pre-hearing matters]. The Appellant is required to show how her impairment(s) affect a major life activity, such as caring for herself, performing manual tasks, walking, seeing, hearing, speaking, learning, or working. CFR §1630.2. The Appellant failed to establish how her insomnia affected a major life activity. She also failed to establish what, if any, breathing difficulty she had, or how it affected a major life activity. The Appellant failed to advance any document indicating what record of impairment she suffers, and failed to establish how the Agency regards her as disabled. The Appellant therefore failed to make a *prima facie* showing of disability as defined within the ADA.

Even if the Appellant had established she was disabled, the Appellant's requested accommodation, "talking to an employee about an issue" [Pre-hearing matters], would not be a reasonable accommodation encompassed by the ADA.

F. HARASSMENT

CSR 19-10 f) and 19-20 e) (8/24/00), make clear an employee must grieve her complaint of harassment first to her supervisor, appointing authority, or human resources

department, before perfecting her appeal. The Appellant did not bring such a complaint to any of those sources, thus her harassment claim fails as not ripe for review.

G. COLORADO FAIR EMPLOYMENT PRACTICES ACT

The Hearings Officer is unaware of any such law as claimed by the Appellant. No citation was provided, and a review of the Colorado labor statutes reveal no such title or popular name, therefore this claim is dismissed for failure to state a claim for which relief may be granted.

H. RETALIATION

A prima facie case for retaliation is made by showing (1) a protected employee action, (2) an adverse employer action after, or contemporaneous with, the employee's protected action, and (3) a causal connection between the employee's action and the employer's adverse action. Poe v. Shari's Mgmt. Corp., 188 F. 3d 519 (10th cir.1999).

The Appellant claims the written reprimand and assessment of two hours leave without pay were in retaliation for the Appellant's legitimate use of FMLA, for attending Worker's Compensation medical appointments, for the Appellant's complaint against her supervisor for breaching confidentiality, or for the Appellant's complaint against her supervisor's mistreatment of clients. [Pre-hearing matters]. The Appellant failed to establish a causal connection between the aforementioned protected activities and the Agency's actions against her. Regarding the Appellant's FMLA leave, Padilla credibly testified she was unaware of the Appellant's request until September 9, 2005, well-after the events leading to discipline in this case. Regarding the Appellant's Worker's Compensation appointments, the evidence indicates discipline was assessed for time away from work which was unrelated to the Appellant's appointments. Finally, the Appellant failed to establish any connection between her retaliation claim and her complaints about Padilla. The Appellant, therefore, failed to establish a *prima facie* case for retaliation.

VII. LEVEL OF DISCIPLINE

The test for discipline is not whether the discipline is the next available step in the scheme of progressive discipline, rather the test is whether the degree of discipline is "reasonably related" to the seriousness of the offense. In re Champion, CSA 71-02, 18 (7/31/02). In determining whether discipline is reasonably related to the offense, the Hearings Officer will not disturb the Agency's determination of the severity of the discipline unless it is clearly excessive or based substantially on considerations that are not supported by a preponderance of the evidence. In re Douglas, CSA 154-02, 166-02, 5 (1/27/03), *citing* In re Armbruster, CSA 377-01 (3/22/02) *and* In re Gallegos, CSA 27-01 (3/21/01).

Padilla stated she chose to issue a written reprimand against the Appellant after considering the following factors: the Appellant developed a two to three month pattern of calling in then arriving late, between 10:00 and 11:00 a.m.; Padilla counseled the Appellant about this pattern previously; the pattern continued, so Padilla required the Appellant to fill out leave slips for her future absences; the Appellant failed to fill out leave slips for her absences on August 16 and 19, 2005, even after being ordered to do so; no other employee has a pattern of tardiness; the Appellant demonstrated her understanding of filling out leave slips previously. [Padilla testimony]. None of the Appellant's responses rebutted Padilla's assertions. The Appellant stated she did not understand how properly to fill out time sheets, however, as stated previously above, the evidence, via Padilla and Hersey, indicates otherwise. The Appellant's claim that Padilla verbally approved her August 16 and 19 absences was unlikely in light of the findings, above. The Appellant's claim that she worked through lunch and therefore was not required to fill out a leave slip, was equally unconvincing, as the Appellant was aware of the Padilla's "no comp. time" rule, and had filled out time slips "for years." Finally, the Appellant's claim, that she was being punished for attending her Worker's Compensation medical appointments was not borne out by the evidence, which indicated she was disciplined for time unrelated to those appointments. [Padilla testimony].

For the reasons stated immediately above, the Hearings Officer finds the Agency's decision to discipline the Appellant was substantially based upon the evidence. Further, its decision to assess a written reprimand was not clearly excessive, and was reasonably related to the seriousness of the offense, in keeping with the purpose of discipline, CSR 16-10.

VIII. ORDER

The Agency's written reprimand of the Appellant, on September 9, 2005, is AFFIRMED.

Done this 3rd day of March, 2006.

Bruce A. Plotkin
Hearings Officer
Career Service Board

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