

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

Appeal No. 93-06

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**SHERRY DYSART**

Appellant,

vs.

**DEPARTMENT OF HUMAN SERVICES,**  
and the City and County of Denver, a municipal corporation,  
Agency.

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The hearing in this appeal was held on Jan. 2, 2007 before Hearing Officer Valerie McNaughton. Appellant was present and represented herself in this appeal. The Agency was represented by Assistant City Attorney Niels Loechell. The Agency's Advisory Witness was Matthew Paris. Having considered the evidence and arguments of the parties, the following findings of fact and conclusions of law are entered herein.

**I. INTRODUCTION**

Appellant was an Administrative Support Assistant IV for the Denver Department of Human Services until her termination on Oct. 27, 2006. The parties stipulated to the admissibility of Agency Exhibits 3 - 4, 6 - 11, and Appellant Exhibits A - C.

**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, and
- 2) Did the Agency establish that termination was within the range of penalties that could be imposed by a reasonable administrator in compliance with the Career Service disciplinary rules?

### III. FINDINGS OF FACT

Appellant was employed at the Agency for about nine years. At the time of her termination, she served as an Eligibility Technician who determined whether applicants were eligible to receive food stamps. Appellant was terminated for unauthorized absence from work on Sept. 27, 2006.

In Sept. 2006, Appellant was on a six-hour work day from 7:30 a.m. to 2:30 p.m. because of a workplace injury. Mr. Paris had approved in advance a doctor's appointment Appellant made for 9:10 a.m. on Sept. 27<sup>th</sup>. The day before the scheduled appointment, Appellant emailed her supervisor Matthew Paris, "Gone & remember, I won't be in until after my Dr. Appt. in the morning." [Exh. A.] Until receiving that message, Mr. Paris believed Appellant would be in before her appointment, which he believed was scheduled for 9 a.m. Appellant believed she informed told Mr. Paris the doctor's office asked her to come in a half hour early to complete some paperwork.

Mr. Paris requires his employees to send him an email message when they arrive at work and when they leave to confirm their presence in the work place. Timely processing of food stamp claims is monitored by the Quality Assurance process. The Agency's funding may be affected by sanctions imposed for claims that are not processed in a timely manner. Each eligibility technician maintains a caseload of 60 to 100 cases, and interviews an average of ten applicants a day. Employees are instructed about leave policy through staff meetings, emails, administrative memos, and the Agency Employee Handbook provision, which requires an employee to call the supervisor "as early as possible" if unable to report at the scheduled work time. [Exh. 4, p.1.]

At 7 a.m. on Sept. 27<sup>th</sup>, Appellant took her daughter and son to a new school to register them. She registered her daughter, but was prevented from registering her son because she did not have a copy of his latest Individual Education Plan (IEP), required for students to enroll in special education. Appellant got to the doctor's office by 8:45 a.m. as requested to complete the paperwork. While there, Appellant received a call from her son's current school, who informed her that the IEP had been faxed to the new school. At the conclusion of the medical appointment at 10:10 am, Appellant's doctor gave her a referral to a specialist who had an office in the same building. Appellant went directly to the specialist's office to make an appointment. Appellant left that office by 10:30 or 10:40 a.m., and went back to the new school to register her son. That process took longer than Appellant anticipated, and Appellant decided that it would not be worthwhile to make the trip to work, since her shift would be over by 2:30 p.m. At 11:36 a.m., Appellant left a message with Mr. Paris that she would not be in that day because she still had some things to take care of.

When Appellant returned to work the next day, her supervisor did not mention her absence. On Sept. 29<sup>th</sup>, Human Resources Analyst Paul

Sienkiewicz telephoned Mr. Paris to ask him about Appellant's time slip for Sept. 27<sup>th</sup>, and to make sure Mr. Paris knew how to record leave hours taken for doctor visits covered by worker's compensation. Appellant walked by during this conversation, and Mr. Paris invited her into his office to clarify the reason for her absence. Appellant told them that she was gone longer than the time needed for the doctor's appointment because she went to school to register her children before the appointment, and had to finish that process after the appointment. Appellant admitted that she had not requested leave for that purpose in advance of Sept. 27<sup>th</sup>.

On Oct. 5, 2006, Appellant was notified that the Agency was considering discipline based on her Sept 27<sup>th</sup> absence. The letter listed six past disciplinary actions. [Exh. 4.] At the pre-disciplinary meeting, Appellant informed Mr. Paris and Division Director Juanita Sanchez that she did not come to work on Sept. 27<sup>th</sup> because she was registering her children for school. Appellant stated that she didn't know why she was there, and thought a disciplinary meeting for the absence was "a bit much."

Mr. Paris recommended termination based on his conclusion that Appellant's actions on Sept. 27<sup>th</sup> was a continuation of a pattern of behavior that showed Appellant's tendency to do what she wanted in any given situation regardless of the instructions given to her. Appellant had been disciplined three times thus far in 2006, one of which was a three-day suspension for a second violation of the policy prohibiting the acceptance of collect calls while at work. [Exhs. 6 – 8.] Over the previous five years, Appellant had been disciplined for dishonesty, failure to follow directives, putting undue pressure on a co-worker, and performance issues. [Exhs. 6 – 11.] Mr. Paris believed that Appellant would continue her pattern of ignoring directives from her supervisor and management, and that therefore termination was appropriate.

Division Director Juanita Sanchez based her decision to terminate on Appellant's failure to contact her supervisor on Sept. 27, 2006, and Appellant's reaction at the pre-disciplinary meeting that she believed that disciplinary action was "a bit much." Appellant informed Ms. Sanchez that she did not believe she was in error for not notifying her supervisor in advance or returning to work after the appointment. Ms. Sanchez also reviewed Appellant's personnel file, which Ms. Sanchez believed demonstrated a continuous history of performance problems and failure to follow directives. In reviewing that file, Ms. Sanchez discovered that Appellant failed to give her supervisor the required documentation from her October 8<sup>th</sup> appointment with the occupational therapist. Based on all these facts and Mr. Paris' strong recommendation, Ms. Sanchez concluded that termination was the appropriate penalty for the misconduct.

Appellant testified that she told Mr. Paris before Sept. 26<sup>th</sup> that she would not be coming in before her appointment. She stated he often needed reminders of her medical appointments, and asked for extra copies of medical documentation

because he lost the first copy she produced. Mr. Paris testified that he does not recall Appellant telling him she would not be at work when her shift began at 7:30 a.m. on Sept. 27<sup>th</sup>. He stated he approved commuting time to get to doctor's appointments if he was asked to do so. Appellant testified she did not return after she registered her son because "it didn't make sense to me to come in for an hour." When served with the pre-disciplinary letter, Appellant assumed that the problem was that she had not returned to work after registering her son that day. The disciplinary letter cited CSR §§ 16-60 L (failure to observe departmental policies) and S (unauthorized absence) in support of the termination action.

#### IV. ANALYSIS

##### 1. Career Service Rules

Jurisdiction is proper under CSR § 19-10 A. 1. I. In this de novo hearing on the appropriateness of the discipline, Agency bears the burden of proof to show by a preponderance of the evidence both that Appellant violated the disciplinary rules as alleged, and that termination was within the range of discipline that can be imposed under the circumstances. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.); In re Gustern, CSA 128-02, 20 (12/23/02).

##### A. CSR § 16-60 L: Failure to observe departmental policies

The Agency asserts that Appellant failed to observe its policy to notify her supervisor of her intention to be absent on Sept. 27<sup>th</sup> beyond the hour needed for her approved medical appointment. It is conceded that Appellant obtained approval to be absent from 9:10 a.m. to 10:10 a.m. on that day. Mr. Paris expected Appellant at her usual reporting time of 7:30 a.m. Instead, Appellant made an appointment for 7 a.m. to register her children for school, without notifying her supervisor. Appellant left her doctor's appointment at 10:10 a.m. and went to a different office, and then back to the school, without telephoning her supervisor. After Appellant finished at the school at 11:36 a.m., Appellant left a message with Mr. Paris that she would not be in for the rest of the day. At that time, there were almost three hours left until the end of Appellant's work shift. The next day, Appellant did not discuss with her supervisor the reason for her absence in order to obtain retroactive leave to cover the hours not worked.

The Agency requires employees to give their supervisors advance notice of any requested leave. Notice must be given "as early as possible", but at least two hours prior to the absence. [Exh. 4, p. 1, DHS Handbook, p. 44.] This is particularly important given the time-sensitive nature of the work of eligibility technicians, and the financial consequences of sanctions for untimely claims. Here, Appellant had three distinct opportunities to inform her supervisor of where she was and when she would be in. Appellant knew two days in advance that she was going to the school to register her children before the doctor's appointment. After making those plans, Appellant should have asked permission

to use leave to cover that time, which would have included the time needed for school, commute and the doctor's paperwork. I find that Appellant did not do so, since her supervisor would have recalled if Appellant had asked for additional time, in accordance with his practice to approve commuting time if it is requested. Appellant had a second opportunity to call her supervisor at 10:10 a.m. after her doctor's appointment, but did not do so. Finally, at 11:36 a.m., Appellant could have requested permission to take the rest of the day off. Instead, Appellant decided unilaterally that it would not be worthwhile for her to go to work for the last three hours of her work day, and so she left a message that she would not be in. In making that decision, Appellant assumed the risk that her supervisor would not agree with her assessment. Moreover, Appellant's failure to discuss the matter with her supervisor thereafter to explain her absence or obtain permission for leave use reinforces the conclusion that Appellant knowingly acted outside the policies set forth in the Agency Handbook.

Appellant argues that she notified her supervisor of her pre-appointment absence via the email message she left at the end of the previous day. While that message served as some notice to Mr. Paris, it was belated and incomplete. Appellant admitted that she'd made the school plans two days before, and did not seek her supervisor's permission to use the pre-appointment time for that purpose. Appellant does not claim that she gave her supervisor notice of her expected absence "as early as possible", in accordance with the Agency policy. Appellant did not establish that she was unable to handle her personal matters at any other time, or that an emergency made her lack of compliance excusable.

As to the hours after the doctor's appointment was over, Appellant merely claims that she made a choice to use that time to take care of two other matters. Appellant admits she did not call her supervisor as early as possible. The Agency considered the failure to notify her supervisor after the doctor's appointment as by far the more serious matter. Appellant's failure to give her supervisor notice of her intent to be absent beyond her doctor's appointment demonstrated indifference to the needs of the Agency to complete the claims of food stamp applicants on a timely basis, and to the needs of the supervisor to schedule work assignments among available employees.

The Agency established that Appellant failed to observe the departmental policy, in violation of CSR § 16-60 L.

**B. CSR § 16-60 S: Unauthorized absence from work**

Appellant admits that she did not report to work on Sept. 27, 2006, and that she did not have permission to be absent from 7:30 to 8:45 a.m., and from 10:10 a.m. to 2:30 p.m., which is approximately five hours out of the six-hour work day. Appellant claims that her voice mail message to her supervisor was sufficient to authorize the absence.

Mere notification of an absence does not bestow permission on an employee for that absence. Appellant had the opportunity to seek that permission for the remainder of that day, and could have thereafter sought retroactive permission for use of leave to cover the absence. In re Lucero, 162-04 (4/15/05.) Appellant did not do so. The Agency therefore proved that Appellant's absence from work on Sept. 27<sup>th</sup> was unauthorized, in violation of CSR § 16-60 S.

## 2. Penalty

Appellant argues that termination of an employee with nine years' seniority is too harsh for the nature of the misconduct, which was a one-day absence from the workplace. The Agency asserts that this was a continuation of a pattern of failure to comply with orders and rules that led to its conclusion that further progressive discipline would not correct Appellant's failure to achieve the desired behavior.

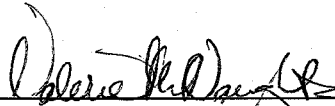
Ms. Sanchez based her conclusion in part on Appellant's reaction at the pre-disciplinary meeting, when Appellant stated she didn't know why she was there, and that she believed a disciplinary meeting was "a bit much." Appellant also informed Ms. Sanchez that she did not believe she was in error in deciding not to come to work that day, since the time off should be considered a part of her worker's compensation claim. After reviewing Appellant's personnel file and the six previous disciplinary actions, Ms. Sanchez concluded that Appellant did not accept the limitations that Agency policies regarding attendance and leave made on her, and that Appellant's failure to follow directives would continue. On that basis, Ms. Sanchez agreed with the recommendation of Mr. Paris, and determined that termination was appropriate.

While Appellant took some responsibility for her past misconduct leading to discipline, her testimony failed to recognize that her absence on Sept. 27<sup>th</sup> was a violation of Agency rules. Appellant used a broad brush to justify her failure to notify her supervisor, or to request permission for the absence. Appellant as a nine-year employee had adequate notice of the Agency attendance rules. In spite of that, Appellant made a decision to disregard those rules. Appellant's expressed belief that the entire day was covered by her doctor's visit because it was work-related is not credible, nor is her argument that a voice message left for her supervisor 90 minutes after she was to return to work constituted permission to miss the remaining hours of work. The Agency's decision to terminate her was not outside the range of discipline that could be imposed by a reasonable administrator, in light of Appellant's failure to acknowledge that her conduct violated the rules as well as her extensive disciplinary history.

ORDER

Based on the foregoing findings, it is hereby ordered that the Agency's personnel action dated October 27, 2006 is affirmed.

Dated this 14<sup>th</sup> day of February, 2007

  
Valerie McNaughton  
Career Service Hearing Officer

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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_service_rules).

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

BY MAIL:

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

BY PERSONAL DELIVERY:

Career Service Board  
c/o Career Service Hearing Office  
201 W. Colfax Avenue, First Floor  
Denver CO 80202

BY FAX:

(720) 913-5995

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

**CERTIFICATE OF SERVICE**

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing it in the U.S. mail, postage prepaid, this 14th day of February, 2007, addressed to:

Sherry M. Dysart  
25 Lansing St.  
Aurora, CO 80010

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** as indicated below via e-mail this 14th day of February, 2007, addressed to:

Niels Loechell  
Assistant City Attorney  
Denver Department of Human Services  
1200 Federal Blvd. 4<sup>th</sup> Floor  
Niels.Loechell@dhs.co.denver.co.us

Jennifer Fairweather  
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