

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

Appeal No. 128-05

DECISION

IN THE MATTER OF THE APPEAL OF:

LINDA DENISE CLAYTON,
Appellant,

vs.

DENVER INTERNATIONAL AIRPORT, DEPARTMENT OF AVIATION,
Agency,
and the City and County of Denver, a municipal corporation.

I. INTRODUCTION

The Appellant, Linda Clayton, appeals her one-day, ten-hour suspension, imposed by her employer, Denver International Airport, on November 6, 2005. The Appellant filed a timely appeal on November 10, 2005. A hearing concerning the appeal was conducted on February 10, 2006, by Bruce A. Plotkin, Hearings Officer. The Appellant appeared pro se, while the Agency was represented by Joseph A. DiGregorio, Assistant City Attorney. Joseph Lawrence served as advisory witness for the Agency. Agency Exhibits 1-5 were admitted without objection. The Appellant offered no additional exhibits. The Agency presented the following witnesses: the Appellant as a hostile witness; Maurice Murray; Joe Gerardi; and Joseph Lawrence. The Appellant offered no additional witness testimony.

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. 1), 3), 13), 20), or 16-51 A. 3), or 5);
- B. if the Appellant violated any of the aforementioned CSRs, whether the discipline imposed was in conformance with, and fulfilled the purpose of discipline, under CSR 16-10.

III. FINDINGS

The Appellant is an Airport Operations Representative (AOR) at the Denver International Airport Communications Center. At the time relevant to this appeal, she worked four 10-hour shifts per week, from 8:30 p.m. to 6:30 a.m. the following morning. On the morning of September 20, 2005, at the end of her shift, the Appellant informed the day shift supervisor, Maurice Murray, that she was not feeling well, and would not be in for her shift that night. Shortly afterward, in the parking garage, her supervisor, Joseph Lawrence saw the Appellant and spoke briefly with her at the Appellant's car. The time was about 7:35 a.m.

When Lawrence arrived in the Communications Center, Murray conveyed the Appellant's announcement to Lawrence. Lawrence then became curious as to why, if the Appellant was ill, she was in the parking garage over an hour after her shift. Lawrence's subsequent investigation revealed the Appellant had scheduled vacation the following day, from September 21 through 26. Also, the Appellant's badge records for vehicle entry and exit times showed the Appellant's vehicle did not leave the garage from September 20, the day he saw her, until September 26, 2005, the day the Appellant returned from her scheduled vacation. [Exhibit 5].

Lawrence felt the Appellant may have abused sick leave to take an extra vacation day, so upon the Appellant's return from vacation, he requested that she present a doctor's note for her September 20, 2005 sick day, in accordance with Standard Operating Procedure (SOP) 80-17. The Appellant replied by email, that she had a "tummy ache," on September 20, but did not see a doctor, and therefore could not comply with his request. [Exhibit 3]. Lawrence deemed the Appellant's absence unauthorized, and notified the Appellant that a pre-disciplinary meeting would be held on October 28, 2005. The meeting was attended by the Appellant, Suzanne Iversen, Senior Employee Relations Analyst, Ms. Rowena Thomas, Manager of Operations/Communications, and Lawrence. During the pre-disciplinary meeting, the Appellant stated after her shift on September 20, she went to the Denver Health clinic at the airport terminal, due to a sore throat. [Exhibit 1, p.3]. However, at the clinic, when she discovered she would have to pay \$25 co-pay to see the doctor, she decided it was too expensive, and left without seeing a doctor, or procuring a note. [Exhibit 3]. She then went to the Frontier Airlines ticket counter and paid \$100 to fly out the same day, instead of her originally-scheduled flight the following day. Notably, the Appellant's bags were packed and in her car when she arrived at work on September 19, two days before her scheduled vacation. [Appellant testimony].

Following the pre-disciplinary meeting, Lawrence issued the Agency's notice of suspension on November 2, 2005, effective November 6, 2005 for the ten-hour duration of the Appellant's shift. The Appellant filed a timely appeal on November 10, 2006.

IV. ANALYSIS

The City Charter and Career Service rules require the Hearings Officer to conduct a *de novo* hearing, meaning the hearings Officer makes findings of fact independently of the Agency's findings, assesses credibility, and resolves factual disputes. See Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975). The Agency alleges the Appellant's actions violate the following Career Service Rules, each of which is treated in the order alleged.

A. CSR 16-50 A. 1) Gross Negligence or willful neglect of duty.

"Gross negligence" does not require the Agency to prove the Appellant intentionally acted in a wrongful manner, only that the failure to perform her work was obviously unreasonable or inappropriate. In re Kiefe, 161-04, 3 (3/16/05), *citing* In re Tennyson, CSA #140-02 (12/26/02). "Willful neglect" implies the wrongful conduct was intentional or conscious, not merely negligent. In re Castaneda, CSA 79-03, 11 (1/12/04).

Lawrence stated he found the Appellant in violation of this rule because she intentionally did not work when scheduled. [Lawrence testimony]. A review of the cases in which gross negligence or willful neglect was found reveals something more is required. For example, an employee's absence violated this rule, where the absence was for two months without notice, In re Kiefe, CSA 161-04 (3/16/05), or 14 days in a 6-week period, where no notice was given and the absence placed significant hardship on the remaining co-workers. In re Trujillo, CSA 28-04 (5/27/04). Here the Appellant, even if she intentionally missed work, provided notice, missed only one work day, and did not unduly burden the Agency, as evidenced by the testimony of Maurice Murray. Murray stated when the Appellant told him at 6:30 a.m. she would not be in that night for her shift, he did not begin making calls to replace her until later, since it was so early in the day. [Murray testimony]. Thus, the Agency did not suffer a significant hardship by the Appellant's absence. For these reasons, the Agency failed to prove, by a preponderance of the evidence, that the Appellant was grossly negligent of, or willfully neglected, her duties in violation of CSR 16-50 A. 1).

B. CSR 16-50 A. 3) Dishonesty, including, but not limited to... lying to superiors or falsifying records with respect to official duties, including work duties...or any other act of dishonesty not specifically listed in this paragraph.

Lawrence claimed the Appellant violated this rule for falsely claiming a sick day. The Appellant replied she was ill, and simply chose, on the spur of the moment, to fly out a day early rather than risk losing her pre-planned vacation to her illness.

This provision of the CSRs, more than most, demands an analysis of credibility. These are the pertinent facts and findings regarding the Appellant's credibility concerning the reason for her leave on September 20, 2005.

1. The nature of the Appellant's illness.

The Appellant presented four distinctly different reasons for taking sick leave. For the first time at hearing, she explained she suffers from chronic Irritable Bowel Syndrome (IBS), and is well-familiar with its symptoms and progression. [Appellant closing statement]. Therefore, she knew the morning of September 20 that she would feel increasingly ill as her shift approached that night, so that it was better just to leave early on her planned vacation to convalesce with family. Even if taken as true, the Appellant's diagnosis contradicts her earlier description, on October 31, 2005, of her illness as "an everyday cold/flu." [Exhibit 4]. Second, the Appellant stated she took sick leave so as not to infect her co-workers with her "cold/flu." *Id.* Incongruously, the Appellant emphasized at hearing that her real illness the morning of September 20, 2005, was IBS, which is not contagious. [Appellant closing statement]. The Appellant's third explanation for taking sick leave was the effects of over-the-counter medicines Theraflu™ and Pepto Bismol™, which she took the morning of September 20, rendered her unfit to work her upcoming shift some 11 hours later. Fourth, at her pre-disciplinary meeting October 28, 2005, the Appellant explained she went to the DIA clinic to treat a sore throat. [Exhibit 1, p.3]. At no time did the Appellant claim she suffered both from IBS and flu symptoms, so her various therapies and diagnoses are inconsistent.

The Appellant claimed to reconcile the diverse illness statements by explaining the symptoms of IBS are embarrassing, so that on the morning of September 20, she amended her diagnosis to Murray as "having some stomach problems." [Appellant testimony]. The Appellant's explanation is inconsistent with her statement that nurses in the DIA medical clinic told her "it looks like you got a pretty good cold or allergies." *Id.*

2. \$25.00 co-pay.

When Lawrence requested the Appellant provide a doctor's note for her sick leave, the Appellant replied "[p]erhaps you can afford that luxury [of a \$25 co-pay], but I on the other hand can not." [Exhibit 3]. Yet, that same morning, she paid \$100 to change her airline ticket to fly out one day early for vacation. The Appellant explained she elected to pay the \$100 change-fee only after deciding if she didn't fly out that day she would have felt too ill from her IBS to fly out at her scheduled time the following morning, and so would have forfeited her vacation.

The Appellant also offered an alternative explanation. She stated she paid \$100 to change her airline ticket by credit card, "not cash in hand, it's not cash up front, it's not right out of my pocket right now," [Appellant closing statement]; however, she presumably could have paid her \$25 co-pay by credit card as well, thus her explanation for not paying to see the doctor is not credible.

3. Packed in advance.

It was also suspect that the Appellant was already packed for her trip, with bags in her car, for at least two days before her scheduled trip, when she coincidentally chose to leave on vacation one day early. The Appellant explained she always prepares for her trips in advance. [Appellant cross-examination]. This explanation, while possible, remains dubious in light of all the conflicting statements, above, which strongly suggest dishonesty. When all the Appellant's explanations for taking sick leave are considered together, the preponderance of the evidence indicates the Appellant was dishonest in violation of CSR 16-50 A. 3).

C. 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; leaving work before completion of scheduled shift without authorization; or taking unauthorized breaks.

Lawrence deemed the Appellant violated this rule when she refused his request, under an Agency rule, Exhibit 2, to produce a medical excuse for her September 20th absence. Exhibit 1, p.3. The Appellant replied Lawrence imposed his request only after her return from vacation, and since she hadn't seen a doctor for her illness previously, it was not possible to comply after the fact. The Appellant has a point. Agency rules allow a supervisor to require a "Return to Work," or "Physicians Statement of Employee Absence ...at any time for sick leave usage of any duration." [Exhibit 2]. However, there is no requirement within the rules or Agency regulations that an authorized illness be of sufficient severity to require medical consultation, so that if such proof of such consultation is required, fairness dictates that the requirement bear some relationship to the absence, and that the employee be provided notice so that she may comply.

Lawrence replied the Appellant was on notice of this requirement by the issuance of the Agency's Communications Center Standard Operating Procedure #80-17 (COMM SOP 80-17), 18 days prior to her absence. However, Lawrence's after-the-fact requirement would have been ineffective for the reason that, since the Appellant was asymptomatic upon her return from vacation, her physician would not have been able to determine whether the Appellant was ill on September 20. The Hearings Officer concludes the Appellant's failure to provide either a "Return to Work" or "Physician's Statement of Employee Absence" was not a violation within the purpose of COMM SOP 80-17, reasonably to provide proof of illness, and therefore not a violation of CSR 16-50 A. 13).

D. 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.

E. 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.

Lawrence stated he found the Appellant violated this rule due to her dishonest use of sick leave to extend her vacation. [Lawrence testimony]. It has already been determined the Appellant was dishonest about the reasons for her sick leave. She therefore abused the intended purpose of sick leave, CSR 11-32, to provide paid time for an incapacitating illness. The Appellant's degree of incapacity on September 20 was questionable, given that she was able to engage in the following activities after her shift, all with the dire and unpredictable consequences of Irritable Bowel Syndrome: go to the medical clinic, change her ticket for departure, shop for medicine at a grocery store at least five miles away, return to the airport, clear security, proceed timely to the designated gate, fly in an airplane where one's ability to use the toilets is always in doubt due to atmospheric conditions and due to wait time when the toilets are available, then wait, presumably without toilet access, while the plane landed, taxied, docked, and allowed her to deplane, and travel to her final vacation destination. Given her successful ability to accomplish these tasks, the Hearings Officer finds the Appellant was not incapacitated within the meaning of CSR 11-32. She therefore abused sick leave on September 20, 2005 by a preponderance of the evidence.

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

Lawrence stated the Appellant violated this rule in failing to provide a doctor's letter, pursuant to SOP 8-17, to provide a medical reason her sick leave on September 20, 2005, the same reason he found her in violation of CSR 16-50 A. 13), above. [Exhibit 1, p.2]. The same analysis applied above also applies here. The Appellant's failure to provide either a "Return to Work" or "Physician's Statement of Employee Absence" was not a violation within the purpose of COMM SOP 80-17 to provide reasonable proof of illness, and therefore was not a failure to observe a departmental regulation under CSR 16-51 A. 5).

V. LEVEL OF DISCIPLINE

The principal consideration in reviewing the Agency's choice of discipline is whether the Agency's discipline is reasonably related to the seriousness of the offense, while taking into consideration the employee's past record. The Agency must also assess the amount and type of discipline needed to correct the situation and achieve the desired behavior or performance. CSR 16-10.

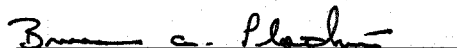
With respect to the "reasonably related" component of CSR 16-10, the Appellant's dishonesty alone could have subjected her to dismissal. CSR 16-10 A. 3. Regarding her past discipline, although the Appellant had prior discipline, none was related to the issues of honesty in this case. Lawrence stated the Appellant's otherwise good work history dissuaded him from recommending a more severe penalty. [Lawrence testimony]. It appears the discipline imposed by the Agency was therefore reasonably related to the seriousness of the offense, was within the reasonable range of penalties

available to the Agency, and seemed reasonably calculated to have corrected the problem and to have achieved the desired behaviors. In short, the Agency's discipline complied with the purposes of CSR 16-10.

VI. ORDER

The Agency's suspension of the Appellant for one day (ten hours), on November 6, 2005, is AFFIRMED.

DONE this 21st day of March, 2006.



Bruce A. Plotkin
Hearings Officer
Career Service Board

CERTIFICATE OF MAILING

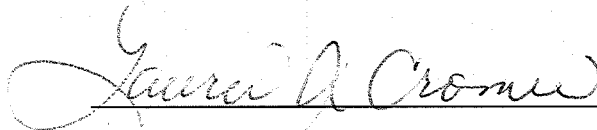
I certify I have forwarded a correct copy of the foregoing DECISION, by depositing it in the U.S. mail, postage prepaid, this 22nd day of March, 2006, addressed to:

Ms. Linda Denise Clayton
8294 Eaton Way
Arvada, CO 80003

I further certify I have forwarded a correct copy of the foregoing DECISION, by depositing it in interoffice mail this 22nd day of March, 2006 addressed to:

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Laura A. Cromie