

AMENDED ORDER ON PENDING MOTIONS

IN THE MATTER OF THE APPEAL OF:

THOMAS CULLEN, Appellant,

vs.

DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,
and the City and County of Denver, a municipal corporation, Agency.

On Jan. 2, 2009, a prehearing conference on pending issues was held in this appeal. The parties appeared by their representatives, and Appellant also appeared in person. After reviewing the pleadings, arguments and authorities submitted by the parties, the following findings and orders are entered herein:

Appellant's Discovery Requests

The Agency conceded during the prehearing conference that it has no objection to Appellant's discovery requests, and will produce the requested information.

Agency's Discovery and Subpoena Duces Tecum Requests

This is an appeal of Appellant's Nov. 5, 2008 termination. That termination was based on the Agency's conclusion that Appellant violated his Stipulation and Agreement to refrain from alcohol until March 1, 2007, as well as violation of several departmental regulations and Executive Order 94 related to an employee's use of alcohol, and Career Service Rules prohibiting dishonesty and conduct prejudicial to the department or city. The termination letter cites Appellant's off-duty conduct on July 15 and 16, and his use of sick leave on those days plus July 17 and 18, 2008. [Exh. 1.]

1. Medical Records

The Agency has requested Appellant's medical records based on Appellant's assertion that he had a migraine headache on July 15, 2008 in support of his request for sick leave. Appellant contends that these records are privileged under CSR § 13-90-107(d), and that he did not waive that privilege by

his factual assertion that he had a migraine on July 15, 2008. Appellant argues that he was forced by his employer to answer the question about his absence that day, and therefore the answer should not be considered a voluntary waiver of the privilege to protect his medical information. He cites three Colorado cases in support of this argument. In the most recent decision, Hoffman v. Brookfield Republic, 87 P.3d 858 (Colo. 2004), the Colorado Supreme Court held that a personal injury plaintiff “did not inject her mental condition into the case so as to impliedly waive [the] privilege merely by making a generic claim for ‘severe pain and suffering, and emotional distress’ incident to the physical injuries,” and that the details provided in plaintiff’s deposition responses “did not transform [that claim] into a peculiar assertion of psychological damages.” Id. at 864. Johnson v. Trujillo, 977 P.2d 152 (Colo. 1999) holds the same on similar facts. Devenyns v. Hartig, 983 P.2d 63 (Colo. 1998) is inapposite, since this Appellant was not required by a separate legal or contractual obligation to provide information about his medical condition.

Both parties acknowledge that the July 15th use of sick leave is at issue. Appellant lists as his fourth issue in this appeal, “[w]as it appropriate for the Appellant to use sick leave resulting from his migraine headache?” The Agency’s fourth issue is, “[w]hether Appellant was truly ill with a migraine headache when he called in too sick to work, or was he still under the influence?” [Parties’ Statement of Issues.] The disciplinary action challenged by the appeal is based in part on the Agency’s charge that Appellant was dishonest in calling in sick on July 15th. Appellant raises a defense of truth against that charge: that he requested sick leave because he was indeed suffering from a migraine. The Agency seeks discovery to rebut that factual allegation.

The physician-patient privilege protects information acquired in attending a patient which is necessary to enable a physician to treat the patient. CRS § 13-90-107(d). The privilege may be impliedly waived when a party raises an affirmative defense that makes his physical condition the basis of an affirmative defense. “This waiver does not amount to a general disclosure of the patient’s entire medical history, but rather is limited to the cause and extent of the injuries and damages claimed.” Cardenas v. Jerath, 180 P.3d 415, 424 (Colo. 2008).

Appellant is expected to present evidence that he had a migraine on the day in question. He has therefore waived his privilege to shield any physician-patient communications to the extent that he obtained treatment on that occasion.

2. Alcohol Treatment Records

Next, the Agency seeks records of programs attended by Appellant as a part of the Employee Assistance Program (EAP), mandated by the 2007 Stipulation and Agreement (S&A). Those records are relevant to the issue of whether Appellant violated the terms of the S&A. Appellant does not claim that

these records are covered by any privilege.

3. Arrest and Police Records

The Agency has requested a release from Appellant for the records of the Westminster Police Department regarding its contact with Appellant on July 15, 2008. Appellant's state and level of intoxication on that date are at issue in this discipline. The requested records for a domestic incident, and Appellant's transport by the police to a detoxification facility later that night, are discoverable as to those issues.

4. Credit Card and Bank Records

Since Appellant's purchase of alcohol on days not covered by this discipline are not sufficiently probative of the issues raised in this appeal, these requests are denied. The subpoena duces tecum requests addressed to those records are also denied.

5. Washington House Records

Finally, the Agency seeks a release signed by Appellant for all records of Washington House Detox Center regarding Appellant, and a subpoena duces tecum to that facility for those records. The only relevant records responsive to this request are those related to Appellant's stay at the Center from July 15 – 16, 2008. The Agency claims that Appellant failed to report to work on July 16th because he was still intoxicated, and Appellant disputes that. Appellant has waived any physician-patient privilege as to that stay, to the extent one might be applicable, by raising his medical condition on those days as a defense to the discipline.

Motion for Continuance

The Agency moved for a continuance of the hearing, now set for Jan. 16, 2009, on the ground that resolution of these issues requires additional time to prepare for hearing. Appellant objects to this request. I find that the motion is supported by good cause and that a two-week delay in trial will not prejudice the Appellant.

Order

1. Appellant is ordered to produce all medical records related to medical treatment of the Appellant for a migraine headache on or about July 15, 2008. The request for all other medical and other treatment records is denied, except as otherwise granted by this order.

2. Appellant is ordered to sign a release for all records generated between himself and the Employee Assistance Program regarding programs

attended and communications had under the Stipulation and Agreement, as covered by RFP No. 2. In addition, a subpoena duces tecum for the records of the Office of Employee Assistance responsive to the request will be separately issued.

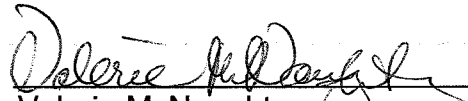
3. Appellant is ordered to sign a release for all records of the Westminster Police Department to enable the Agency to obtain the records requested by RFP No. 3. In addition, a subpoena duces tecum for those records will be separately issued for the Westminster Police Department.

4. The Agency's requests for credit card and bank records are denied, as are the related requests for subpoenas duces tecum.

5. Appellant is ordered to sign a release for all records of Washington House Detox Center regarding Appellant's stay at the Center from July 15 – 16, 2008. A subpoena duces tecum to that facility will also be issued for those records.

6. The Jan. 16, 2009 hearing is vacated, and the matter is reset for hearing **Wednesday, February 25**, and **Friday, February 27, 2009**, after coordination with the schedules of the parties and their representatives.

Done this 7th day of January, 2009.


Valerie McNaughton
Career Service Hearing Officer