

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

DAVID DURAN, Appellant,

vs.

DEPARTMENT OF AVIATION,

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

The hearing in this appeal was held on July 14, 2010 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Andrea Kershner. Deputy Manager of Aviation for Maintenance Ken Greene served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE CASE

On Feb. 10, 2010, Appellant David Duran was dismissed from his position as Plumber with the Plumbing Division of the Department of Aviation ("Agency" or "Department"). Appellant filed this timely appeal challenging that dismissal on Feb. 19, 2010. The parties stipulated to the admissibility of Agency Exhibits 2, 4 - 7, 14, 16, 18, 20 - 24, and 26 - 30, and Appellant's Exhibit A. Appellant withdrew Exh. B.

II. ISSUES

The issues in this appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR), and

2) Did the Agency establish that dismissal was within the range of penalties that could be imposed upon Appellant by a reasonable administrator for the violations proven under the rules?

III. FINDINGS OF FACT

Appellant David Duran has been employed as a Plumber at the Denver Department of Aviation for nine years. He was dismissed for asserted violations of policies governing attendance and leave, dishonesty, and misappropriation of city property.

Plumbing work assignments are tracked within the airport by work order number, which are automatically generated by the Maximo electronic program as soon as a request for plumbing work is received by the Plumbing Division. [Exh. 24.] Plumbers are required to keep track of the time they spend on each job by daily entries into their Employee Work Order Time Report by work order number. [Exh. 23.] They are also instructed to use a disbursement form to list any supplies they remove from the stockroom, and add the work order number of the relevant job on that form. [Exh. 21.]

Appellant has been employed at the city as a Plumber since June 2001. On Dec. 5, 2009, Appellant checked out four copper parts and a ten-foot conduit from the stockroom, but left the work order number space blank. On Dec. 9, 2009, he obtained another four copper parts and eight other items from the shop, and referenced Work Order No. 09-141856. [Exh. 21-2.] Appellant's supervisor David Thompson later noticed that Appellant's time records did not match his disbursement reports, since the five jobs Appellant listed on his Dec. 5th time report all had work order numbers, but the parts checked out "didn't belong to the work orders for that day." [Testimony of Mr. Thompson, 7/14/10, 9:01 am.] Mr. Thompson informed his supervisor Charles Williams of the discrepancy, since Mr. Williams had asked him to be accountable for the accuracy of records on work, supplies, leave and work hours. After a review of this matter as well as Appellant's leave and attendance records, a pre-disciplinary meeting was set for Jan. 27, 2010, based in part on allegations of theft and falsifying records.

At that meeting, Appellant presented eleven photographs and a written statement, part of which addressed the misappropriation issue:

DIA Property

The materials in question that were checked out at DIA can be verifiable in photos that I am submitting as evidence. Each photo is taken at its current location where it has been installed on DIA jobs. These items were installed at jobs that I did not

receive Work Order Numbers and Work Order Numbers were not generated. . . .

Copper Fittings

The copper fittings were used at the electric shop trailer to separate the water heaters. This job was given to me and a co-worker.

Snow Call-Out Day

On the snow call-out day, my supervisor, Dave Thompson was on watch, on his snow route.

I did not have a company truck of my own and was working out of a co-workers truck where these materials are still stocked or have been returned to the materials bin at the back of the plumbing shop.

[Exh. 4-1, 4-2.]

The pre-disciplinary letter also notified Appellant that discipline was contemplated for several leave and attendance issues. Appellant's records showed that he had 13 non-consecutive sick leave incidents over the past year. The DIA Maintenance Department Policy Manual restricts unscheduled personal sick leave to five incidents per year. The airport pay and leave policy requires three days' notice for all requests for vacation leave, and limits the use of emergency vacation to no more than one day every six months. His records reflected that he used two days of emergency vacation within three months. Appellant also was charged with 17 hours of unauthorized leave without pay, and six hours of leave without pay. The letter also claimed that Appellant missed six snow call-out days in November and December, two of which occurred without advance notice. [Exh. 6.] Appellant's written statement submitted at the pre-disciplinary meeting addressed these allegations by informing the Agency that he had been diagnosed with severe sleep apnea, and that he receives treatment to regulate the condition. [Exh. 4.]

Finally, the letter alleged that Appellant took "a side job in the mountains", contrary to his earlier signed statement that he was not engaged in any outside employment or business activity. [Exh. 6-4.] Appellant responded that this was "a drywall tile job that I did to help out a friend. It involved NO plumbing and I was compensated in-trade [by] time spent at this condo." He added that he asked for and received vacation time to cover that absence. [Exh. 4-1.] The Agency did not submit the signed statement into evidence.

At hearing, the Agency withdrew the allegation that Appellant had given no notice of his inability to respond to the Dec. 4, 2009 snow call-out day. It also withdrew its assertion that Appellant had reported late to work in violation of CSR § 16-60 S, and corrected the citation to the disciplinary rules prohibiting dishonesty by substituting CSR § 16-60 E for its reference to § 16-60 D on page one of the disciplinary letter. [Opening remarks of Assistant City Attorney, 7/14/10, 8:32 am.]

On Dec. 2, 2009, Plumbing Supervisor Donald Gaasvig was informed that Maintenance Control received a call for service on the water heater at the new electric shop trailer. Maximo, the work order tracking system used by the department, automatically assigned Work Order Number 09-141856 to that repair assignment. [Exh. 24-1.] Mr. Gaasvig asked swing shift employees Kevin Grau and Darnell Pace to go look at the heater with him. [Exh. 24-2.] They checked the elements and ran hot water into the cold water in an attempt to increase the amount of hot water. That did not fix the problem.

Appellant testified that on Dec. 5th, he was instructed by either radio or Mr. Thompson to separate the water heater at the electric shop. He retrieved the parts he believed he would need from the stockroom. At the time, Appellant was using other employees' trucks, as his truck was being repaired. He did not have a key to the parts bins in those trucks, and so he put the parts in his own bag. He stated that he listed no work order number on his disbursement record because none had been assigned to the job at that point. [Testimony of Appellant, 3:11 pm; Exh. 21-2.] Appellant then went to Lift Station One and used one of the parts he had ordered that day, the ten-foot conduit, to clean it out. Later that afternoon, he went to the electric shop to look at the heater. Appellant concluded that he would need copper pipe and more parts to perform the repair. [Testimony of Appellant, 7/14/10, 3:19 pm.]

The Agency presented its contemporaneous time and disbursement reports, which show that Appellant requisitioned the copper fittings and conduit on Dec. 5 without listing a work order number. [Exh. 21-2.] Appellant reported five jobs that day, all of which he performed with his co-worker Joel Maynes. [Exh. 23.] None of those jobs required the fittings or other equipment Appellant removed from the stockroom on Dec. 5th. [Testimony of Mr. Maynes, 11:48 am.] Appellant's time report did not list any work on the water heater that had been assigned Work Order Number 09-141856. [Exh. 23.]

On Dec. 9, Mr. Gaasvig and supervisor David Thomas met with Appellant and Robert Duffy, and assigned them to change the heater back to the way it was before the Dec. 2nd work done by Mr. Grau and Pace. [Exh. 24-2.] Appellant did not inform them that he already knew about the job, got the parts, and looked at the heater. Mr. Duffy went with Appellant to the stockroom

and checked out the twelve items on the disbursement report for that job, referencing Work Order 09-141856. [Exh. 21-2.] Mr. Duffy already had the adapter they needed in his work truck, and so they used that adapter and did not take another one from the stockroom. He did not recall that Appellant brought any parts to the job. They completed the work that day, using ten feet of the ¾" copper pipe, and placed the remaining piece of pipe in the truck's storage tube. [Exhs. 4-4, 4-5.] Appellant stated he placed about five extra parts in either Mr. Duffy's parts bin or the bin at the back of the plumbing shop. Some time that day, Appellant mentioned to Mr. Duffy that he had a plumbing job up in the mountains. [Testimony of Mr. Duffy, 11:17 am.]

Thereafter, both supervisors reviewed the work done and the parts ordered on Dec. 9th for that job. They confirmed that the parts were both appropriate for use in the repair and adequate to complete it, with one exception: the installed adapter was not ordered that day. [Testimony of Mr. Gaasvig, 10:48 am; and Mr. Thompson, 10:06 am; Exhs. 4-5, 21-2.] "Every part that was used with the exception of the male adapter ¾" was checked out on the 9th. . . On the 9th, the parts that actually are in this picture [Exh. 4-5] . . . are on that work order for this job. . . . Once they're checked out from the stock room, they go to that work order. So they are tracked." [Testimony of Mr. Thompson, 10:06 am.]

All plumbers are instructed to account for their ten-hour shifts by recording all jobs on their time reports by work order number and hours consumed by the work. In October or November 2009, Mr. Thompson verbally counseled Appellant to fill in all of his work time. [Testimony of Mr. Thompson, 10:04 am.] Appellant's statement at the pre-disciplinary meeting indicated that he used the parts ordered on Dec. 5th for the Dec. 9th job, but also said he put those materials into the truck's parts bin or the bin in the plumbing shop. Mr. Thompson observed that the copper couplings shown on two of Appellant's pictures appear to be ½" in diameter, in contrast to Appellant's statement that the fittings he ordered on Dec. 5th were ¾" in diameter. He also noted that the pictured conduit "looks used. It's not shiny." [Exh. 4-12.] Plumbers sometimes place extra fittings not needed for a job into their truck's parts bin, and use them as needed on other jobs. [Testimony of Mr. Thompson, 10:10 am.]

After Appellant received the pre-disciplinary letter on Jan. 15, 2010, he took the pictures he submitted at the pre-disciplinary meeting to rebut the charges of theft. He included a picture of the conduit at the lift station, photos of the end of a conduit next to a tape measure to illustrate its length, and a picture of the work he did in the mountains: a Jacuzzi in his friend's condo in Avon. [Exhs. 4-7, 4-8, 4-12, A.] Appellant admitted at hearing that he lied when he said the job involved no plumbing, but explained that plumbing was "less than one percent" of the job and so he did not believe it was worth mentioning.

Appellant stated the job required that he raise the shower head two feet, for which he purchased ½" copper pipe and other parts at Home Depot. [Testimony of Appellant, 3:51 pm.] However, his co-worker on that job, David LaMark, testified that they raised the shower head by four to five feet. [Testimony of Mr. LaMark, 2:30 pm; Exh. 4-1.]

Appellant's time detail records show that he used 17 hours of unauthorized leave without pay from Apr. 16, 2009 to Jan. 9, 2010, and accumulated 13 incidents of sick leave usage for the past year. Rule No. 2012 limits unscheduled personal sick leave to five incidents per year. Appellant also used emergency vacation leave twice in three months. Airport policy permits one use of emergency vacation leave every six months. [Testimony of Mr. Thompson, 9:14 am.]

Appellant acknowledged that he has worked for the Agency at DIA for nine years, and is familiar with the Career Service Rules and Agency work rules governing his pay, time and leave. He admitted that his leave balances were available on Maximo, the Kronos time system, and on his paycheck, but that he did not check them. "I knew I was close. . . . I didn't look it up." [Testimony of Appellant, 4:28 pm.] Appellant stated he was never told by a supervisor that his attendance or leave use was a problem, or that he could not miss another day without risking disciplinary action. "I didn't know I was abusing it at the time I was abusing it." [Testimony of Appellant, 3:32 pm.]

A full snow emergency was in existence on Nov. 14, 15, and 16 based on "greater than 10 inches and/or winds 25kts or greater." [Exhs. 26 – 29.] Appellant conceded that his time records show he worked the first two days of the three-day snow emergency, but was not at work on Nov. 16, 2009. Appellant does not recall that day, or whether he received a call, automated or otherwise, to report to work for a snow emergency. He did not call the snow line to determine if the snow callout was still in effect on that day, but concedes that the previous two days' snow event should have caused him enough concern to alert him to the possibility that it would be continued into Nov. 16th. "I don't have an explanation." [Testimony of Appellant, 4:07 pm.]

Mr. Thompson testified that all plumbing employees were called out by radio on Nov. 16 to cover the snow emergency, and that snow duty is mandatory for plumbing employees. DIA plumbers are essential to provide needed snow removal functions, and also because frozen pipes and malfunctioning heaters are more common during snow events. The two- to three-person skeleton plumbing crew available in a snowstorm must cover shop functions, snow removal, and plumbing problems created by the storm throughout the airport. Thus, the absence of one person can threaten the

smooth functioning of airport plumbing systems. [Testimony of Mr. Thompson, 9:21 am.]

Appellant argues that his diagnosed sleep apnea affected his ability to comply with attendance and leave policies. However, he first informed the Agency of that condition at the Jan. 2010 pre-disciplinary meeting, stating that he "effectively manage[s his apnea] on a daily basis." [Exh. 4-1.] Appellant was aware that the Family Medical Leave Act (FMLA) provides protection from discipline for a serious health condition, since he applied for and obtained certification for FMLA leave in 2007 and 2008 for two surgeries. 29 USCA § 2611. He did not request FMLA protection on the basis of sleep apnea until Jan. 27, 2010, the day of the pre-disciplinary meeting. [Testimony of Appellant, 4:08 pm; Exh. 4-3.]

After attending the pre-disciplinary meeting and reviewing the information presented, Deputy Manager of Maintenance Ken Greene found that Appellant had misappropriated DIA property for his own use, violated Agency leave and attendance rules, and failed to report for a snow call-out. He determined that dismissal was the appropriate penalty based on the seriousness and cumulative effect of these infractions.

IV. ANALYSIS

The City Charter requires that appeals from employment actions must be decided based on a de novo determination of the facts. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975); In re Luna, CSB 42-07, 4 (1/30/09). The Agency bears the burden to prove that the imposition of discipline was appropriate under the Career Service Rules, and that the level imposed was within the range that could be issued by a reasonable administrator.

1. 16-60 A: Neglect of duty

Deputy Manager of Maintenance Ken Greene found that Appellant neglected his work duties based on his use of over 150 hours of leave over the past year, totaling over 15 ten-hour shifts. Included in those absences were excessive emergency vacation and five missed snow callouts, one of which was taken without notice to the supervisor. Employees are notified that they are required to be aware of all policies that go with the job, and are given access to those policies. Given the fact that the plumbing function is critical in providing fire protection, preventing frozen pipes and maintaining an operational airport, Mr. Greene determined Appellant's attendance record demonstrated neglect of duty in violation of this rule.

Appellant presented his diagnosis and treatment for sleep apnea in response to this allegation. He admitted that he did not seek FMLA protection for any of the absences listed in the disciplinary letter, and did not notify his supervisor of any recurring physical illness in explanation of those absences. Appellant also acknowledged that he is aware of the attendance rules, and knew his absences were close to the maximum allowable under the rules. Nonetheless, Appellant failed to check his leave balances in Kronos, Maximo, or his pay slips. Appellant testified that he did not know why he did not check the snow line on the third day of the Nov. 2009 snow emergency, despite his attendance on the first two snow days. It is undisputed that snow duty is mandatory for airport employees, and that they have a duty to maintain accurate contact numbers for emergency callouts. Appellant was on actual notice of the snow emergency. Under these circumstances, the Agency established that Appellant was heedless of an important work duty, resulting in significant potential harm, based on his failure to comply with the attendance rules and to respond to emergency snow duty.

2. 16-60 B: Carelessness in the performance of duties

A violation of this rule is proven by evidence that Appellant failed to exercise ordinary care in performing a job duty. In re Sandrowski, CSA 58-07, (2/6/08). Mr. Greene found Appellant was careless based on his failure to file a complete and accurate disbursement report on Dec. 5th, noting the absence of a work order number and its lack of any discernable relationship with his work that day. [Exhs. 21-2, 23.]

Appellant testified that the work order number had not yet been generated on Dec. 5th when he took the plumbing supplies from the stockroom and filled out the disbursement report. On the contrary, the evidence shows that a work order number was automatically generated on Dec. 2nd at 3:11 pm, and that Appellant had access to that information through the Maximo work tracking system. [Exh. 24.] Mr. Thompson had recently counseled Appellant during his quarterly review to fill in his time and reports accurately and completely. The Agency emphasized its need for accurate supply and work records to minimize waste and theft, and to assure that Agency resources, including employee time, are efficiently spent. I therefore find that Appellant was careless in his performance of his duties to file accurate disbursement records.

3. 16-60 C: Theft

The Agency also found Appellant guilty of theft of City and Agency property by virtue of his removal of parts and equipment on Dec. 5th, independent of any assigned work. It supported this allegation by Appellant's

failure to list a work order number on the disbursement report, failure to use the parts on any airport job, and his admission at hearing that he was engaged in a private job involving some plumbing around that time.

Appellant testified that he was informed on Dec. 5th by either the radio or by Mr. Thompson that he was to separate the water heater in the new electric trailer. He signed out the parts from the stockroom, put them in his bag, and went to clean out the triturator, an airplane waste processing system. Appellant stated he later took his bag to the trailer and looked at the water heater, but concluded that he needed pipe and additional parts. Appellant testified that he brought the bag with him on Dec. 9th, and put the unused parts in one of the parts bins.

The work records do not support Appellant's version of these events. Given the difference in the types of parts withdrawn on Dec. 5 and 9th, it is difficult to credit Appellant's statement that he requisitioned the Dec. 5th supplies with the water heater separation in mind. Only one of the parts is the same: item no. 119592, the ¾" elbow joint. Appellant withdrew four elbow joints on Dec. 5th, but did not bring any of them to the trailer. Mr. Duffy and Appellant obtained another two elbow joints on Dec. 9th, and installed one or both of them on the job. [Testimony of Appellant, 3:48 pm; Exh. 21-2.]

Moreover, Appellant's failure to list any work on the heater project in his Dec. 5th time report is inconsistent with his other time records for that day, which accounted for only 2.5 hours out of his ten-hour work shift. Even if Appellant performed but did not list routine chores, the need to justify another 7.5 hours should have led him to include any time spent in the stockroom and electric trailer on the water heater job, if Appellant had performed that work.

The Maximo records do not reflect that Appellant was informed about the job until Dec. 9th, when he met with Mr. Duffy and his supervisors and received the assignment. Both supervisors and Mr. Duffy stated that Appellant never mentioned that he knew of the work, or that he had gathered some parts for it and even gone to see the heater. It would be unreasonable to conclude that the plumbing supervisors assigned the work to two plumbers on Dec. 2nd and recorded that assignment in Maximo, but then failed to record their assignment of Appellant to the same job on Dec. 5th, three days later.

In addition, the evidence of all other witnesses contradicts Appellant's account. Mr. Duffy testified that Appellant did not bring any parts to the job, and they completed the separation using only the parts they requisitioned on Dec. 9th and an adapter Mr. Duffy had in his truck. The supervisors testified that the parts taken out on Dec. 9th were identical to the ones installed, supplemented only by Mr. Duffy's spare adaptor. It is noteworthy that Appellant

checked out three adapters on Dec. 5th, but did not produce them on Dec. 9th while they were doing the work.

Appellant's failure to mention or record any work related to this job on Dec. 5th renders his explanation less credible. The absence of a work number on the disbursement report, despite a clear policy requiring same, tends to show that Appellant chose to receive the parts in a manner that made it difficult for the Agency to track their use. He also denied that his work in the mountains involved plumbing during the pre-disciplinary meeting, knowing that was false, in order to rebut the suggestion that he had converted City property. [Exh. 4-1.] The only theory that fits all of the credible facts is that Appellant sought to conceal his Dec. 5th withdrawal of parts by attributing those parts to Work Order No. 09-141856, after the fact.

The totality of the evidence establishes that Appellant intended to permanently deprive the City and Agency of the items removed from the stockroom on Dec. 5th, in violation of § 16-60 C.1 prohibiting theft of city property. See In re Schultz, CSA 156-04, 6 (6/20/05).

4. 16-60 E: Dishonesty

In order to prove a statement is dishonest, an agency must prove that an employee supplied incorrect information to a superior, with knowledge of its falsity. In re Compos, CSA 56-08, 14 (12/15/08). The Agency supported this allegation by Appellant's statement that his mountain job "involved NO plumbing." [Exh. 4-1.] During cross-examination, Appellant admitted that this was a lie. Lying during a disciplinary proceeding is especially egregious, as it undercuts the Agency's efforts to seek the truth in important matters involving employment rules and the rights of employees, and weakens the ability of an agency to place its trust in the statements of its employee. See In re Galindo, CSA 39-08, 10 (9/5/08). I find that the Agency established that Appellant's statement to the pre-disciplinary panel was dishonest, in violation of this rule.

5. 16-60 J: Failure to comply with lawful orders or perform work

Mr. Greene found that Appellant violated an order to respond to a mandatory snow callout on Nov. 16, 2010. He also found that Appellant had failed to perform work he was capable of performing by both his Nov. 16th no-show during the snow emergency, and his pattern of taking unauthorized leave and other leave violations, totaling over 15 work days. Appellant did not dispute the Agency's records of his leave, or that the leave violated both the Agency's emergency vacation and sick leave policies.

This rule requires proof that a supervisor communicated a reasonable

order, and that the employee violated the order under circumstances demonstrating willfulness. In re Owens, CSA 69-08, 4 (2/6/09), citing In re Mounjim, CSA 87-07, 7 (7/10/08), aff'd 1/8/09. Here, the Agency proved that Appellant, a DIA worker for nine years, ignored the third day of a mandatory snow callout during a snowstorm, despite the critical nature of plumbing and snow removal functions and his knowledge of emergency callout policies and procedures. In addition, Appellant accumulated 62 hours of excessive sick leave, and 23 hours of leave without pay, the majority of it unauthorized. Under these circumstances, the Agency proved that Appellant violated the snow callout order, and failed to perform duties he was capable of performing as a result of his excessive use of leave.

6. 16-60 K: Failure to meet standards of performance

Appellant's 2009 Performance Enhancement Plan (PEP) requires the following standards of performance: 1) Appellant must ensure that his leave balance is adequate to cover requested leave time before making the request, and submit accurate leave slips; 2) Appellant must exercise good judgment to resolve problems and meet organizational needs; 5) Appellant must participate in mandatory snow removal operations; and 6) Appellant must make decisions based on business rather than personal needs. [Exh. 2-1, 2-2.] The Agency concluded that he had violated those standards by virtue of his accumulation of excessive leave, failure to answer the snow callout, and his removal of plumbing stock for his personal use.

Two of these standards describe the type of qualitative or quantitative standards that may be enforced by the disciplinary rule: those related to leave requests and snow callouts. Those two standards are enforceable by discipline based on the fact that they give an employee clear notice of the standard imposed and the nature of conduct that would violate the standard. See In re Lottie, CSA 132-08, 4 (3/9/09). Appellant admitted he was aware of the leave and snow coverage rules. Appellant does not deny that he violated these standards by his excessive use of leave and failure to respond to the Nov. 16 snow emergency. The evidence was undisputed that Appellant failed to meet the above standards related to the taking of leave and snow callouts, in violation of this rule.

7. 16-60 L: Failure to observe regulations

Next, the Agency asserts that Appellant failed to observe its vacation and sick leave policies, and therefore disobeyed agency regulations. The Agency proved it had written policies limiting emergency vacation leave to one day every six months, and restricting unscheduled personal sick days to five per year. Appellant admitted he knew of those policies, but took leave without checking

his balances on Kronos, Maximo, or his pay slips, knowing he "was close" to the limits. Appellant took a second day of emergency vacation leave on Aug. 5, 2009, less than three months after his first day of emergency vacation leave. Appellant also accumulated 13 occurrences of sick leave within a year, well in excess of the five-day limit imposed by Rule No. 2012. The Agency thus established that Appellant failed to observe its leave regulations, in violation of this rule.

8. 16-60 S: Unauthorized absence from work

This rule prohibits an employee from being absent from work without giving prior notice to the Agency. Department of Aviation policy also states that unauthorized absences "may result in disciplinary action." Section XII, DOA Standard Policies and Procedures; Exh. 2-2.

Airport emergency operations is dependent on the presence of plumbers during severe weather callouts in order to maintain its fire protection systems, assure repairs to frozen pipes, and supplement snow removal from the airfield and parking lots. Appellant concedes that his attendance records indicate he was not at work during the Nov. 16, 2009 emergency snow callout. Appellant was notified of the emergency by an automated call to his provided contact phone number. [Exh. 14.] Appellant does not claim that any specific absence was caused by his medical condition. He did not file an FMLA certification request until the day of his pre-disciplinary meeting, almost a year after his first absence without paid leave. This indicates the FMLA claim was filed in response to discipline rather than a need for protected leave based on a medical condition.

The Agency proved that Appellant failed to respond to work during an emergency snow callout. In addition, Appellant was absent without prior notice or permission for another 17 hours from April 2009 to January 2010. On the basis of these absences, I find that the Agency established a violation of this rule.

9. Appropriateness of level of discipline

Deputy Manager Greene was the final decision-maker for the Agency in this matter. In determining the level of discipline for the asserted misconduct, Mr. Greene first considered a suspension. Upon reviewing the entire scope of the violations, including extensive leave violations, missed and ignored snow callouts, dishonesty, and the misappropriation of City inventory, Mr. Greene concluded that the cumulative effect of this conduct made dismissal the reasonable and prudent disciplinary decision.

The first factor for determining the appropriate level of discipline is the gravity of the offense. CSR § 16-20. Here, the Agency established that Appellant misappropriated city property and submitted a dishonest statement at the pre-disciplinary meeting. The Agency also considered Appellant's 150 hours of leave usage and several missed snow callouts in determining that the pattern of behavior was both serious and continuing in nature, spanning a 12-month period.

Appellant contends that the Agency's failure to warn Appellant that he was approaching a violation of the leave policies should be considered in mitigation of the penalty. The Agency responds that an employee is responsible for knowing his own leave balances, and that Appellant failed to take ordinary measures to check his balances via his own time and pay records. I agree that the failure of the Agency to remind Appellant that he may be in danger of exceeding his leave balances does not mitigate the seriousness of the proven offenses, especially in light of the number and types of attendance violations present here, and the fact that Appellant was aware of the policies and on notice of his own leave use.

The next factor to be considered in determining the type and level of discipline is Appellant's past record. "Wherever practicable, discipline shall be progressive" in order to provide an employee with an opportunity to correct behavior. § 16-50 A.1. Here, Appellant has no previous disciplinary history.

Finally, discipline must be of the type and level "needed to correct the situation and achieve the desired behavior or performance." § 16-20. Throughout these proceedings, Appellant has denied that his actions violated the disciplinary rules. Appellant was dishonest during the pre-disciplinary meeting, and covered up his misappropriation of city property by filing false work reports. Under these circumstances, the seriousness and intentional nature of the misconduct outweighs Appellant's otherwise blameless disciplinary history, and renders dismissal a reasonable penalty for the proven violations.

In light of the seriousness and extent of the proven rule violations, I find that dismissal was within the range of penalties that may be imposed by a reasonable administrator.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency action dated Feb. 10, 2010 is AFFIRMED.

DATED this 1st day of October, 2010.


Valerie McNaughton
Career Service Hearing Officer