

**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**CATHERINE MARTINEZ**, Appellant,

vs.

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

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**I. INTRODUCTION**

The Appellant, Catherine Martinez, appeals her 15 day suspension, 10 of which were held in abeyance, by her employer, the Denver Sheriff's department (Agency). The Agency imposed the suspension on November 19, 2010, for the violation of specified Career Service Rules. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on February 8, 2011. Martinez was represented by Daniel Foster, Esq. and Marcy McDermott, Esq. The Agency was represented by Jennifer Jacobson, Assistant City Attorney.

Agency exhibits 1- 7 and Appellant's exhibits A-Q, and S-V were admitted into evidence. The Agency called Director Wilson, Sergeant Philip Swift, and Deputy Manager Ashley Kilroy. The Appellant testified on her own behalf, and also presented Director of Corrections and Undersheriff Gary Wilson, and Sergeant Gabel, by telephone. The suspension is REVERSED.

**II. ISSUES**

The following issues were presented for appeal:

1. whether Martinez violated any of the Career Service Rules specified by the Agency;
2. if Martinez violated any of the specified Career Service Rules, whether a fifteen-day suspension, with ten days held in abeyance, was reasonably related to the seriousness of the proven violations.

### **III. FINDINGS**

Deputy Sheriff Catherine Martinez began working for the Denver Sheriff's Department in 1996. She serves at the Denver County Jail where her primary duties are the care and custody of inmates. Approximately five years ago, due to Martinez' ongoing anxiety and depression, the Agency approved her request for intermittent leave pursuant to the Family and Medical Leave Act of 1993 (FMLA). Intermittent leave for those same two medical conditions has been renewed annually to the present. [Martinez Testimony; Exhibit B-3]. Pursuant to departmental policy, Deputy Martinez was allowed to substitute paid sick and vacation time for unpaid FMLA leave. However, Martinez exhausted her accumulated paid leave by the time the Agency began to penalize her for taking excessive leave in the current case.

In September 2009, Deputy Martinez began having stomach aches and headaches. Both symptoms were unrelated to her anxiety or depression. When those symptoms became severe, she called in sick September 21, 2009, and October 1, 2009.

While on duty on November 11, 2009, Martinez became very ill with intense abdominal pain. Dr. Crum, the physician responsible for the inmates, examined her and had her transported by ambulance to Rose Medical Center, [Wilson Testimony, 10:14 am; Exhibit V], where she was admitted. During her hospitalization, she missed her next two shifts, November 12 and 13, and she remained in the hospital during her scheduled days off, November 14-16. Martinez remained ill after being discharged, and consequently missed her next shift on November 17, 2009. [Martinez Testimony].

The nature of Martinez' new ailments eluded diagnosis until January 2010, when her symptoms were diagnosed as cluster migraines and h. pylori infection. [Martinez Testimony; Exhibits R-2; E]. The treatment for h. pylori took six weeks, followed by a three to four week recuperation before Martinez began feeling significantly better. [Martinez Testimony]. During her treatment and recuperation, Martinez worked, but was too ill to work on January 5, 2010, and February 5, 2010. [Exhibit B-3].

Martinez' three consecutive absences in November triggered the Agency's Relief Factor Management System (RFMS) to offer FMLA leave. [Martinez Testimony; Exhibit B-3]. Under RFMS, FMLA requests are submitted to the human resources department, and employees must coordinate with their physicians to complete the required paperwork. Director Wilson and other supervisors are generally unaware of an employee's medical condition, unless an employee advises them of the information. [Wilson Testimony].

Supervisors in the Agency are trained to recognize potential FMLA issues. Martinez' supervisor, Sergeant Gabel, was present on November 11, 2009 when Martinez was taken by ambulance to the hospital. While Gabel was aware FMLA may be granted for separate conditions at separate times, she did not refer Martinez to HR because she believed Martinez was already on FMLA leave. Gabel did not know what medical conditions were included under Martinez' FMLA, and did not inquire because believed privacy concerns prevented such inquiry, and because she believed it is the employee's responsibility to inquire about the need for FMLA. [Gabel Testimony]. Gabel's practice was to refer employees who have FMLA concerns to the human resources department. She believed HR would request the appropriate medical paperwork and then grant FMLA, if appropriate. [Gabel Testimony].

An employee who calls in sick and who is not on FMLA may request substitution of vacation leave or compensatory time, but authorization is at the discretion of the employee's division chief or the Director of Corrections. [Exhibit S-4]. Employees must keep track of their own leave banks. [Wilson Testimony]. Martinez exhausted her sick leave in November 2010, and she did not request a substitution of her vacation time or compensatory time. Consequently, her absence was designated as unauthorized leave. [Martinez Testimony; Swift Testimony; Wilson Testimony].

Employees receive a time accounting report every month. If an employee disagrees with the accounting, she may ask a supervisor or the RFMS unit to make corrections. [Exhibit M]. Wilson acknowledged there is no rule or policy which limits the period to request corrections. [Wilson Testimony]. Martinez' time accounting reports for September 21, 2009 and October 1, 2009 categorized Martinez' absences as unauthorized. [Exhibits K; L]. Her time accounting report and attached time slips for November 12, 2009 contain a note stating she was "out of sick," and also categorized that absence as unauthorized leave. [Exhibit M-5]. Martinez did not dispute any of the Agency's time accounting reports for those entries at that time. [Martinez Testimony].

The Agency assigned Sergeant Philip Swift to investigate Martinez' use of leave. He provided her with the record of ten leave dates the Agency deemed unauthorized. Based on Martinez' representation and documents showing three of those days were related to her anxiety and depression, Swift changed three incidences of unauthorized leave to FMLA leave. [Martinez Testimony; Exhibit 1-3; B-3].

After Swift submitted his report, the Agency notified Martinez that discipline was being contemplated against her for her absences, then convened a pre-disciplinary meeting on October 28, 2010. At the meeting, Martinez presented medical documentation, including: a letter from her physician describing her

symptoms and treatment from September 2009 through March 2010; a medical procedure report and two pathology reports, dated January 4, 2010; a message detailing pathology and prescribed medications; and a bill from Rose Medical Center for her hospitalization from November 11 through November 15, 2009. [Wilson Testimony; Exhibits E-J]. She also presented testimony and documentation that her absences on September 21, 2009 and October 1, 2009, were due to cluster migraines and stomach issues. [Wilson Testimony; Exhibit C-2]. Swift did not conduct any further investigation after Martinez provided her medical documentation. [Swift Testimony].

At the pre-disciplinary meeting, Deputy Manger Ashley Kilroy asked Martinez and her attorney if any of her seven remaining unauthorized absences were FMLA events. Martinez' attorney responded "there are no FMLA issues as it relates to this particular incident or series of incidents, and I think that's because she is following through with what she had indicated she would do." [Exhibit 7-2]. Martinez did not request substitution of vacation or compensatory time for any of the seven days deemed unauthorized by the Agency. [Martinez Testimony; Exhibit 7-2]. No one at the pre-disciplinary meeting suggested Martinez could substitute banked compensatory and vacation time for her depleted sick time, [Wilson Testimony], and no one suggested FMLA leave.

Some time after the pre-disciplinary meeting, but before deciding on discipline, Kilroy called Martinez' attorney again to ask whether any of Martinez' seven absences in question were attributable to her FMLA condition. Martinez' attorney replied none was attributable to her FMLA for anxiety or depression.

Martinez remained unaware FMLA could be taken concurrently for two separate conditions until December 8, 2010, about nine months after her new conditions were diagnosed. The next day, Martinez applied for retroactive FMLA for her new ailments. The Agency denied her request, stating the delay was too lengthy, although the Agency did not dispute the nature or legitimacy of the illnesses. [Wilson Testimony; Kilroy testimony].

After requesting recommendations from the Director of Corrections and the Office of the Independent Monitor, Kilroy made the final disciplinary decision. Before making her decision, Kilroy contacted Martinez' attorney and asked for the third time whether Martinez' conditions were FMLA-related. He replied they were not FMLA-related conditions. [Kilroy Testimony].

On November 19, 2010, the Agency assessed a 15-day suspension against Martinez, holding 10 days in abeyance, pending no further violations for one year. Martinez filed a timely appeal on December 3, 2010.

## IV. ANALYSIS

### A. Background

#### 1. Factual Background

Some elements of this case are similar to In re Espinoza, CSB 30-05 (8/23/06), and In re Rock, CSB 09-10A (4/7/11), in that an employee was disciplined for taking excessive leave even while the Agency did not dispute the validity of the medical necessity of the leave. In those cases, and in the present case, the Agency alleged employees violated Career Service and Agency rules for taking unauthorized leave, while the employees countered their leave is authorized by the Career Service Rules. What distinguishes this case from Espinoza and Rock is Martinez, unlike Espinoza and Rock, had exhausted her sick leave bank. There is another important distinction in the present case. Martinez learned belatedly that she could take FMLA leave for two different conditions at the same time. As soon as she learned that information, she asked the Agency to designate her second set of illnesses as FMLA retroactively.<sup>1</sup> In contrast, Espinoza and Rock asked to apply their non-FMLA, banked sick leave contemporaneously with their illnesses. A complicating factor in this case was Martinez' representation to the Agency that her cluster migraines and h. pylori infection were not FMLA-related conditions. The final twist to the intrigue was Kilroy's declaration that, even if Martinez' cluster migraines and h. pylori infection qualified for FMLA leave, Martinez was well-beyond a 30-day limit to declare it as such.

#### 2. Legal Background/Pertinent Authority.

The Career Service Rules are "intended to comply with and be interpreted consistent with the FMLA." CSR § 11-150 . Consequently, federal regulations interpreting the FMLA also govern leave under the Career Service Rules. CSR § 11-151 D. Since agency leave rules must be enforced only in such manner as is consistent with the Career Service leave rules, [see, Espinoza, and Rock, above], and the Career Service leave rules, in turn, must comport with federal regulations interpreting the FMLA, then agency rules must also comply with federal regulations interpreting the FMLA.

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<sup>1</sup> Martinez was not alone in being unaware employees may take FMLA leave for two separate conditions simultaneously. Apparently, no one at the Agency knew it either, since Martinez' hospitalization and follow-up care, both qualifying conditions under the FMLA, [see federal regulations citations, below], did not trigger the Agency's notification process, mandatory under the FMLA. *Id.*

### 3. Statement of the underlying issue

It follows from the discussion of facts and authority, above, that whether Martinez' seven absences, cited by the Agency, constitute a violation of Career Service Rules, depend upon an underlying issue, which may be stated as follows. Do the Career Service Rules permit an employee, whose illness is not disputed, to designate FMLA leave retroactively when she has exhausted her sick leave bank? The answer turns on three conclusions of mixed fact and law: (1) whether Martinez had a qualifying health condition under the FMLA; (2) if so, whether Martinez waived her right to FMLA leave by her representation that her condition is not FMLA-related; and (3) if Martinez did not waive her right to FMLA leave, whether she was time-barred to declare her absences as FMLA leave. We turn next to each sub-issue in turn.

#### **B. Did Martinez have a qualifying health condition under the FMLA**

Martinez was taken by ambulance from work to a hospital where she was admitted for four days. She remained under follow-up care for several months for the same conditions which caused her hospitalization. All seven absences were attributed to the same health conditions, and rendered Martinez unable to work. Martinez provided the Agency with proof of her hospitalization and follow-up care. [Exhibits E-J]. The Agency was aware of both the hospitalization and the follow-up care by her physicians.

Federal regulations which interpret the FMLA state "[e]mployers covered by FMLA are required to grant leave to eligible employees... (4) because of a serious health condition that makes the employee unable to perform the functions of the employee's job." The Family and Medical Leave Act of 1993, 29 CFR § 825.112 (2010). The term "serious health condition" includes any condition which results in an overnight stay in a hospital and the term includes continuing treatment for the condition which required hospitalization. FMLA, 29 CFR § 825.113 (2010); FMLA, 29 CFR § 825.114 (2010). Martinez' hospitalization and follow-up care for her serious health conditions, neither of which were disputed by the Agency, clearly constitute qualifying conditions under the FMLA.<sup>2</sup> Thus, the first prong is established.

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<sup>2</sup> The federal regulations also make it clear that "an employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment." FMLA, 29 C.F.R. § 825.114 (a). Thus, an employee who remains absent for a medical condition following the expiration of FMLA leave may become subject to disqualification if the agency establishes disqualification criteria under the ADA. [CSR § 14-21].

**C. Did Martinez waive her right to FMLA leave by her representation that her condition was not FMLA-related?**

As detailed in the findings, above, at her pre-disciplinary meeting on October 28, 2010, Martinez presented documents which demonstrated her absences, from the time of her hospitalization in November 2009, through February 5, 2010, were due to her FMLA-qualified conditions. She also presented documents showing her two pre-hospitalization absences for which she was disciplined, September 21, 2009, and October 1, 2009, were due to one of the same qualifying medical conditions: cluster migraine headaches "that were so severe that I could not get out of bed." [Martinez Testimony; Exhibit C-2]. Both Martinez and her attorney told the Agency neither condition was FMLA-related. Based upon those representations, and because Martinez was out of sick leave, the Agency felt justified in assessing discipline.

When an employer suspects an employee has a condition that may qualify for FMLA, the employer is obligated to notify the employee regarding her rights under the FMLA. [29 C.F.R. § 825.301(a)(2010)]. When Martinez was taken by ambulance to the hospital on November 11, 2009, and remained there for several days, the Agency was on notice that she had a severe health condition. The Agency was on notice of Martinez' cluster migraine attacks of September and October 2009 when Martinez presented her diagnosis to the Agency at her pre-disciplinary meeting in October 2010. Migraine headaches specifically qualify as a severe medical condition under the FMLA. [29 C.F.R. § 825.113(d)].

Despite notice of Martinez' severe health condition, no one at the Agency notified her that her new conditions may have qualified for simultaneous FMLA leave, even though the Agency asked Martinez whether her unauthorized sick leave was FMLA-related. [Wilson Testimony; Kilroy testimony]. The important point here is that an agency may not shift this burden to its employees. Even if the employee fails to use any magic words such as "I need FMLA leave," once an employer acquires information that reasonably apprises the employer the reason for leave may be qualified under the FMLA, the employer has an affirmative duty to determine if the leave is likely to be covered by the FMLA. 29 C.F.R. § 285.303(b); Bailey v. Southwest Gas Co., 275 F.3d 1181, 1185 (9th Cir. 2002); see also Strickland v. Water Works and Sewer Bd. Of City of Birmingham, 239 F.3d 1199, 1209 (11th Cir. 2001) ("once an employee taking unforeseeable leave informs his employer that potentially FMLA-qualifying leave is needed, the regulations place on the employer the burden of ascertaining whether the employee's absence actually qualifies for FMLA protection.").

The Career Service Rules have adopted this affirmative burden. "An employee may expressly request FMLA leave, or may merely state that he or she

needs leave for a reason which the appointing authority knows is a qualifying reason for FMLA leave. **In either instance, the appointing authority shall notify the employee that the leave may qualify as FMLA leave** and request and provide information in accordance with this rule. CSR § 11-153 A. (emphasis added). Kilroy conceded that, before she asked Martinez' attorney if Martinez' conditions qualified for FMLA leave, she was unaware if anyone in the department notified Deputy Martinez she may have been eligible for FMLA as it related to her abdominal pains and headaches. [Kilroy cross-exam].

If the Agency's failure to make further inquiries into Martinez' medical conditions was understandable when Martinez was absent in September and October 2009 due to headaches, and understandable before her stomachaches were diagnosed, the federal regulations and Career Service Rule CSR § 11-153 A. make it clear the Agency failed its obligation to acknowledge, or at least inquire further into Martinez' conditions once she presented compelling medical documentation, the legitimacy of which was undisputed. It is a concern that the Agency failed to consider Martinez' medical documentation at her pre-disciplinary meeting in light of the plainly-stated purposes for conducting such meetings:

B. The purpose of the pre-disciplinary meeting is to allow an employee to:

1. correct any errors in the department or agency's information or facts upon which it proposes to take disciplinary action; and
2. Tell his or her side of the story and present any mitigating information as to why the disciplinary action should not be taken.

CSR § 16-40 B. When Martinez presented medical documents to the Agency at her pre-disciplinary meeting, and those documents corrected errors in the Agency's information, she fulfilled the function of the meeting.

Because the Agency may not shift its burden to determine whether Martinez' conditions qualified for FMLA leave, and because the Agency became aware Martinez suffered serious health conditions, Martinez' representations that her conditions were not FMLA-related did not relieve the Agency of its obligation to offer FMLA or, at least, to inquire further. Consequently, Martinez did not waive her right to FMLA leave by her representation that her condition was not FMLA-related. In short, an agency may not wait for its employees to ask for FMLA leave, and may not rely on the representations of its employees. When an agency acquires information from an employee or an employee's representative that the employee may have a serious health condition that makes her unable to perform the functions of her

job, it must provide the option of FMLA leave or make reasonable, further inquiry into the condition to determine whether the employee suffers from a qualifying condition. It is a delicate balancing act for agencies to walk the fence line between privacy on one side and meeting their responsibility to provide legitimate leave on the other; however agencies are better placed and equipped to make those determinations rather than each employee.

**D. Was Martinez time-barred to declare her absences as FMLA leave?**

The federal regulations allow an employer to designate FMLA leave retroactively. 29 C.F.R. § 825.301 (2010). When, as in this case, the need for leave is not foreseeable, employees "must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a).

Kilroy testified Martinez' request to designate her seven questioned absences as FMLA leave, even if otherwise proper, was barred because she did not submit her request within 30 days of the occurrence of her illness. Employees must provide at least 30 days advance notice before taking FMLA leave when the need is foreseeable. 29 C.F.R. § 825.302 (a). When the need for FMLA leave, as here, was unforeseeable, the federal regulations require only that the employee provide notice "as soon as practicable." 29 C.F.R. § 825.303. The following circumstances were determinative of that requirement.

(1) The Agency was aware Martinez was admitted to the hospital overnight on November 11, 2009. That fact alone was sufficient to trigger the Agency's obligation to offer FMLA leave, or inquire further into Martinez' condition. It did neither. (2) Martinez did not become aware of the nature of her illnesses until January 2010. (3) Martinez remained unaware she could request FMLA leave for her second set of illnesses until December 8, 2010. (4) The day after she learned she could take FMLA leave for a second illness contemporaneously with her existing FMLA leave, she submitted her request to the Agency. [Exhibit R].

The Agency may not claim, as stated above, that Martinez carried the burden to apprise herself of what health conditions qualified for FMLA leave. Moreover, the Agency was obligated to inform Martinez her conditions may have so qualified and its failure to do was a direct cause of Martinez' delay in requesting FMLA leave. The Agency may not neglect its notice obligations under the FMLA, then transfer its negligence to its employee. Under these circumstances, Martinez submitted her request as soon as practicable under the circumstances, consequently she was not barred to claim FMLA leave for the seven absences at issue.

Even if the need for Martinez' leave had been foreseeable, and even if she

failed to provide a 30-day notice of her need for FMLA leave, the Agency could only delay, and not deny, FMLA leave. "If an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employer may delay the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employer of the need for FMLA leave." 29 C.F.R. § 304 (2010).

Having determined Martinez had a qualifying health condition under the FMLA, and having also determined, in response to the underlying question posed above, that the Career Service Rules entitled her to designate retroactive FMLA leave for her migraine headaches and h. pylori infection, we turn to the violations alleged by the Agency. The Agency alleged seven of Martinez' 10 absences between September 21, 2009 and February 5, 2010 violated the following Career Service Rules.

**E. Career Service Rules alleged to have been violated.**

**1. CSR § 16-60 L. Failure to observe written departmental rules or agency regulations, policies, or rules. When citing this subsection, a department or agency must cite the specific regulation, policy or any rule the employee has violated.**

Sheriff's Dept. Rule 100.1. Deputy Sheriffs and employees shall not be absent from duty without authorization. Any such absence shall constitute cause for dismissal or other disciplinary action as provided by Career Service Authority Rules.

The Agency claimed Martinez was in violation of this Agency rule for each of seven absences without authorization between September 21, 2009 and February 5, 2010 [Exhibit 1-3] because Martinez had no sick leave left on each of those days. Martinez did not dispute that she was absent each of the seven days in question; nor did she dispute the Agency did not authorize leave any of the seven days. However, under the circumstances of this case, Martinez had the right to take retroactive FMLA leave for each of those seven days. Consequently, her leave was authorized pursuant to the FMLA and the adoptive Career Service Rule, CSR § 11-150. Because her leave was authorized, Martinez did not violate this Agency rule.

Sheriff's Dept. Rule 100.2. Deputy Sheriffs and employees unable to appear for duty because of illness or injury, or for any other valid reasons, shall notify their supervisor or duty supervisor in their division or unit at least two hours prior to their scheduled reporting time. If the office or work unit is closed, the employee should call as soon as the office opens. In the case of an emergency, notification shall be made as soon as possible or practical.

Sheriff's Department Order 2053.1 Employee Use of Sick Leave

A. Reporting Absences and Failure to Report to Work for Scheduled Shift (Including Overtime)

1. Every time an employee is unable to work for a scheduled shift (including overtime the employee has agreed to work), the employee must contact his/her immediate supervisor or designee in the manner prescribed by Denver Sheriff Department Rules and Regulations No. 100.2.
2. Contacting the employee's immediate supervisor or designee to report the inability to work a scheduled shift does not "excuse" the employee's absence from work. Except in cases of an emergency or where extenuating circumstances exist, if an employee fails to notify his or her supervisor/designee at least two hours prior to the employee's scheduled reporting time, such absence shall be treated as unauthorized leave (without pay). In addition, such unauthorized absence may be grounds for discipline.
4. Two instances of unauthorized absence within a twelve-month period may result in corrective action, up to and including termination.

Martinez notified her supervisor at least two hours prior to her scheduled reporting time that she was ill and unable to appear for duty on September 21, 2009, October 1, 2009, November 17, 2009, January 4, 2010, and February 5, 2010. [Exhibit C-2 – C-3]. The Agency therefore failed to prove she violated Rule 100.2 or D.O. 2053.1 A. 1. or 2. for those five days.

The emergency exception incorporated into D.O. 2053.1, A. 2., ("except in cases of emergency") applies to the Appellant for the days she was hospitalized. Thus, Martinez did not violate this rule for the remaining two days in question. Martinez also did not violate D.O. 2053.1 A. 4., where all seven of her absences in question were authorized by law for reasons as stated above.

**2. CSR § 11-90 Unauthorized Absence for Non-Exempt Employees**

- A) Non-Exempt employees: A non-exempt employee who is absent from duty without approval shall receive no pay for the duration of the absence. Such denial of pay shall not affect the right of the City or any of its agencies to invoke any form of disciplinary action which it deems appropriate, up to and including dismissal.**

Martinez' right to take FMLA leave for the seven days at issue make this rule inapplicable.

**3. CSR § 16-60 S. Unauthorized absence from work; or abuse of paid time off, sick leave, or other types of leave; of violation of any rules relating to any forms of leave defined in Rule 10 PAID LEAVE or Rule 11 UNPAID AND EXTENDED LEAVE.**

As found above, for each of the seven days Martinez was absent, she had a serious health condition which qualified for leave under the FMLA. She provided evidence of that qualification to the Agency. The Agency did not question the veracity of the certification and did not request further clarification or a second opinion. As Martinez' seven absences were authorized under the FMLA, she did not violate this rule.

Even assuming Martinez' absences on September and October 2009 were unauthorized, there was another problem with the Agency's claims. The Agency averred Martinez was subject to discipline even for a first instance of unauthorized absence. Under Departmental Rule 100.1, any instance of unauthorized absence constitutes presumptive cause for any degree of discipline, including termination. Not only does this rule seem unduly harsh, but it conflicts with the Agency's own D.O. 2053.1, which contemplates discipline for no less than two instances of unauthorized absences. The two rules are irreconcilable.

## **V. DEGREE OF DISCIPLINE**

Since the Agency failed to prove Martinez violated any of the Career Service Rules it alleged in its notice of discipline, no discipline may be assessed.

## **VI. CONCLUSIONS**

Employee health issues create myriad difficulties for agencies. They must maintain confidentiality of employees' health matters, yet must inquire sufficiently to determine if an employee suffers from a condition that may trigger FMLA protections.<sup>3</sup> The Federal regulations assist agencies in providing the proper scope of such inquiry under 29 C.F.R. §§ 825.306-825.308 (2010).

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<sup>3</sup> Another example of the complicating factors for agencies regarding employee's health matters occurs when an employee's health condition invokes the Americans with Disabilities Act. Agencies must then take care to maintain separate records of those employee's medical certifications, medical histories, and those of their families, apart from the rest of those employees' personnel files. 29 C.F.R. § 1630.14(c)(1).

Despite these difficulties, it is incumbent on agencies to understand their role and obligations under the FMLA, including their obligation to notify employees of their FMLA rights within five days after the agency acquires knowledge that an employee's leave may be for an FMLA-qualifying reason. 29 C.F.R. § 825.300(b). Agencies may not shift that burden to their employees.

It is clear Martinez initially failed to provide sufficient information to justify FMLA leave for her two pre-hospitalization absences. "Calling in 'sick' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job... [or] that the employee... has been hospitalized overnight." 29 CFR § 825.303. However, the same regulation also makes it evident that once Martinez provided proof her pre-hospitalization condition was for the same condition for which she was hospitalized and made her incapacitated, the Agency was obligated to inquire further or to grant retroactive FMLA. Under the Career Service Rules, via the FMLA, it is an employee's right to take FMLA, not the agency's choice to permit it. 29 CFR § 825.112; 29 CFR § 825.220 (2010); CSR § 11-153. Moreover it is at the employee's election to apply banked sick, vacation, or compensatory time to her otherwise unpaid FMLA leave. CSR § 11-154 D.

The Agency asserted that even if Martinez' absences following her hospitalization could be deemed FMLA-qualified, her two pre-hospitalization absences were not qualified, and therefore justified the same level of discipline. In light of the discussion, above, it should be clear Martinez' two absences before her hospitalization also qualified for retroactive FMLA leave.

#### **VII. ORDER**

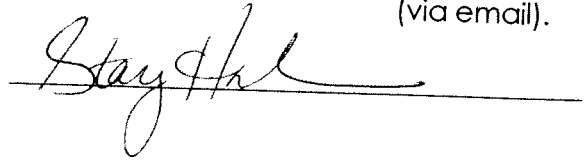
The Agency's suspension of Martinez is REVERSED.

DONE May 16, 2011.

  
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Bruce A. Plotkin  
Career Service Hearings Officer

I certify that on May 16, 2011, I delivered a copy of this Order to the following in the manner indicated:

Ms. Catherine Martinez, <a href="mailto:cpmartinez80236@hotmail.com">cpmartinez80236@hotmail.com</a>	(via email);
Marcy McDermott, Esq., <a href="mailto:mmcdermott@fostergraham.com">mmcdermott@fostergraham.com</a>	(via email);
Dan Foster, <a href="mailto:Danny@fostergraham.com">Danny@fostergraham.com</a>	(via email);
Lori Uhlberg, <a href="mailto:lhlberg@fostergraham.com">lhlberg@fostergraham.com</a>	(via email);
City Attorney's Office at <a href="mailto:Dlefilng.litigation@denvergov.org">Dlefilng.litigation@denvergov.org</a>	(via email);
Ms. Lili Tran, HR., Lili. <a href="mailto:Tran@denvergov.org">Tran@denvergov.org</a>	(via email).



### NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You 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 decision's certificate of delivery. The Career Service Rules are available as a link at [www.denvergov.org/csa](http://www.denvergov.org/csa).

#### **All petitions for review must be filed with the:**

Career Service Board  
c/o CSA Personnel Director's Office  
201 W. Colfax Avenue, Dept. 412, 4<sup>th</sup> Floor  
Denver, CO 80202  
FAX: 720-913-5720  
EMAIL: [Leon.Duran@denvergov.org](mailto:Leon.Duran@denvergov.org)

AND

Career Service Hearing Office  
201 W. Colfax, 1<sup>st</sup> Floor  
Denver, CO 80202  
FAX: 720-913-5995  
EMAIL: [CSAHearings@denvergov.org](mailto:CSAHearings@denvergov.org).

AND

Opposing parties or their representatives, if any.