

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 08-10

DECISION

IN THE MATTER OF THE APPEAL OF:

FREDDIE K. MARTIN, Appellant,

vs.

DENVER AUDITOR'S OFFICE, and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, Freddie Martin, appeals his suspension of five days, beginning February 1, 2010, by his employer, the Denver Auditor's Office (Agency). A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on April 21, 2010. The Agency was represented by Robert A. Wolf, Assistant City Attorney. The Appellant represented himself. Agency exhibits 1-15 were admitted into evidence, as were Appellant exhibits A, B, E-Q, R and S. The following witnesses testified for the Agency: Dawn Hume; LeAnna Mosher; and John Carlson. The Appellant testified on his own behalf and recalled Dawn Hume as his only other witness. For reasons which follow, the five-day suspension is **AFFIRMED**.

II. ISSUES

The following issues were presented for appeal:

- A. whether Martin violated either Career Service Rule (CSR): 16-60 E. or L;
- B. if Martin violated either of the aforementioned Career Service Rules, whether the Agency's decision to assess a five-day suspension conformed to the requirements for the assessment of discipline under CSR 16-10.

III. FINDINGS

Mr. Martin is employed as a Staff Auditor by the Agency. His immediate supervisor is Dawn Hume. On November 17, 2009, Martin requested leave for jury duty on November 25. [Exhibit 5-2]. The Jury Commissioner subsequently sent a revised notice, changing Martin's jury duty to December 7 at 8:30 a.m. [Exhibit 5-1].

On December 2, 2009, Hume met with Martin to go over what jury duty documents he was required to submit in order to comply with the Career Service Rules. CSR 11-72.¹ Pursuant to that rule and his supervisor's instructions, Martin was required to submit his jury summons, and, following his jury service, to submit an affidavit signed by the court clerk, that recorded the date and length of his service.

On December 9, 2009, Martin provided Hume with the required summons, [Exhibit 5] and a Jury Service Certificate, but the Certificate did not provide his hours of his attendance. [Exhibit 6].² Consequently, Hume called the Jury Commissioner, Leanna Mosher, who reported Martin arrived late, at 9:14 a.m. instead of 8:30 a.m., and was released at just before noon, about 2 ¾ hours of jury service. [Hume testimony]. On his time sheet for that week, Martin verified he served eight hours of jury duty on December 7, although, after his noon release from jury duty, he went home did not return to work.

A pre-disciplinary meeting was held on January 26, 2010. Martin attended with his representative who made a statement on Martin's behalf. On January 29, 2010, the Agency personally served and mailed its notice to Martin that he was being suspended for five days, From February 1-5, 2010, and that his pay for December 7, 2009 was modified to reflect 5 ½ hours of unauthorized leave without pay. Martin filed a timely appeal of both actions on February 12, 2010.

IV. ANALYSIS

A. Jurisdiction and Review

Personal jurisdiction: As an employee in the Career Service personnel system, Martin may appeal discipline under the Career Service Rules. Charter, §§ 9.1.1. E.(vi), 9.8.2.(A); CSR § 19-10 A.1.a.

Subject matter jurisdiction is proper under CSR §19-10 A.1.b., as the direct appeal of a suspension. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove Martin violated one or more cited sections of the Career Service Rules, and to prove its decisions to suspend him for five days and modify his pay, complied with the purposes of discipline. CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

¹ That rule has been amended and renumbered, effective 1/1/10, to CSR 10-53 C. The required documentation did not change.

² Jurors receive a Certificate of Service only upon request, fill it out themselves, and must request any special information such as a statement of hours attended. [Testimony of Leanna Mosher, Jury Commissioner].

C. Career Service Rule Violations

1. CSR 16-60 E. Any act of dishonesty, which may include, but is not limited to... 3. Lying to superiors... with respect to official duties, including work duties ... or false reporting of work hours.

The Agency claimed Martin was dishonest in misrepresenting how he spent his time on December 7, 2009, and in falsely claiming pay for unauthorized leave. [See Exhibit 1; Agency closing statement]. Claims of dishonesty are frequently determined by credibility. In that regard, the following evidence is significant.

Martin did not allege Hume had any improper motive to impugn him. He alleged only that she should have but failed to catch his "error" when he submitted eight hours of jury duty. That claim does not rebut Hume's credibility. On the other hand, the totality of Martin's testimony strongly suggested credibility issues. (1) Martin's late arrival for jury duty. That Martin was late for jury duty is not significant for that fact, alone. The significance is in Martin's subsequent justifications. He claimed he was justified in arriving late due to snowy weather, [Exhibit B; Martin testimony], while his own exhibit showed a total of 0.01" of snow fell the entire day on December 7. [Exhibit R]. In addition, he couldn't remember whether he took the bus or drove, but later remembered the bus was 40 minutes late due to the snowy weather. (2) Reasons for going home after jury duty. Here, Martin's claims also varied widely. At first, Martin seemed to admit he did not serve jury duty for eight hours when he told Hume it is common practice for employees to take off the rest of the day after jury duty. Martin waffled between suggesting he did not make such an allegation, and insisting such practice is common. The following exchange at hearing was telling in that regard.

Martin Q. to Hume: Are you saying Freddie Martin was intentionally trying to mislead the City when he stated, or when you allege he stated, it's a common practice in the City to go home from jury duty?"

Hume: When I heard that statement it didn't ring true.

Martin: Is it possible you misunderstood that question?

Hume: No, I don't believe I misinterpreted it at all.

At that point in Martin's direct examination of Hume, Martin had raised an inference that he did not state or, at least, did not intend that such a practice is common. However, Martin immediately cleared up any possible misunderstanding.

Martin: Is it possible for employees who attend jury duties, who work for the City and County of Denver, to go home after jury service? ... The purpose of the question is, an Open Records request... may show that the employees do go home after jury service.

[Hume direct exam by Martin].

At that point, it was inescapably clear Martin intended his failure to report to work after jury duty was justified only because it is common practice for City employees to go home when they finish jury service, and not also due to his alleged illness. Notably, Martin produced no document, witness, or any other evidence of such “common practice.” Then, he dropped the matter altogether, and focused on his illness as the only reason he went home after jury duty. While it is plausible an employee would claim he was ill and that it is common practice, as alternate, but concurrent explanations for going home after jury duty, it was clear from Martin’s testimony and his direct examination of Hume, that he intended only one explanation then only the other, and not both concurrently. As presented, the two explanations were incompatible and, therefore, raise significant credibility questions about either of Martin’s principal defenses: illness or common practice. Even if Martin intended his explanations contemporaneously, his failure to produce a modicum of evidence of “common practice,” and Hume’s unrebutted denial that such practice occurs, still raise significant questions about Martin’s credibility.

Martin also claimed he fell ill during his jury service, too ill to return to work, so he walked to the bus terminal, took a bus from downtown Denver to a stop near the airport, walked to his car at a nearby park-and-ride, drove home, and felt extremely ill by that time. When asked how ill he felt on a pain scale of 1-100, Martin replied “97,” which, he affirmed, meant “as if you could die.” He testified the near-fatal state persisted for several hours. [Appellant cross-exam]. He stated he felt too ill to call work, but called his doctor, who told him to eat some yoghurt, drink some ginger ale, and report to work the next day. [Appellant cross-exam; Exhibit I]. When asked if he was in such intense pain he felt he could die, how his doctor could know he would be fine to return to work the next day, Martin gave two non-responsive answers then replied “my doctor only can give out a doctor excuse for the day of the illness, they will not give it out for the next day.”

In response to the Agency’s next allegation - that even if Martin were too ill on December 7 to think about notifying his supervisor, he failed to correct his jury duty claim when he approved it on December 12 – Martin replied with the following two claims. (1) The KRONOS timekeeping system, which was relatively new at the time, was known to make mistakes. It was unclear what mistake Martin claimed was made by KRONOS, or how it affected his approval of his KRONOS entry for December 7, which clearly shows a claim for eight hours of “Jury Duty Exception” in three places. [Exhibit 7]. (2) Martin also claimed, and the Agency did not rebut, that he made all his KRONOS entries for the week that included December 7 before that date, so when he became ill that day and forgot to revise his December 7 entry, it was a simple mistake, and not dishonest. Unfortunately for Mr. Martin’s claim, the Agency also uses a separate time-keeping system in addition to KRONOS, called TEC, which is well known to Martin. Entries for TEC, unlike KRONOS, can be approved only after the work day. Although Martin whiffled, dithered, hemmed and hawed, he did not deny he approved his KRONOS and TEC entries after his jury duty. It is difficult to quantify the extent to which Martin demurred in response to direct questions without referring to an actual exchange, as in the cross-examination of Martin.

Q: The TEC entry for your payroll was done AFTER you had served jury duty, correct?

Martin: The TEC entry?

A: Yes.

Q: After you had your experience with the jury, right?

A: I'm not sure. I don't recall. I don't specifically... no I do not recall the specifics or the [inaudible].

Q: But, anyway, when you made that TEC entry, I think what you said was that you made sure that your TEC entries agreed with your KRONOS entries, right?

A: No I did not. I just stated that normally my TEC entry would be the same as my KRONOS, but I don't go around checking it. I said in the past I used to check my time card, because I had to sign without them [inaudible], but this is KRONOS, this is electronic.

Q: I'm talking about the TEC entry now. Therefore, as the Hearing Officer noted, you made an affirmative decision to enter into the TEC system the fact that you had put in eight hours of jury duty, right?

A: [long pause]. I don't recall. I mean, if it's there, then yes, I mean if I put it in, then yes, cause normally TEC will reflect my KRONOS.

...

Q: At most, you put in two hours forty five minutes in the jury room, and you represented, electronically, that you put in eight, right?

A: [long pause, no answer].

Q: So when you put in the eight, you HAD to know that was wrong.

A: In KRONOS?

Q: No, in TEC.

A: No, not at the time, no.

Q: So, at the time you made the eight-hour TEC entry for eight hours of jury duty, you thought you had put in eight hours of jury duty? You remembered serving eight hours in that room?

A: I don't recall just...I put in eight hours for that day, but I don't know if I notated it as jury service in TEC, or not... KRONOS was already pre-prompt[ed], so therefore I didn't really go back to try to see what I had and to compare it to TEC, to make sure it was a match. Like I said, it [KRONOS] was already pre-dated, so I didn't concern myself to...

Q: You approved your KRONOS entries AFTER the time was completed, in other words, the December 7th entry may have gotten IN before December 7th, but you approved it after December 7th, correct?

A: Yes, about December the 18th.

Q: So, when you were looking at your KRONOS screen, your KRONOS screen indicates regular hours, right? Was in on a two-week period?

A: Yes.

Q: So it would indicate that you worked 72 hours, regular time, right? Right?

A: Well, not exactly like that, we go about our week...

Q: OK, so let's say 32 hours regular time, right?

A: Something similar to that.

Q: And there'd be a separate line for an eight hour exception, right?

A: If you...yes.

Q: I do KRONOS too, and the eight hour exception specifically would have been noted as 'Jury Duty', right? Or 'Jury Duty Exception,' that's what it says.

A: Yes.

Q: All right, and so when you approved that after the fact, you knew that wasn't right, correct? I mean, you had to know...

A: Not at that time, no because, like I said, cause it was a mistake. I didn't know, it did not come to mind of the illness did not come to mind on that date of December 7th.

Q: Forget the illness. You KNEW that you hadn't put in eight hours in the jury room.

A: At the time, no. It was an innocent mistake. I did not... it did not come to mind about the jury service. On December the 18th, I was trying to get out [to go Christmas shopping], and I'm sure it would show that I approved the time card after the hour when I was rushing. No, it did not come to mind. At that time did I think that I knew that KRONOS was incorrect? No I did not.

[Martin cross-exam].

Martin's professed forgetfulness was not credible, particularly that he could be unaware he entered eight hours for jury service in two different time-keeping systems. Finally, even when ordered by Hume to bring in proof of the time he spent at jury duty, Martin failed to do so, adding weight to the inference that he was aware of his échappement from duty. The totality of the forgoing circumstances raise significant problems with Martin's credibility and support the Agency's allegation that Martin was aware his claim for eight hours for jury duty was dishonest.

Martin replied to the forgoing with the following allegations. [Exhibit A].

a. Hume knew or should have known Martin's December time entry was wrong.

First, this claim is irrelevant to whether Martin was dishonest. Second, even if it were relevant, Hume rebutted the contention. In her unchallenged testimony, Hume testified that, while she initially approved Martin's KRONOS and TEC submissions for eight hours of jury duty on December 7, when she conducted her follow-up time slip due diligence for low-priority items, she noticed Martin's certificate of jury service contained no hours of service. She then immediately brought it to Martin's attention. [Hume testimony].

b. Hume deliberately submitted a false time record for Martin's December 7 timekeeping. See above regarding relevance.

c. The Agency failed to discipline Hume for submitting a false time record for Martin's December 7 entry. See above. These three claims add up to an allegation that the Agency should have, but failed to catch Martin's wrongdoing. It would be ironic if Martin's contentions were established, because his contentions tend to prove his wrongdoing.

In light of the agency's having established a basis to find Martin was dishonest, and Martin's failure to rebut that claim, the Agency established, by a preponderance of the evidence, that Martin was dishonest in violation of CSR 16-60 E.

2. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules...

The Agency claimed Martin violated departmental rule 11-27 which states, in pertinent part

Unexpected Absences.

Any employee unable to work shall notify his or her supervisor prior to the scheduled starting time. It is the employee's responsibility to do this. The preferred method of notification is via telephone; email is acceptable if agreed upon by the employee's supervisor. If the immediate supervisor is not available, notification shall be given to the division director or designee. A message left on the general Agency voice mail (X35000) or with the receptionist shall not constitute notice.

[Exhibit 9-1,].

Department rule 11-27, in turn, refers to CSR 11-100, which requires any compensation paid for unauthorized time away from work to be deducted. CSR 11-100 also authorizes progressive discipline for the same unauthorized time away from work.

Martin failed to notify his supervisor before taking the rest of the day off after jury duty. For reasons stated above, Martin's explanation for claiming compensation for eight hours of jury duty was not credible. Thus, his failure to notify his supervisor was unexcused in violation of Departmental rule 11-27, and consequently establishes a violation of CSR 16-60 L.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

A. Severity of proven offenses.

By itself, false reporting of work hours justifies a substantial penalty. See In re Vigil, CSA 110-05, 4 (3/3/06) (decided under former CSR§16-50 A.3.).

B. Past Record

Martin received two written reprimand in 2007 for intimidating, and being discourteous to co-workers. He received a verbal reprimand in 2003 for similar reasons. The prior discipline did not appear to play a significant role in the present discipline.

C. Penalty most likely to achieve compliance.

Throughout the disciplinary process, from his first response to the Agency's letter in contemplation of discipline, through his closing argument at hearing, Martin's principal defense was that Hume engaged in wrongdoing, and should be punished for not correcting his (Martin's) mistaken claim for eight hours of jury duty. First, there was not a scintilla of evidence Hume did anything wrong. Second, Martin never acknowledged he engaged in wrongdoing which makes it less likely he would comply with CSR and Agency rules without any penalty assessed.

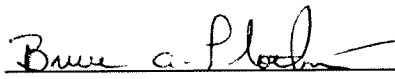
D. Additional factors. Martin failed to understand that, even if a supervisor engages in wrongdoing, unless the supervisor caused the appellant's wrongdoing, something not alleged here, then the appellant's wrongdoing is neither diminished nor excused by the supervisor's wrongdoing.³ Finally, it was clear Hume gave Martin ample opportunity to comply with the requirement to provide supporting documentation for jury duty in lieu of work, or to provide evidence of his illness, and Martin continually ignored her requests or failed to keep his promise to provide documentation. [See, e.g., Exhibits 8; 14-20; 14-21; 14-22; 14-24]. Moreover, Hume gave full credit to Martin when provided requested information in a recent, separate request for substantiation, contrary to Martin's unproven allegation that Hume was out to "frame" him. [Exhibit 14-17].

Based upon the discussion, above, the Agency's election to suspend Valdez for five days was neither clearly excessive nor based upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), citing In re Delmonico, CSA 53-06, 8 (10/26/06).

VI. ORDER

The Agency's decisions to suspend Mr. Martin for five days, beginning February 1, 2010, and the modification of Martin's pay on December 7, 2009, to reflect five and one half hours of unauthorized leave without pay, are **AFFIRMED**.

DONE May 24, 2010.



Bruce A. Plotkin
Career Service Hearing Officer

³ Martin asked for the reversal of his suspension because: Hume "knew or should have known the time entry was incorrect;" "purposely submitted a time record she knew to be in error in order to frame appellant;" "the agency did not discipline the supervisor;" and "the agency did not mitigate..." [Exhibit A]. None of these allegations are relevant to Martin's wrongdoing.

I certify that, on May 24, 2010, I delivered a correct copy of this DECISION to the following, in the manner indicated:

Mr. Freddie K. Martin, 4982 Jasper Street, Denver, CO 80239	(via U.S. mail);
Dennis Gallagher, Auditor, Dennis.Gallagher@denvergov.org	(via email);
Denver City Attorney's Office, dlefilng.litigation@denvergov.org .	(via email).