

DECISION AND ORDER

RAECHEL ANDERSON, Appellant,

vs.

OFFICE OF ECONOMIC DEVELOPMENT, and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on June 28, 2010 before Hearing Officer Valerie McNaughton. Appellant was present and represented herself. The Agency was represented by Assistant City Attorney Karla Pierce. Having considered the evidence and arguments of the parties, the following findings of fact, conclusions of law and order are entered herein.

I. INTRODUCTION

Appellant Raechel Anderson is a Business Development Associate (BDA) II at the Office of Economic Development (Agency). This is her appeal of the denial of her complaint alleging the Agency violated the Career Service Rule governing FMLA leave requests, and that as a result Appellant was deprived of 66.5 hours of pay. The parties stipulated to the admissibility of all exhibits, which are Agency's Exhibits 1 – 17, and Appellant's Exhibits A – L.

The issues presented in this disciplinary appeal are 1) whether the Hearing Office has jurisdiction of this appeal, and 2) if so, whether Appellant established that the Agency violated CSR § 11-154 by designating a portion of her FMLA leave as unpaid leave.

II. FINDINGS OF FACT

The facts in this appeal are not in dispute. Appellant was hired in Jan. 2007 as a BDA II for the Office of Economic Development. On Apr. 27, 2009, Appellant requested leave for the expected birth of her child in July under the Family Medical Leave Act (FMLA), 29 US § 2617. A Notice of Eligibility under the Act was issued on the same day. On Aug. 3, the city designated all leave she

would take as FMLA leave, and acknowledged that she had requested use of paid leave. [Exhs. 3, 4.]

Before Appellant began her leave, Human Resources Support Technician Diane Gallegos from the Controller's Office provided Appellant with a first draft of her leave history, which showed a balance of 302 hours of sick leave, and 96 hours of vacation leave as of July 23, 2009. Ms. Gallegos told Appellant she would send her the final leave history shortly. Appellant did not believe she had that much leave, but relied on Ms. Gallegos to provide accurate leave hours, or inform her if there was a change. Appellant told Ms. Gallegos that she wished to use a week each of vacation and sick leave during the last two weeks of her leave, and return to work on Sept. 15, 2009. Ms. Gallegos informed her that she should have enough leave to cover that time. [Testimony of Appellant, 6/28/10, 9:14 am.]

On July 31, 2009, Appellant went into labor, and began her FMLA leave. Her absences were initially covered under short-term disability insurance. On Aug. 5, 2009, Ms. Gallegos internally circulated an update of Appellant's leave calendar, showing that Appellant had 302 hours of sick leave and 96 hours of vacation leave at the beginning of her FMLA leave. The next leave calendar, dated Aug. 26, showed the same numbers. However, on Aug. 28, the leave calendar showed "a big change": as of July 31st, Appellant's sick leave balance was only 44 hours, and her vacation leave was 62.5 hours. [Exh. K.] That leave calendar was sent to Appellant's work email in late August, but Appellant did not retrieve it, as she was still on leave following the birth of her child.

Appellant received a copy of the Aug. 5th calendar, and believed on that basis that she had plenty of paid leave to cover her last two weeks of leave after the end of her short-term disability. [Exh. B.] Appellant was not informed of the sharp reduction in her leave numbers shown in the Aug. 28 leave calendar. Appellant's Employee Leave History reflects that she exhausted her vacation leave on Sept. 5, and that her absences from Aug. 10 to Sept. 25 were treated in whole or in part as leave without pay (LWOP) – FMLA. [Exh. 5.] Shortly after her return to work on Sept. 28th, Appellant discovered the error when she received a paycheck of \$500 based on 41.5 hours of leave without pay. [Exh. C.] Appellant accumulated a total of 66.5 hours of leave without pay prior to this discovery. She seeks recovery of the money she would have earned by her early return to work if she had been informed of her correct leave balances.

At the conclusion of Appellant's case, the Agency moved for judgment on the evidence, contending that Appellant failed to establish that the Agency violated the rule, or that Appellant lost any pay as a result of the Agency's

actions. The motion was granted orally, consistent with the findings and conclusions now stated in this decision.

III. ANALYSIS

1. Jurisdictional Issues

Appellant has the burden to establish the existence of jurisdiction over the Agency's denial of a grievance under CSR § 19-10 A. 2.b.i. [Order on Motion to Dismiss, (1/8/10), aff'd CSB (4/19/10).] That rule permits appeals of grievances which allege a violation of a Career Service Rule that negatively impacts an employee's pay. Appellant here asserts that the Agency violated CSR § 11-154 C. and deprived her of pay by its failure to notify her of "information about FMLA leave", i.e., her correct leave balances. On interlocutory appeal, the Career Service Board upheld denial of the Agency's motion to dismiss, holding that Appellant's filing of a complaint instead of a grievance to raise this issue "substantially complied with the requirements of CSR 18 and her use of the wrong form does not divest the Hearing Office of jurisdiction over her appeal." Appellant has raised a colorable claim of jurisdiction, requiring a hearing on disputed issues of fact. In re Anderson, CSA 102-09 (CSB 4/19/10.)

Next, it must be determined whether the Agency as appointing authority delegated its responsibilities to designate FMLA leave, notify the employee of the designation, "and provide other required information about FMLA leave" under the above rule. I find that the jurisdictional rule does not require that the action being appealed must be taken by the appointing authority. The appealable act is denial of a "grievance which results in an alleged [violation of a rule and reduction in pay]". CSR § 19-10 A.2.b.i, emphasis added. Therefore, the Agency's acceptance of a designation issued from another city agency is a sufficient basis for jurisdiction of the grievance appeal.

2. Did Agency Violate Rule on Use of FMLA Leave?

Appellant argues that the Agency violated the Career Service Rules by designating several hours of her FMLA leave as unpaid leave, contrary to her request for paid leave. Appellant does not dispute that she had no earned vacation or sick leave at the time in question.

First, Appellant contends that the Agency failed to provide her with accurate leave balances, thereby depriving her of the opportunity to return to work two weeks earlier than she planned. Appellant relies on CSR § 11-154, which states that an appointing authority has the responsibility to "provide other required information about FMLA leave", in addition to its duty to designate qualifying leave and notify the employee of that designation. The

Agency argues in response that an employee's leave balances are not "other required information about FMLA leave" within the meaning of the rule.

Generally, FMLA leave is unpaid leave. However, . . . FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. . . . The term "substitute" means that the paid leave provided by the employer, *and accrued pursuant to established policies of the employer*, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave. . . . If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave.

29 CFR § 825.207(a) (emphasis added).

The Act and applicable regulations do not require an employer to notify an employee that she has or lacks paid leave, and does not create the right to paid leave if none had been earned under the employer's benefit policies. See also 29 CFR § 825.700(a); Miller v. Personal-Touch of Virginia, Inc., 324 F.Supp.2d 499 (E.D.Va. 2004), aff'd 153 Fed.Appx. 209 (holding that employer's designation of FMLA leave controlled over employer's oral assertion of rights to take accrued paid leave); Ragsdale v. Wolverine World Wide, Inc. 122 S.Ct. 1155 (2002); McGregor v. Autozone, Inc., 180 F.3d 1305 (11th Cir., 1999).

Appellant has presented no basis for her conclusion that the existence of accrued paid leave was "required information about FMLA leave." The Act requires an agency to designate leave as FMLA-qualifying, and notify an employee of that designation. 29 CFR § 825.300(d)(1). The existence of paid leave is a matter covered by the Agency's benefit policies, not federal law.

Second, Appellant contends that, once the Agency discovered she had no paid leave, it should have issued a second notice of designation without the check mark next to the words, "[y]ou have requested to use paid leave during your FMLA leave." [Exh. 3.] If she had received such a form, Appellant believes she would have realized she did not have paid leave, and would have gone back to work. [Testimony of Appellant, 6/28/10, 9:37 am.]

Appellant admits that the form accurately showed that Appellant had requested paid leave. Neither federal law nor the Career Service Rules

require that an employer re-send a designation form every time there is a change in the amount of paid leave. The FMLA specifically requires only one notice of designation "for each FMLA-qualifying reason per applicable 12-month period", and does not require that notice to specify the amount of paid leave in the employee's leave bank. 29 CFR § 825.300(d)(1). Therefore, the Agency did not violate CSR § 11-154 by its failure to inform Appellant of her correct leave balances prior to her return to work.

In addition, Appellant concedes that she had access to her leave balances, and knew that the Aug. 3rd leave history upon which she relied "was high", and was not final. [Testimony of Appellant, 6/28/10, 9:22 am.] Nevertheless, Appellant did not check her leave balances by going to her own online time and attendance records, or contact either the Agency or Controller's Office to confirm the availability of earned, paid leave before taking the time off. Under the circumstances, Appellant's reliance on the inaccurate draft leave history was unreasonable. In addition, detrimental reliance on a draft leave history does not render the Agency's FMLA designation improper under § 11-154.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency's denial of Appellant's grievance is AFFIRMED.

Done this 20th day of July, 2010.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* 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](http://www.denvergov.org/csa/career%20service%20rules).

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

BY MAIL OR PERSONAL DELIVERY:

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

BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.

I certify that on July 20, 2010, a copy of this Decision and Order was delivered to the following in the manner indicated:

Raechel Anderson, 8422 South Upham Way, G-60, Littleton, CO 80128	(via U.S. mail)
City Attorney's Office at Dlefilng.litigation@denvergov.org	(via email)
Jeff Fitzgerald, Acting Dir., Jeff.Fitzgerald@denvergov.org	(via email)
Kathy Billings, HR., Kathy.Billings@denvergov.org	(via email)

A handwritten signature in cursive script, appearing to read "Linda Noel", written over a horizontal line.