

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

Appeal No. 40-05

DECISION

IN THE MATTER OF THE APPEAL OF:

ERNEST LEE CONWAY,
Appellant,

vs.

DENVER POLICE FLEET MAINTENANCE, DENVER POLICE DEPARTMENT,
Agency,
and the City and County of Denver, a municipal corporation.

I. INTRODUCTION

The Appellant, Ernest Conway, appeals the termination of his employment by the Agency, the Police Fleet Maintenance Division of the Denver Police Department. A hearing concerning this appeal was held on August 10, 2005, before Hearings Officer Bruce A. Plotkin. The Appellant was *pro se*. The Agency was represented by Robert Nespov, Esq., with Ms. Vivian Koras, the Appellant's supervisor, serving as advisory witness.

The Agency's exhibits 1-10 were admitted without objection. The Appellant's only exhibit, A, was also admitted without objection. The Agency presented the following witnesses: Ms. Vivian Koras, Mr. Dennis Mazgulski, Mr. Clyde Cline, Mr. Jim Holbrook, Chief Dan O'Hayre, and Deputy Manager Tracy Howard. The Appellant presented no testimony.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant violated Career Service Rules (CSR)16-50 A. 7), 13), or 20; CSR 16-51 A. 3), or 11);

B. whether there was just cause for the Agency's decision to dismiss the Appellant;

C. whether the Agency unlawfully discriminated against the Appellant based upon a disability;

D. if the Agency unlawfully discriminated against the Appellant based upon his disability, whether he is entitled to reinstatement, back pay and lost benefits.

IV. BACKGROUND

The following facts are not in dispute. The Appellant was employed as a stock keeper at the Agency. He was responsible for ordering, supplying and accounting for parts for City and County of Denver police, sheriff and other vehicles which came to the Agency for maintenance, repair, and fittings. By all counts he was exceedingly proficient at the procurement aspects of his job. For example, he was able to obtain parts when others could not, and other stock keepers would ask him for advice.

The Appellant was counseled on September 19, 2002 about his excessive sick leave use and was ordered to bring a doctor's note for each subsequent sick day. On March 2, 2004 the Appellant received a verbal reprimand for his continued unexcused absences. The reprimand required him to speak with his supervisor, Vivian Koras each time he requested leave.

On March 3, 2005, Koras approved four hours of vacation for the Appellant, from 6:00 a.m. to 10:00 a.m., but the Appellant did not appear for the rest of the day and did not contact Koras or any other supervisor. As the Appellant's shift was ten hours, six were assessed as unauthorized.

On March 16, 2005, the Appellant left Koras a voice mail message at 5:35 a.m. stating he was not going to be at work, and would use his annual personal day off. Because the leave was not approved in advance, pursuant to the orders, above, the Agency assessed a day of unauthorized leave against the Appellant.

On March 17, 2005, the Appellant called at 5:09 a.m. and left a voice message stating he had "kind of" a family emergency and would not be at work. The messages also stated he would talk to Koras later. Koras did not receive any subsequent communication from the Appellant that day about his absence, and deemed the absence unauthorized.

On March 22, 2005, at 5:16 a.m. the Appellant left a voice message for Koras stating he had a tooth ache, would be unable to go to work, and that he would call back at 6:00 a.m. to explain. Koras received a message from the Appellant at 5:57 a.m. stating he called the dentist from work the previous day, was still trying to get an appointment, and would call later. Koras did not receive any other messages or

communication from the Appellant. The Appellant provided no doctor note subsequent to that absence. The Agency recorded the absence as unauthorized.

A pre-disciplinary meeting was held on Friday April 8, 2005 at Police Headquarters. The Appellant appeared pro se. The Agency was represented by Ms. Koras, Fleet Superintendent Jim Holbrook, Division Chief Daniel O'Hayre, Lieutenant Chapman, and Sergeant DiMarco. During the meeting, the Appellant was asked three times what it would take for him to comply with orders concerning leave. Each time he replied he did not know, and did not provide any assurance that he intended to comply with instructions in the future.

On April 14, 2005, the Appellant was served notice that the Agency was dismissing him effective April 15, 2005. This appeal followed on April 22, 2005.

V. ANALYSIS

A. CSR16-50 A. 7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing.

Whether the Appellant's failure to comply was willful as required by the rule, see In re Trujillo, CSA 28-04, 9-10 (5/27/04), depends on the circumstances of this case. Koras, the Appellant's immediate supervisor, testified the Appellant's attendance problems began from before she began as his supervisor, September, 2002, and continued throughout his employment. She counseled him on many occasions, [Exhibits 1, 2, 4, 6, 7, 8, 9, and Koras testimony], issued verbal and written reprimands, [Exhibits 6, 7], and made clear to him the importance of complying with her orders to check with her each time he sought leave. [Appellant testimony, Exhibits 1, 4]. Koras explained the importance of having the Appellant clear leave with her was because the department was short-staffed, and suffered excessive backlogs of work affecting the safety of the public, when police and other vehicles were out of service due to the Agency's inability to supply parts. [Koras testimony].

The Agency established a reasonable basis for its order to the Appellant, public safety. It also established the Appellant's continuing failure, on March 3, 16, 17, and 22, 2005, to comply with Koras' order to notify her regarding all leave. [Koras testimony, Exhibits 1, 2, 4, 6, 7, 8, 9]. The Agency also established that it counseled the Appellant many times about his absence. [Koras testimony, Exhibits 1, 4], and warned him that continued abuse would result in discipline. [Exhibits 3, 6, 7]. The Appellant offered no testimony to rebut these claims. Under these circumstances, the Agency established, by a preponderance of the evidence, that the Appellant violated CSR 16-50 A. 7).

B. 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.

The purpose of sick leave is outlined in CSR 11-32, which allows such leave for personal or family incapacity due to illness or for a death in the family. Agency policy requires adherence to this rule. [Exhibit 5]. Due to the Appellant's prior abuse of sick leave, he was required to speak directly with Koras for each sick leave absence. [Exhibit 6]. He continued to fail in complying with that order. [Koras testimony, Exhibits 4, 6, 7, 8, 9]. These continuing absences negatively affected production at the Agency. [Koras, Mazgulski, Cline, Howard testimony]. The Appellant did not reply at hearing. After being ordered to contact his supervisor for each day of leave, the Appellant's continued unexplained failure to do so constitutes a violation of CSR 16-50 A. 13) by a preponderance of the evidence.

C. 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. Therefore the Hearings Officer declines to apply this rule.

D. 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.

The same evidence regarding the Appellant's violation of CSR 16-50 A. 13), above, also applies to this violation. For the same reasons as stated above, and because the Appellant did not refute the Agency's proof, the Appellant violated this rule 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. Therefore the Hearings Officer declines to apply this rule.

F. Whether the Agency unlawfully discriminated against the Appellant based upon a disability.

The Appellant claimed his unauthorized absences should be excused due to the Agency's unlawful discrimination against him. As the Appellant did not present any testimony at hearing, only his Appeal and Pre-Hearing Statement remain as possible bases to overcome the Agency's case. The Appellant's Appeal states the Agency made him work outside his classification, causing undue stress, and therefore causing him to take "excessive time off," but no evidence was presented at hearing how the Appellant was made to work outside his classification. His Pre-Hearing Statement did not state a basis for a claim of discrimination at all. The Appellant failed to present any evidence that he was disabled or that the Agency was aware of any disability. For these reasons, the Appellant's disability claim fails.

VI. CONCLUSION AND ORDER

The Agency established the Appellant's violation of CSR 16-50 A. 7), 13), and CSR 16-51 A. 3). The Appellant offered no evidence to refute the Agency. The Agency also established that the Appellant's continued unauthorized absences harmed the Agency and public safety. It also established the Appellant had been advised frequently about his absences, but was unlikely to change. For these reasons, the Hearings Officer finds the Agency's decision to dismiss the Appellant was reasonably related to the seriousness of the offense, and took into consideration his past discipline, pursuant to CSR 16-10. The Hearings Officer therefore AFFIRMS the Agency's decision to dismiss the Appellant.

It is tragic for the Agency and for the Appellant, that he was unable to overcome the issues resulting in his continued unauthorized absences. Mr. Mazgulski, a friend and co-worker of the Appellant, best expressed the loss to both sides when he testified at hearing

Ernie, the world is your oyster. You could have everything you want, cause you're so smart, and the opportunity is right there for you, but you always seem like you come to the edge of greatness and you just let it fall apart. You could have been the Manager twice. [You] have a great talent for the job, but [you] always seem to shoot [yourself] in the foot at the last moment.

DONE this ____ day of August, 2005.

Bruce A. Plotkin
Hearings Officer
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION**, by depositing same in the U.S. mail, postage prepaid, this _____ day of August, 2005, addressed to:

Mr. Ernest Lee Conway
4401 W. 2nd Ave.
Denver, CO 80219

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing same in interoffice mail this _____ day of August, 2005, addressed to:

Robert D. Nesor, Esq.
City Attorney's Office
Litigation Section
201 West Colfax Avenue Dept. 1108
Denver, CO 80202

Mr. Alvin J. LaCabe, Jr.
Department of Safety

Ms. Linda Lambiotte
Denver Police Department
