

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

COREY S. PAZ, Appellant,

vs.

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

The hearing in this appeal was held on June 17 and 19, 2009 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing, and was represented by Sarah McCutcheon, Esq. The Agency was represented by Assistant City Attorney Andrea Kershner, and Sgt. Charles DeNovellis served as the Agency advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE CASE

On Jan. 23, 2009, Appellant Corey S. Paz was terminated from his position as Deputy Sheriff with the Denver Sheriff's Department within the Department of Safety (Agency). He filed this direct appeal challenging the termination on Feb. 6, 2009. The parties stipulated to the admissibility of Agency Exhibits 1, 2, 4 – 8, 9-1 to 9-40, 12, 13, and 15, and Appellant's Exhibits C – F, H – Q, S – V, and DD – II. Agency Exhibits 16 - 19, and Appellant's Exhibits X, Z and AA – CC were admitted during the hearing.

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 (CSR), and
- 2) Did the Agency establish that dismissal was within the range of penalties that could be imposed upon Appellant by a reasonable administrator for the violations proven under the rules?

III. FINDINGS OF FACT

Appellant Corey S. Paz was hired as a Deputy Sheriff for the Denver Sheriff's Department in 1991. On March 6, 2008, Appellant was notified that the department's Internal Affairs Bureau (IAB) had received a complaint about him. [Exh. 7-27.] On March 12, Appellant was interviewed by Sgt. David Oliver to investigate 14 occurrences of sick leave use from March 2007 to March 2008. When asked if there were any mitigating circumstances, the following exchange occurred:

OFFICER COREY PAZ: I can just recall two of the days where both of my daughters each had a baby on that day and I called in on those days.

SERGEANT DAVID OLIVER: Okay. Do you remember what days those were?

OFFICER COREY PAZ: December 26 and February 13. And as far as the other days, you know what? I was doing really good for awhile, but I do, you know, raise all my kids by myself. It's just me, so if one of them is sick or absolutely has to be to the doctor or something, I have to take them, you know. I've been trying to do real good. Or you know, I'm trying to remember exactly what these, but those two birthdays I know. Those are the two kids that were just born.

SERGEANT DAVID OLIVER: Those are, those are grandchildren of yours?

OFFICER COREY PAZ: Yeah my daughters, yeah.

SERGEANT DAVID OLIVER: Okay.

OFFICER COREY PAZ: Both of them. I have a grandson and a granddaughter that were born on those days.

[Exh. EE-2 to -3.]

Two weeks after that interview, Appellant submitted nine pages of medical records that showed doctors' appointments for his children on three out of the 14 occurrences during the relevant period. [Exh. 7-15, 7-33 to 7-41.]

On July 24, 2008, Appellant attended a pre-disciplinary meeting as a result of the IAB's conclusion that Appellant had nine occurrences of unauthorized leave within a 12-month period. [Exh. 7-96, 7-102.] Director of Corrections and Undersheriff William Lovingier conducted the meeting. Also in attendance as a part of the hearing board were three Division Chiefs, Captain Bob Kricke of the IAB, three sheriffs from the IAB,

and a representative from the Office of Independent Monitor, which provides oversight for the Denver Police and Sheriff's Departments.

During the 19-minute meeting, Mr. Lovingier asked Appellant about his claim of mitigation regarding the birth dates of his grandchildren:

SHERIFF WILLIAM LOVINGIER: . . . You said that on December 26th of '07 and February 13th of '08, you had to be with your daughters at the time, right?

OFFICER COREY PAZ: Yeah.

SHERIFF WILLIAM LOVINGIER: Okay, December 26th and February 13th. Why am I not seeing February. Oh, okay, this is just - - so you've got two new grandchildren?

OFFICER COREY PAZ: Right.

SHERIFF WILLIAM LOVINGIER: Okay. How old are your daughters?

OFFICER COREY PAZ: One is 17 and one is 21.

SHERIFF WILLIAM LOVINGIER: And these are the two daughters you're talking about here?

OFFICER COREY PAZ: Right.

SHERIFF WILLIAM LOVINGIER: Okay. And was it the 17 year old or 21 year old that had the grandchild on December 26th?

OFFICER COREY PAZ: The 17 year old.

[Exh. FF-4 to -5.]

Later during that meeting, Mr. Lovingier invited one of the Division Chiefs to ask any questions he had of Appellant.

CHIEF: Yeah, I just wanted to clarify a couple of things, Corey. On December 26, 2007, what was that date used for?

OFFICER COREY PAZ: In all honesty, [my daughter's birth.¹]

¹ The transcript indicates this phrase is indecipherable. However, the words, "my daughter's birth" are clearly audible on the CD recording. [Exh. 15-8.] Mr. Lovingier later confirmed he heard those words when he quoted Appellant as saying, "[i]n all honesty, my daughter's birth" during the Dec. 30, 2008 pre-disciplinary meeting. [Exh. 11-7.]

[Exh. FF-8 to -9.]

In response to Mr. Lovingier's invitation to Appellant to present his side of the story, Appellant stated, "I also have another county medical leave act form that was signed back on the 12th, which was probably knocked off from the other three. But I just didn't turn that in." [Exh. 8-99 to -101.] When asked if that was from his physician, Appellant answered, "Yes, it is."

SHERIFF WILLIAM LOVINGIER: Okay. Looks like on July 24th, your physician provided this, correct?

OFFICER COREY PAZ: Correct, and then he revised it today because I personally went in for treatment. He thought it was between two and six, and on there he put the last date of treatment.
...

SHERIFF WILLIAM LOVINGIER: . . . So January 1st and March 4th, you were sick on MLA, is what you're saying?

OFFICER COREY PAZ: Correct.

[Exh. FF-3, FF-6.]

After reading the FMLA certification presented by Appellant, Mr. Lovingier asked,

SHERIFF WILLIAM LOVINGIER: . . . This says you are unable to perform work of any kind, so medical leave is required for employee's absence from work because of employee's own condition. Is the employee unable to perform work of any kind? And the response was "yes, unable to perform work of any kind," is that correct?

OFFICER COREY PAZ: That was when I was given the medications he wanted me to take. . . . The pain killers . . . And so if I needed one, I would take one and then he didn't want me to show up for two days. So, it had to be completely out of my system, and he knew the line of work I was in, so - -

SHERIFF WILLIAM LOVINGIER: Okay. Okay, is this our copy?

OFFICER COREY PAZ: Yes, you can keep that. You know, and I know I still have to work on this. When I went to turn this in, in January when I got it, I just didn't think I had taken that many days.

[Exh. FF-3, to -4.]

Notes from the July pre-disciplinary meeting summarized the panel's contemporaneous understanding of Appellant's statements. Those notes record Appellant's claim that two of his absences (Jan. 1 and Mar. 4, 2008) should be considered FMLA leave, and that another two (Dec. 26 and Feb. 13) were used for the birth of his two grandchildren. Based on these claims, the Director determined that the violation was not sustained, but ordered another internal investigation into the truthfulness of Appellant's statements made during the IAB and pre-disciplinary proceedings. [Exh. 7-89 to -90.]

On Aug. 1, 2008, the Agency submitted the FMLA certification to Senior Human Resource Professional Melissa Miera, who has handled all FMLA requests for the Agency since Sept. 2007. Ms. Miera testified that Appellant never turned in a request for FMLA, but that the certification was treated as constructive notice of information that could justify FMLA leave. On Aug. 4th, Appellant filed a Return to Work form with the Agency, which stated that he could return to work with no restrictions. [Exh. 8-114.] Based on that information, the FMLA request was denied. [Testimony of Ms. Miera; Exh. 8-104, 8-209, 8-219.]

At some point during the second IAB investigation, Appellant clarified that the mothers giving birth in December and February were actually his sister Jennifer, and his daughter Yvette, not two daughters, as he had stated before. Appellant was named his sister's guardian in 1996 after the death of their mother. [Exh. 8-154.] During an Aug. 12 interview with IAB Sgt. DeNovellis, Appellant repeated that the dates of birth for the two grandchildren were Dec. 26 or 27, 2007, and the first week of February, 2008. [Exh. LL-10.] At that time, Appellant was orally ordered to produce dates of birth for Jennifer, Yvette, and his grandchildren and nephew. Appellant refused to provide the information. [Exh. LL-13.] He also stated, "[t]he only thing I have to offer from December to whatever my FMLA was to May, I think it's the 15th, what that is, I was sick. I was on FMLA, I had the papers." He admitted that the FMLA was not approved. [Exh. LL-12, -13.] When asked about each of his twelve sick leave absences individually, Appellant stated either, "I have no idea" or "I don't recall." [Exhs. 8-18; 8-25; LL 3-4; LL 8-9]

On Sept. 24, Sgt. DeNovellis interviewed Appellant again, and repeated his order to produce the names and dates of birth. Appellant initially refused to comply with the order, but then asked to have it reduced to writing so he could consult with an attorney. [GG-2, -4, -5].

On Sept. 30, 2008, Appellant complied with the order by providing the full names and dates of birth for his sister, daughter, grandchildren, and nephew. [Exh. HH-3, 8-116.] The next day, Sgt. DeNovellis obtained copies of the children's birth certificates, which show that then-19 year old Jennifer gave birth to a boy, Zane, on Feb. 6, 2008, and Appellant's daughter Yvette, who was 25 in Sept. 2008, had two children: a baby boy, Eric, born Dec. 31, 2004, and a baby girl, Alyssa, on June 5, 2007. [Exh. 8-117 to -119.]

As a result in part of the conflict between Appellant's earlier statements and the birth records, a pre-disciplinary meeting was held on Dec. 30, 2008. Appellant submitted a three-page summary of his notes and seven attachments. [Exh. 8-150 to -160.] In that statement, he apologized for his confusion in claiming that Dec. 26, 2007 was the date his grandchild was born, stating, "I did have a grand child born at the end of December just didn't remember which one. Nerves." [Exh. 8-151.] At the pre-disciplinary meeting, when Mr. Lovingier asked him to confirm his former statement that on Dec. 26th his absence was for "[i]n all honesty, my daughter's birth", Appellant replied, "I remember it wasn't Chief Foos, it was Chief Wilson that asked me and I said twice clearly, it was one or the other." [Exh. II-7.] A little later at the meeting, Appellant admitted he was incorrect in claiming he used sick leave on Dec. 26th for his daughter's birth. Appellant stated that the baby he had claimed was born on Dec. 26, 2007 was actually born in June 2007. [Exh. II-10.²] When asked again about the Dec. 26th absence, Appellant stated, "I was sick with myself." [Exh. II-16.]

As to his previous claims that his absence on Feb. 13, 2008 was for the birth of another grandchild, he wrote in his pre-disciplinary statement, "[a]s I state on the tape it was either 'sick or for the birth of the baby.' You are correct in the baby being born (Zane) on 2/6/08." He added that Jennifer had medical treatment from Feb. 1 to Feb. 9, 2008, and came home from the hospital "with major complications still. So, I was still caring from [Jennifer] for the birth of her son." [Exh. 8-151.] He attached Kaiser explanation of benefits showing medical care given to Jennifer on Feb. 1, 5 and 9, 2008. [Exh. 8-155, -156.] However, on the next page of his statement, Appellant said,

I must correct my first answers during the hearing on July 24, 08 and state that now after taking the time to research everything I would like to tell you that on Feb. 13, 2008 I was sick, document from Kaiser shows that seen the doctor in . . . 2/13/08. See document 6.

[Exh. 8-152, -159.³]

At the December pre-disciplinary meeting, Appellant stated that he had a medical appointment in the Kaiser Neurosurgery department on Feb. 13, 2008. [Exh. II-12.] He explained that Jennifer was rushed to the hospital on Feb. 1st because of problems, and was admitted for the birth from Feb. 5 – 9. When asked to confirm that he took Feb. 13th off for himself rather than Jennifer, he stated, "[g]oing back, looking through everything, yeah. While I was helping her and taking care of myself at the same time." [Exh. II-15.]

² Mr. Lovingier asked if the baby he claimed was born on Dec. 26, 2007 was actually born in "June of '08", and Appellant answered, "Yes". [Exh. II-10.] However, the records clearly show only two grandchildren: one born in Dec. 2004 and another in June 2007. [Exh. 8-118, 8-119.] Appellant's nephew Zane was born to his sister Jennifer, Appellant's ward, on Feb. 6, 2008. [Exh. 8-117.]

³ Appellant also submitted his partially-redacted Kaiser records in the first IAB investigation. [Exh. 7-33 to -41.]

Appellant was also asked to explain the remaining sick leave occurrences, eight unauthorized leave occurrences, and trades of overtime for straight time⁴ between July 2007 and July 2008. He responded,

I can't prove anything. I mean, you know, I couldn't find any more documentation to prove I was sick there or from 08/16 of '07 - - one through four at the top.⁵ . . . And the unauthorized leave . . . [t]here again, the first four in '07, I don't.

[Exh. II-12 to -13.]

At the July 24th meeting, he said, "I assume I was just sick on those days"⁶And then the other dates above, honestly I can't tell you, can't be exact what exactly I took them for." [Exh. FF-6 to -7.] He admitted in his pre-disciplinary statement that he took sick leave for a non-work related court date. [Exh. 8-152.]

With regard to the claim for FMLA leave, Appellant explained in his written statement that he "only needed to be restricted while on heavy medications". He obtained the certification on Jan. 4, 2008 "just in case", and worked hard to limit his use of medications to his days off, "but it was not always possible. . . . Once I found out about [the pre-disciplinary meeting] on July 24, 08 I went back to my doctor to have the document extended to cover the dates of treatment, because they differed from what was originally projected." [Exh. 8-151.] The FMLA certification dated July 24, 2008 has a hand-written note, "Member was seen 12/21 – 5/15/2008 / A Caliendo". [Exh. 8-99.]

At the December pre-disciplinary meeting, Appellant submitted new documents reflecting his own medical treatment and medications from Dec. 21, 2007 to Apr. 3, 2008 to show that he "was actually sick and under the care during this time period." [Exh. II-18, 8-157, 8-158.] He also included a copy of a summons requiring an answer in a civil lawsuit by May 29, 2008, another date on which Appellant took sick leave. [Exhs. 1-6, 8-160.] Appellant stated that he presented the FMLA certification at the July meeting in mitigation of his uses of sick leave. When asked to explain why he continued to come to work although the certification said he was "unable to perform work of any kind", Appellant replied that he thought his physician told him verbally that he was only restricted from work while on medication. He offered to get written clarification from his doctor by the next day. [Exhs. II-9, -11, 8-100.]

On Jan. 8, 2009, Appellant submitted a "modification that my doctor made to my FMLA sheet, line 7. It now shows that I was only restricted from work while taking medication." [Exh. 8-145, -147.] The health care provider who signed and amended

⁴ The trades of straight time for work done in overtime was "due to being out of sick leave to make up the 165-hour requirement for the month," according to a finding made in the disciplinary letter. [Exh. 1-6.] That finding was not disputed by Appellant.

⁵ Appellant is referring to the dates listed in the pre-disciplinary letter, Exh. 1-6.

⁶ Aug. 16, Sept. 26, Oct. 19 and Nov. 16, 2007. [Exh. FF-7.]

the certification, and to whom Appellant refers as his doctor, was Anthony Caliendo, Physician's Assistant. [Exh. 8-101, -220.]

Deputy Manager of Safety Mary Malatesta made the disciplinary decision in this case. Ms. Malatesta testified that she reviewed all transcripts, video and audio tapes of the interviews and compared Appellant's statements as they differed over time. She found that Appellant made false statements at the March interview and July pre-disciplinary meeting by affirmatively stating that his Dec. 26th and Feb. 13th absences were for the birth of his grandchildren, quoting the tape: "Those two birthdays I know." She noted that at the Dec. 30th pre-disciplinary meeting, Appellant stated he used Feb. 13th either for the birth of the baby or his own sickness. In watching the videotape of the August IAB interview, Ms. Malatesta observed that Appellant angrily and belligerently refused to comply with orders to produce the information, in what she believed was an attempt to roadblock discovery of the facts regarding his absences. Ms. Malatesta found that Appellant admitted that no grandchild was born on Dec. 26, 2007 only after IAB had obtained the birth certificates. Ms. Malatesta stated that Appellant made no attempt to correct the erroneous information during the nine months between March and December, 2008.

Ms. Malatesta also found that Appellant falsely stated his absences from Dec. 2007 to May 2008 were covered by FMLA. It was "like trying to catch mercury" in attempting to determine the applicability of the purported FMLA certification. "Probable duration" was changed from "2 - 6 weeks" to "12/21 to 5/5/2008". The need for leave was described in Jan. 2008 as "unable to perform work of any kind". [Exh. 8-100.] In Jan. 2009, that phrase was amended by the addition of the phrase, "while on medication." [Exh. 8-147.] The document was signed on both Jan. 4, 2008 and July 24, 2008. However, Appellant worked during those periods and never submitted the certification to the Agency. In Ms. Malatesta's view, that increased the Agency's liability by placing in question Appellant's readiness while on duty to back up other Deputy Sheriffs.

Ms. Malatesta concluded that Appellant's evasions and false statements during the IABs and pre-disciplinary process violated Career Service Rules related to dishonesty and employee conduct. CSR §§ 16-60 E, Z, 15-5.

As to the issue of Appellant's use of sick leave, Ms. Malatesta stated that the Sheriff's Department has "serious staffing issues" because of its mission to provide 24-hour coverage of the jail facility and the need to pay overtime for unanticipated employee absences. Inadequate staffing, she said, can put officers on duty at high risk of injury. Departmental Order (D.O.) 2053.1 D. was put in place to ensure full staffing of the jail, while allowing employees to use leave benefits considered by Ms. Malatesta as generous. The sick leave policy is very flexible, and permits command staff to exercise broad discretion to excuse absences in appropriate circumstances. Use of FMLA leave and pre-authorized absences are not considered "occurrences of absence" within the meaning of the rule, and management has authority to excuse absences if an employee notifies a supervisor as few as two days in advance of an absence.

Ms. Malatesta found that Appellant had twelve occurrences of absences during the 12-month period commencing July 2007: 8/16 to 8/17/07, 9/26/07, 10/19/07, 11/16/07, 12/26/07, 1/22/07, 1/1/08, 2/13/08, 3/4/08, 4/30 to 5/1/08, 5/29/08 and 7/1/08.⁷ During that same period, Appellant had seven occurrences of unauthorized leave for partial shifts: 7/12/07, 11/16/07, 12/26/07, 3/4/08, 4/30/08, 5/1/08, and 7/2/08, one occurrence of unauthorized leave for a full shift on 5/29/08, and three occasions when Appellant traded overtime for straight time because he was out of sick leave: 4/5/08, 10/17/08, and 11/15/08. She noted that Appellant justified these absences by stating he assumed he was sick on all but one of those days.⁸

Based on Appellant's failure to assert any reason to excuse the absences under the departmental policy governing employee use of sick time, Ms. Malatesta determined that those absences and overtime trades violated Appellant's duty to be accountable for his time under D.O. 2440.1, and exceeded the number of occurrences of absences for a twelve-month period under D.O. 2053.1. [Testimony of Ms. Malatesta, Exh. 1-6.] She also concluded that the absences constituted neglect of duty and carelessness under CSR § 16-60 A and B.

The seriousness of the violations was further aggravated in Ms. Malatesta's judgment by Appellant's "blatantly false" statements during the two IAB processes, and his absolute unwillingness to provide information routinely requested during investigations. When he finally disclosed the birth dates, one of them was false.⁹ In addition, Appellant's "ever-changing story was really concerning" regarding his credibility. She noted that Appellant was working on Feb. 6, 2008, the day his sister Jennifer gave birth, contradicting his claims in March and July that he knew he took sick leave on that date to assist her. [Exh. 8-82.] Appellant's medical documents seemed to indicate that Jennifer had a phone consultation rather than a doctor's visit on Nov. 16, 2007, one of the days on which Appellant claimed "Jennifer sick". [Exh. Z-1.] She discounted his claim that he was pressured to recall dates, observing that Appellant himself re-started the IAB interview in March to affirmatively assert that his sick leave on Dec. 26th and Feb. 13th were for the birth of two grandchildren. The transcript and videotape confirmed that Appellant had not said the Feb. 13th absence was "either sick or for the birth of the baby" at the July pre-disciplinary meeting, as he claimed in his December statement. [Exhs. 8-151, FF-5, -8 to -9, 15-8.] The videos of his interviews also did not corroborate his later claim that he was confused, "under the gun", or speaking "off the top of my head". His failure to correct his statements until he was forced to do so several months after the questions arose showed an intention to block the investigation.

⁷ "A single occurrence of absence ends when the employee returns to work and thereafter works at least one full scheduled shift, provided that the absence is less than five consecutive work days in duration". D.O. 2053.1(3)(D)(2)(b). [Exh. 5-7.]

⁸ The sole exception was May 29, 2008, when Appellant acknowledged he requested sick leave to attend a court proceeding. [Exh. 8-160.] The absence was ultimately recorded as unauthorized leave. [Exh. 8-82.]

⁹ Eric Quintana was born on Dec. 31, 2004, not, as stated by Appellant, on Dec. 30, 2006. [Exhs. 8-116, -118.]

Ms. Malatesta concluded that Appellant's ever-changing statements and insolent demeanor during the interviews demonstrated that he could not be trusted to be honest in matters concerning his job. Honesty is an essential element of the job of Deputy Sheriff, and law enforcement officers and command staff have to be able to rely on each other to tell the truth in matters involving public safety as well as employment issues. She thus considered his dishonest statements acts of neglect of duty and carelessness in the performance of his duties, one of which was to tell the truth.

Finally, Ms. Malatesta considered Appellant's claim of FMLA leave and submittal of various versions of the FMLA certification to Mr. Lovingier an act of dishonesty where Appellant never applied for or received FMLA leave.

In establishing the penalty level for these violations, Ms. Malatesta considered Appellant's two previous written reprimands and one three-day suspension for violations of attendance policy over the past three and a half years. She noted that Appellant had been interviewed and counseled about attendance as a part of the past disciplinary actions. She also considered that he was given the benefit of the department's exercise of discretion to excuse past absences. Ms. Malatesta found that Appellant did not use those warnings and opportunities to improve his attendance or compliance with policy. Under these circumstances, she considered this fourth attendance violation an indication that the situation was uncorrectable. In view of the aggravated nature of the proven violations, three other disciplinary actions for similar violations, and strong evidence that lesser discipline would not be effective, Ms. Malatesta determined that termination was the most appropriate penalty.

Appellant testified that he is a single parent who is raising his three children and his sister Jennifer, whom he considers his daughter, as well as two grandchildren. He has sole responsibility for taking his children to medical appointments, which he tries to set up for his days off. Appellant believes that the first occurrence listed on the disciplinary letter, Aug. 16 and 17, 2007, was more than likely caused by his caring for one of his sons, Cody, age 13, or Corey, age 14. The next two occurrences, Sept. 26 and Oct. 19, were caused by his own sickness and that of one of the children. On Nov. 16, 2007, he was caring for Jennifer, who was experiencing bleeding early in her pregnancy. Exh. Z shows that Jennifer had a telephone consultation with an Ob/Gyn physician's assistant on that date.

Appellant stated that the Dec. 26, 2007 absence was caused by medication he was taking as a result of a serious auto accident he had on Dec. 19, 2007. [Exh. X.] He sustained back and neck injuries, for which he received medication and other non-surgical treatments until May 2008. On Jan. 22, 2008, Appellant took both sons to the doctor for physical examinations required to catch up on their immunizations for school. [Exhs. AA, BB.] On Feb. 13, Appellant was seen by a neurosurgeon. [Exh. L.] He called in sick on April 30th because he had taken medication for pain. On July 1, Appellant was seen by his primary care physician. [Exh. CC.] On May 29, Appellant used sick leave to respond to a summons in Adams County Court. [Exh. V.]

Appellant recalled that a 2007 IAB investigation into his attendance had resulted in no discipline based on a determination that his brother's death had created some hardships, and that he had since improved his sick leave bank. [Exh. H.] Appellant had not been given a list of the dates at issue before going into the March 2008 IAB interview with Sgt. Oliver. Appellant told Sgt. Oliver the Dec. 26th absence was used for the birth of a grandchild because he remembered that one of his grandchildren had been born in the month of December. He did not check on the accuracy of his statement, but did provide Sgt. Oliver with copies of Exhibits L, M and N, after blacking out areas he believes show his Kaiser insurance number. [Exh. 7-33.]

Appellant recalled that he told Mr. Lovingier at the first pre-disciplinary meeting in July that he was either sick or attending the birth of his grandchild. He obtained the FMLA certification just in case he needed it, because the Sheriff's Department "is hard on absences." He took it to that pre-disciplinary meeting to prove he was not just "making things up" about the Dec. 2007 auto accident. He told Mr. Lovingier he had FMLA papers showing he was unable to do work of any kind, but explained that it only applied if he was taking pain medications.

Appellant testified that he realized in early August after the pre-disciplinary meeting that he may have been mistaken about the birth dates of his grandchildren. When interviewed during the second IAB in August, he became frustrated because he had been told the prior IAB was not sustained, and some of the same absences were included in the new investigation. He was reluctant to disclose his children's birth dates, as he felt they were not his to give out, and he did not feel the IAB needed them. "It became a shoving match. . . I bear some responsibility in that." Once given the written order, Appellant stated he provided the birth dates. He later realized one of them was incorrect, but by that time "it became a personal thing" between himself and Sgt. DeNovellis. He obtained an attorney, and decided to wait until the pre-disciplinary meeting to correct the information he had previously provided.

Appellant stated he gave Sgt. Oliver all the medical documents he could find in the day or two he gave him to gather the information. [Exhs. 7-33 to -41.] Sgt. Oliver testified that Appellant submitted those documents two weeks after the March IAB interview. The insurance documents were printed on April 3 or 4, 2008, three weeks after the first IAB interview.

Appellant testified that he was familiar with the departmental policies regarding use of leave, and that he had been previously disciplined for leave abuse. He stated that in 2005, his penalty for 13 occurrences under D.O. 2053.1 was mitigated to a written reprimand because of family hardships, and that he was advised during that discipline of the availability of FMLA to cover absences. [Testimony of Appellant; Exh. 9-29, -31.] Appellant took sick leave to attend the May court appearance because he knew he would be disciplined for the absence if he requested comp time for that day and it was denied. He admits that his use of sick leave for the court appearance violated the leave policy. Appellant was aware that he could avoid occurrences of

absences by asking his supervisor to pre-approve use of leave, but stated he never did that because it is not approved if they are short-staffed. In 2002, he was issued another written reprimand for dishonesty based on misuse of his city-issued credit card. [Exh. 9-48.]

Appellant stated he was very familiar with IAB procedures as both a witness and the subject of investigations for the last ten years of his employment. He acknowledged that the departmental code of ethics requires employees to cooperate in IAB investigations. Appellant testified that he was first ordered to produce the birth dates at the Aug. 12th interview, and complied with that order on Sept. 30th once it was reduced to writing. Appellant admitted at hearing that he was careless in not watching his use of leave more closely, as continuously emphasized by Mr. Lovingier. He testified however that he believed his conduct complied with the principles contained in the departmental mission statement, and that no lesser discipline would have changed his opinion on that issue.

IV. ANALYSIS

The Agency bears the burden to prove that the imposition of discipline was appropriate under the Career Service Rules, and that the level imposed was within the range that could be issued by a reasonable administrator.

A. Leave Abuse

The Career Service Rules prohibit unauthorized absence from work, abuse of leave, and violation of Rule 11 related to leave. CSR § 16-60 S. An absence is unauthorized if it is taken in violation of either departmental or career service rule. In re Dessureau, CSA 59-07, 8 (1/16/08). Since it is not disputed that Appellant was sick and was granted sick leave on the twelve days in question, Appellant's use of sick leave was not unauthorized under the first clause of § 16-60 S. [Exh. 8-82, -83.] In re Lucero, CSA 62-04 8 (4/15/05).

It is undisputed that Appellant was absent without authorization on eight different days for a total of 25.42 hours from July 12, 2007 to July 2, 2008. [Exhs. 1-6, 8-82, -83.] These absences violated §16-60 S, which prohibits unauthorized absences from work. Appellant also admitted that his use of sick leave on May 29, 2008 for a court appearance was an abuse of sick leave, which proves a violation of the same disciplinary rule. CSR §11-32, effective 2/8/05 (repealed and amended 10/10/08 as CSR § 11-25.)

The Agency presented no evidence to support a conclusion that trading overtime for straight time is an unauthorized absence or abuse of leave, and therefore the three occasions when Appellant made such a trade do not prove a violation of § 16-60 S.

The Agency also asserts that Appellant's use of sick and unauthorized leave and straight time trades constitute violations of D.O. 2053.1. Again, Appellant does not

contest that he was absent on the days listed in the disciplinary letter, or that there were ten or more occurrences of absence as that term is defined in the departmental rule¹⁰ within a twelve-month period. Appellant argues however that 1) the departmental rule conflicts with CSR 11, and is thus invalid, 2) legitimate use of sick leave should not be counted as an occurrence under the rule, leaving only one occurrence¹¹, 3) the IAB's prior "not sustained" finding as to seven of the seventeen occurrences prevents use of the same absences to support this discipline, 4) Appellant should have been offered the use of comp time for the absences, and 5) the absences should be mitigated by his serious motor vehicle accident in December 2007 and his need to care for his children and grandchildren as a single parent.

The question of whether a departmental rule may be upheld in light of a city employee's rights to use leave under Rule 11 has been before the Hearing Office on at least three occasions. We have ruled that a regulation controlling absences does not conflict with Rule 11 unless it is "inflexibly applied in a manner that deprives an employee of the use of accumulated sick leave under any conditions." In re Garcia, CSA 123-05, 5 (2/27/06); In re Espinoza, CSA 30-05, 2 (CSB 8/23/06). See also In re Martinez, CSA 52-02, 9 (5/15/02).

The Agency established that its mission to maintain a safe 24-hour environment for inmates and employees at the city jail requires some measure of control over staff absences. D.O. 2053.1 excepts several kinds of absences, including emergencies, pre-approved absences, and use of FMLA. In addition, command staff has been given broad discretion to exclude other absences on a showing of mitigating circumstances. I find that the rule as applied does not unreasonably restrict a departmental employee from use of sick leave.

Appellant testified that the Agency reduced the penalty for his excessive absences in 2005 to a written reprimand upon a showing of family hardship. He was aware that he could obtain pre-approval for medical appointments, but chose not to request pre-approval because he believed such requests would not be granted. He testified that at least one of the days, Jan. 22, 2008, was used for doctor's appointments for his two sons. On two other days (2/13/08 and 7/1/08), Appellant had doctors' appointments. [Exhs. L, CC.] His failure to avail himself of the opportunity to request pre-approval for those three days does not render the rule unreasonable or a denial of the right to use sick leave.

Appellant demonstrated his knowledge that FMLA leave was excluded from the rule when he claimed at the July meeting that two of his absences were covered by FMLA. His changing statements and submittal of amending health certifications confused the issue for five months, until it was finally determined that Appellant never filed an FMLA request, and the Agency never approved FMLA leave on his behalf. His argument that it was submitted only to support his claim that he really was sick during

¹⁰ Three of the listed absences (7-12-07, 11-16-07 and 3-4-08) were for less than two hours and thus do not meet the definition of an occurrence of absence under D.O. 2053.1 (3)(D)(1).

¹¹ May 29, 2008, the date of the court appearance.

the time in question does not resolve the question under the departmental rule, which prohibits even legitimate use of sick leave if it is excessive as defined therein. Likewise, his statements that he assumed he was sick on each of the listed dates does not assert an emergency, pre-approved leave, good cause for mitigation, or any other circumstance that would exclude the absences under the rule. D.O. 2053.1 properly addresses excessive use of sick leave, a different attendance problem than use of unauthorized leave. Thus, the fact that Appellant may have been sick on the days in question does not foreclose discipline under 2053.1.

In addition, the rule is clearly intended to look at the pattern of absence over a 12-month period, rather than individual days of absences. Therefore, the Agency is not prohibited in considering the same absences in two different disciplinary investigations. As to the argument that Appellant should have been offered comp time, Appellant failed to show he requested use of comp time for good reasons justifying the Agency's discretionary granting of such a request. CSR § 9-100 A.1.b.i.

Appellant argues that his auto accident on Dec. 19, 2007 and his responsibilities as a single parent should be held to mitigate his absences. However, Appellant identified only three absences caused by his accident (12/26/07, 1/1/08 and 3/4/08), and he did not apply for FMLA or otherwise request an exception to the policy for those absences. [Exhs. FF-6, II-16.] In addition, his children's medical appointments shown in Appellant's insurance documents reflect none of the absences at issue in this discipline. [Exh. 7-33 to -41.] Ms. Malatesta pointed out that Appellant worked on Feb. 6, 2008, the day Zane was born to Jennifer. [Exh. 7-32.] Appellant did not request that any specific date be excepted from the policy based on his family responsibilities, in spite of the fact that the Agency had previously reduced his discipline for excessive absences to a written reprimand based on family hardships.

I find that the Agency established that Appellant violated the rule by seventeen occurrences of absence within the twelve months from July 2007 to July 2008, and that Appellant did not prove any of the absences should be excluded under the rule. In addition, the Agency proved that the five occasions on which he used unauthorized leave established a violation of Departmental Rule 100.1.

The Agency also alleged that Appellant reported to work after his start time, in violation of CSR § 16-60 T. The Agency listed one instance of late reporting on July 12, 2007. [Exh. 1-6.] Appellant did not dispute that he reported almost an hour late on that day, and the relevant Absence Category Report corroborates that allegation. [Exh. 8-83.]

In sum, the absences established violations of CSR § 16-60 L by violation of departmental rules D.O. 100.1 and 2053.1, as well as CSR § 16-60 S, T and Y.

B. Dishonesty

The Agency based its termination action largely on Appellant's changing statements made during IAB interviews and pre-disciplinary meetings while this matter was pending over a ten-month period. The statements considered false relate to the birth dates of his grandchildren and his claim of FMLA leave.

At the first IAB interview in March, Appellant stated his absences on Dec. 26, 2007 and Feb. 13, 2008 were for his grandchildren. "Those two birthdays I know." In July, he told the nine-member panel his 17-year old daughter had a child on Dec. 26th, and reaffirmed the Feb. date was for another grandchild. At the second pre-disciplinary meeting in Dec. 2008, Appellant admitted Dec. 26th was used for his own sickness, and that the Feb. 13th absence was used for both his own sickness and to assist his daughter after the birth.

Appellant first claimed his 17-year old daughter gave birth to a child on Dec. 26, 2007. In fact, his sister/ward Jennifer gave birth in Feb. 2008, she was 19 at the time, and Appellant worked on the day of the birth. He also claimed another daughter gave birth on Feb. 13, 2008. In fact, his daughter Yvette, who was 25 at the time of Appellant's first statement, had a baby girl in June 2007. Her other child Eric was three years old in March 2008.

I find that Appellant's statements were false, and Appellant knew them to be false at the time he made them. It strains credulity to believe that a grandfather living with his children and their infants would mistake a three year old for a newborn, or that he would believe he attended the birth of a grandchild a month earlier when he had actually worked that day. Appellant's repeated effort to withhold the birth dates of his grandchildren, despite several IAB orders to produce them, is consistent with this conclusion. Appellant never gave the Agency the correct birth date of his grandchild Eric, who was two years older than asserted by Appellant. That error was made intentionally in an effort to show that his original misstatement was the result of excusable confusion. Appellant's decision not to correct the birth dates until Dec. 2008, at least two months after he discovered his error, further demonstrates a willful refusal to cooperate with IAB, in violation of his admitted duty to cooperate with investigations and to tell the truth in matters involving his employment. Appellant's explanation that "it became a personal thing" . . ."a shoving match" between himself and the IAB Sergeant does not justify his failure to cooperate with the investigation.

Appellant also attempted to mitigate his absences by submitting a signed FMLA certification at the pre-disciplinary meeting, although he never filed that certification with the Agency. Appellant stated, "I know I still have to work on this", but claimed that he was "sick on MLA" on some of the occurrences of absence. [Exh. FF-4, -6.] The Agency was thereby given notice of a claim that some of the absences were protected by FMLA. It was therefore required by that Act to determine whether the certification was sufficient or request a second opinion. 29 USCA § 2613; Miller v. AT & T, 60 F.Supp. 2nd 574 (S.D.W.Va.1999), affirmed 250 F.3d 820. Appellant compounded the

confusion by submitting several amended versions of the certification to support his claim that some of the absences should be mitigated. Even after FMLA leave was denied based on Appellant's own statements that he was able to work, he obtained and submitted an amended certification limiting its effect to days on which he was using pain medication. When given the opportunity during the meetings, Appellant contradicted his FMLA claim by stating, "I have no idea", or "I assume I was sick". Clearly, the certifications were submitted in an effort to require mitigation under the departmental policy, rather than as a good faith effort to access benefits under the FMLA. As a result, Appellant intentionally misled the Agency with regard to his entitlement to FMLA leave and mitigation of his absences under the departmental policy.

Ms. Malatesta also concluded that Appellant's false statements proved neglect of duty and carelessness in the performance of his duty to tell the truth. Neglect of duty is violated when an employee neglects to perform a duty he knows he is obligated to perform. In re Compos et. al., CSA 56-08A, 2 (CSB 6/18/09). In contrast, carelessness in the performance of a duty is proven when an employee performs a duty poorly, rather than neglecting to perform it at all. In re Galindo, CSA 39-08, 9 (9/5/08); In re Hill, CSA 14-07, 6 (6/8/07).

The Agency found that Appellant's false statements neglected his duty to be honest during internal investigations, and was careless in performing that duty. This is in effect an allegation that Appellant was dishonest. Since it adds nothing to the proven charge of dishonesty, I take no position as to whether the evidence also establishes a violation of § 16-60 A or B.

The termination letter also asserts Appellant's actions failed to reflect credit on the Agency, in violation of CSR § 15-5 governing employee conduct. The predecessor to this rule was held to be a broad statement of policy rather than a disciplinary rule. In re Dessureau, CSA 59-07, 9 (1/16/08); In re Stockton, CSA 159-02, 14 (12/03/02). The Agency also cites § 16-60 Z, which prohibit conduct prejudicial to the Agency or that brings disrepute on or compromises the integrity of the City. The Agency failed to present any evidence that Appellant's conduct had any adverse effect on the Agency or the City, other than the Agency's efforts to investigate Appellant's conduct. I find that the rule was not intended to target conduct during investigations or disciplinary proceedings. Any other interpretation would place an unnecessary burden on employees' rights to defend themselves against allegations of misconduct.

Based on the foregoing findings, I conclude that the Agency established that Appellant violated CSR § 16-60 E, L and Y, and departmental rules 200.4 and 2440.1.

C. Failure to Comply with Supervisor's Orders

The disciplinary letter also cites CRS § 16-60 J, failure to comply with a supervisor's orders, and found that Appellant produced an incorrect birth date for his nephew Zane in response to an order by an IAB investigator. The evidence is undisputed that Appellant initially refused to produce the birth dates of the infants he

claimed were born on two of the absences being investigated by IAB. Six weeks after the initial order, Appellant requested time to consult a lawyer or a union representative, and did provide the information from which the Agency was able to obtain the correct birth date for Zane, Jennifer's son. Although this conduct violated Appellant's duty to cooperate with investigations, it did not also prove noncompliance with a supervisor's orders, as there was no evidence that Sgt. DeNovellis stood in the status of a supervisor to Appellant. I therefore find no violation of this rule.

D. Appropriateness of Penalty

Appellant argues that termination is unreasonably severe for the admitted misconduct of abusing sick leave for one day, May 29, 2008. He claims that he was actually sick on the remaining days. Appellant presented no credible mitigation for the fifteen proven occurrences of absence, and thus it has been determined that he violated D.O. 2053.1, which permits disciplinary action up to and including termination. I have also concluded that Appellant was dishonest over a period of ten months during the pendency of the internal investigation into his absences, including a false and misleading claim of FMLA leave. The large number of matters on which Appellant made false statements, and the long period during which he continued those statements, support a finding that the level of dishonesty was serious and would not be remedied by any lesser penalty. CSR § 16-20.

Given Appellant's extensive past disciplinary history of similar offenses involving abuse of leave and dishonesty, and the Agency's compelling need for honesty in its deputy sheriffs based on its law enforcement mission, I conclude that the penalty of termination is within the range of punishment that a reasonable administrator may impose for the proven misconduct.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency action dated January 23, 2009 is AFFIRMED.

DATED this 28th day of July, 2009.


Valerie McNaughton
Career Service Hearing Officer