

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

Appeal No. 09-10

DECISION

IN THE MATTER OF THE APPEAL OF:

LAURA ROCK,

Appellant,

vs.

DEPARTMENT OF SAFETY, DENVER POLICE DEPARTMENT,

and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, Laura Rock, appeals the imposition of a two-day suspension by her employer, the 911 call center of the Denver Police Department (the Agency), for violation of specified Career Service Rules. The suspension was assessed on February 4, 2010. Rock filed a timely appeal on February 18, 2010. A hearing concerning this appeal was conducted on August 19, 2010 by Bruce A. Plotkin, Hearing Officer. Rock was present and was represented by her attorney-at-law, Leonard A. Martinez, Esq., while the Agency was represented by Assistant City Attorney, Franklin A. Nachman, Esq.

All exhibits for both sides, Agency's 1-16 and Appellant's A-F, were entered into evidence by stipulation. The Agency called the following witnesses: Ernest Franssen, Shenikwa Novacich, Christine Bradshaw, and Carl Simpson. Rock testified on her own behalf, with no other witness presented.

Immediately prior to hearing, Rock withdrew her age discrimination claim. To the extent she had claimed a hostile work environment, that claim was also withdrawn.

II. ISSUES

The issues presented for appeal were:

A. whether Rock violated specified Career Service Rules and Denver 911 attendance policies;

B. whether retaliation was a substantial or motivating factor in Agency's disciplinary action against Rock;

C. if Rock violated any of the above-cited Career Service Rules, and if retaliation was not a substantial or motivating factor for assessing discipline, whether a two-day suspension assessed by the agency was reasonably related to the seriousness of the established offenses.

III. FINDINGS: DISCIPLINARY CASE

The salient facts in this case were not disputed. Rock has been employed with Denver 911 Communications Center as a Police Dispatcher since April 26, 1993. Her superiors consider Rock to be an excellent dispatcher¹ with overall work review ratings of "exceeds expectations" and "successful," [Exhibit 16]. The Agency's only reservation about Rock's performance is her use of sick leave.

911 dispatchers are essential employees whose attendance is critical to serving the Agency's mission. Any absence by a dispatcher creates economic and logistical problems such as overtime pay and juggling of schedules. [Bradshaw testimony]. In July 2007, the Agency implemented a new attendance policy. Under the policy, attendance became a more closely monitored performance factor. An employee with four or fewer absences now receives a rating of "exceptional" for the accountability and ethics portion of her review. Five to seven instances of absence results in a rating of "successful." An Agency employee with more than seven instances of absence in a rolling year is assessed a "needs improvement" rating. [Exhibit 12, 5-6].

Before 2007, an employee could maintain a "meets expectations" or "successful" attendance rating with 95-97% successful attendance, meaning up to thirteen absences. [Exhibit 16]. From the year 2000 through 2007, Rock used sick leave as follows:

<u>Year</u>	<u>Hours of sick leave taken</u>
2000	111.5
2001	104
2002	112
2003	64
2004	64
2005	56
2006	72
2007	99.

¹ See, e.g. Exhibit D-7 written by the Agency director. "Laura, you are an extremely talented dispatcher and your employee file is filled with accolade upon accolade."

After the 2007 attendance policy went into effect, Rock was absent 8.5 times in 2008 and 4 times during her 2009 review period from May through July 2009.

In each of the above-referenced reviews, Rock's supervisors noted concern about her use of sick time. [Exhibits 11; 16]. In Rock's 2006-2007 PEPR, issued on May 1, 2007, her supervisor stated:

[B]ased on Dispatcher Rock's use of sick time this rating period, quarterly meetings will be held between Dispatcher Rock and her immediate Supervisor. Should significant improvement not occur, the employee may be subjective to the progressive disciplinary process. Additionally, a 'Needs Improvement' rating in this category would negatively impact the overall PEPR rating in the upcoming evaluative period.

[Exhibit 16-146]. Rock acknowledged that she was trained in the 2007 attendance policy in June 2007. [Exhibit 4-2; Rock Testimony]. In December 2007, Rock's supervisor, Shenikwa Novachich, met with Appellant to discuss her attendance and to issue a verbal warning, stating that if Rock were absent again she would be subject to a written reprimand. [Exhibit 4-2; Rock Testimony]. Rock then used two sick leave days in January 2008. [Exhibit 3-3]. On March 3, 2008, Novachich issued a written reprimand to Rock for abuse of sick leave. [Exhibit 4-3]. The written reprimand noted

[D]ispatcher Rock's attendance record clearly indicates an atypical and excessive number of absences over consecutive years. As an employee of the city with fifteen years of seniority, it is unusual and alarming to note that Dispatcher Rock has less than 40 hours of sick leave available to her....Any further violations may result in additional disciplinary action up to and including dismissal.

On September 29, 2009, the Agency approved Rock's FMLA request for leave due to influenza from September 20 - 23, 2009. [Exhibits 5, 6]. On October 27, 2009, the Agency approved Appellant's second FMLA request for leave from October 27-December 23, 2009 due to shoulder surgery. [Exhibits 7, 8]. This second leave was extended through January 3, 2010. [Exhibit 9].

On October 29, 2009, the Agency notified Rock that it was contemplating discipline for abuse of sick leave. The letter stated Rock has

continued to demonstrate a pattern of excessive absences, despite years of repeated conversations and counseling by Denver 911's leadership team, receiving a PEPR rating of "needs improvement" in the attendance section, and progressive discipline in the form of a letter of reprimand addressing your need to take accountability and ultimately improve your overall attendance....While it is reasonable for an employee to have a challenging and/or unhealthy year, your attendance record

clearly indicate an atypical and excessive number of absences over consecutive years. As an employee of the city with sixteen years of service, it is unusual and alarming to note that you have 42.25 hours of sick leave available. This is only 2.25 hours more than you had nineteen months ago when you received the written reprimand on March 3, 2008.

[Exhibit C].

The Agency convened a pre-disciplinary meeting on February 4, 2010. Rock attended with her legal counsel. After the meeting, Director Simpson issued a letter on February 4, 2010, notifying Rock of the two-day suspension, from February 25-26, 2010. This appeal followed on February 18, 2010.

IV. JURISDICTION AND REVIEW

Jurisdiction over the Agency's assessment of a suspension is proper under Career Service Rule (CSR) § 19-10 A. 1. The City Charter § C5.25(4) and CSA 2-104 b) require the Hearing Officer to determine the facts in an appeal *de novo*, meaning hearing the evidence as though no previous action had been taken. In re Lung, CSB 42-07, 4 (1/30/09), citing Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

V. ANALYSIS OF THE ALLEGED CAREER SERVICE RULE VIOLATIONS

The Agency alleged Rock abused her sick leave, resulting in a violation of three Career Service Rules.

A. CSR § 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards. When citing this subsection, a department or agency must cite the specific regulation, policy or rule the employee has violated.

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

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

The Agency specified the Agency's attendance policy, §1.8.1, which states employees are rated for attendance in their annual work reviews (PEPRs) as follows:

1. Exceptional: 0-4 instances
2. Successful: 5-7 instances
3. Needs Improvement: more than 7 instances

In order to prove Rock violated the Agency's attendance policy, and therefore abused leave in violation of CSR 16-60 K., the Agency must prove 1) it established an attendance standard; 2) it clearly communicated that standard to Rock; and 3) Rock failed to meet that standard. See In re Mounjim, CSA 87-07, 8 (7/10/08) (*add'l citations omitted, affirmed In re Mounjim*, CSB 87-07a, 3-5. Performance standards include those requirements which are contained in performance evaluations, classification descriptions, or, pertinent to this case, in agency or division policies and procedures. In re Dessureau, CSA 59-07, 7 (1/16/08), *citing In re Routa*, CSA 123-04, 3 (1/27/05).

Rock was aware the Agency's new attendance policy went into effect in July 2007. [Exhibit 4-2; Rock Testimony]. In addition, she did not dispute that her supervisor discussed attendance issues with her in her 2007-2009 PEPR evaluations, and she did not dispute that her supervisor issued verbal and written reprimands for violation of the Agency's attendance policy. [Novachich testimony]. Rock's acknowledgments of the attendance policy establish the first and second elements of the violation, the establishment of a standard, and clear communication of the standard.

In Rock's verbal reprimand, on December 27, 2007, Novachich warned Rock that further absences would subject her to progressive discipline. [Exhibit 4-2, 4-3]. Rock then missed two days in January 2008. [Exhibit 3-3]. Novachich issued a written reprimand, dated March 3, 2008.

In a pre-PEPR meeting on April 13, 2009, Novachich told Rock she had seven absences and her next absence would result in a "needs improvement" on her PEPR. [Exhibit 10-3]. One week later, Rock used an additional ten hours of sick leave. [Exhibit 10-3]. The third element, failure to meet the attendance standard, is established.

To prove a violation of CSR 16-60 L., the Agency need only to prove there was a written policy, the employee was aware of the policy, and the employee failed to follow the policy. In re Mounjim, CSA 87-07, 6 *affirmed on other grounds, In re Mounjim*, CSB 87-07a (1/8/09). The same evidence which established the elements of CSR 16-60 K., above, also establish the elements of this violation. Rock was aware of these policies, and failed to follow them.

The Agency's evidence for Rock's alleged violation of CSR 16-60 S. was the same as for CSR 16-60 K., and L., above. While the Agency established a prima facie case that Rock violated all three Career Service Rules, the matter does not end there.

A department or agency has the right to control the attendance of its employees in order to allow it to plan for staffing to accomplish its work. In re Garcia, CSA 123-05, 5 (2/27/06), *citing to In re Martinez*, CSA 52-02 (5/15/02). At the same time, agency policies must be consistent with the application of the Career Service Rules so that agency rules and policies which create an

irreconcilable conflict with the Career Service Rules are unenforceable. See In re Espinoza, CSA 30-05 (1/11/06), *affirmed*, In re Espinoza, CSB 30-05.

I see no significant difference in the pertinent facts and conclusions here and in Espinoza. In both cases, the agency did not dispute the appellant, or a family member, was actually incapacitated each time appellant took sick leave. [Espinosa; Bradshaw testimony; Novachich testimony]. In both cases, the agencies agreed the appellants never exhausted their sick leave balance. *Id.* In both cases, the Career Service Rules permitted the appellants, at their discretion, to use banked sick leave for an incapacitating illness.² Finally, in both cases, the agencies' policies punished the appellants' use of more than six days of sick leave, irrespective of the legitimacy of the Appellants' reason for sick leave and irrespective of whether such leave was banked. *Id.*³ I conclude, as in Espinoza, that where the Agency did not dispute its employee's use of sick leave was for a permissible reason, and where the employee used banked leave, the Agency failed to establish an abuse of leave within the meaning of Career Service Rules.⁴ In the present case, the Agency's assessment of discipline for Rock's legitimate use of sick leave also violates CSR 5-62 which states a Career Service employee "is entitled to the full benefit of leave provisions in accordance with Rule 10, **Paid Leave**." CSR 5-62 #3 [emphasis in the original].

Thus, even though an agency establishes a *prima facie* case that an appellant violated an agency policy or rule, if such policy or rule irreconcilably conflicts with a Career Service Rule, the Career Service Rules take precedent and the policy or rule is unenforceable. In short, agencies may not prohibit what the Career Service Rules permit. For reasons stated here and above, the Agency failed to prove, by a preponderance of the evidence, that Rock violated CSR 16-60 K., L., or S.

VI. ROCK'S RETALIATION CLAIMS.

Rock claimed the Agency disciplined her in retaliation for filing an EEOC claim and for taking leave under the Family Medical Leave Act.⁵ The current test

² CSR 10-33 (formerly CSR 11-32 at the time the Espinoza decision was filed), provides, in pertinent part, "[s]ick leave may be used when an employee is incapacitated by sickness or injury...."

³ The Agency claimed Rock's use of sick leave was abusive because she exhibited a "pattern of sick use" [sic]. [Agency's notice of discipline]. The only pattern that emerged from the evidence, however, was that Rock regularly used most, but not all, her sick leave for legitimate reasons. This evidence, alone, is insufficient to establish an abuse of sick leave. Espinoza, *supra*.

⁴ In addition, the Agency's inconsistent testimony exposed the problem of trying to reconcile its policy with the Career Service Rules. For example, Novachich testified "the Agency does not frown on the benefit of sick leave, and if you have sick leave accrued, you should take it if you are sick." [Novachich testimony]. Even though Novachich testified she did not dispute the legitimacy of Rock's illness, she said if Rock was sick, she would not have required her to come to work. *Id.* Bradshaw testified the Agency does not encourage employees to come to work if they are sick. [Bradshaw testimony]. Simpson testified if an employee is legitimately sick, and they have sick time allotted to them, they are allowed to use it. [Simpson testimony]. Incongruously, all three believed Rock's use of sick leave must be penalized even though her use of it was legitimate.

⁵ 29 U.S.C. 2601; 29 CFR 825 (1993).

to establish a retaliation claim is whether the employee can show that a reasonable employee would have found the challenged action materially adverse. Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405, 2415 (U.S. 2006). In the context of this case, that means the Agency's suspension might well have dissuaded a reasonable worker from making or supporting an EEOC claim or FMLA leave. In addition, Rock must show a causal connection between the protected activity and her suspension. See Metzler v. Federal Home Loan Bank of Topeka, 464 F.3d 1164, 1171 (10th Cir. 2006).

A. EEOC retaliation claim.

Rock filed her EEOC claim on May 27, 2008. The Agency issued its contemplation notice to Rock on October 29, 2009, some one and one half years later. Even if the first two elements of retaliation were established, the period between the protected activity and the Agency action is too remote to establish a causal connection, and no other evidence was provided to close the gap. For that reason, Rock's EEOC retaliation claim fails. Moreover, Franssen, the Agency's Operations Manager, testified without rebuttal that he was unaware Rock filed an EEOC claim until he met with counsel to prepare for this appeal. [Franssen testimony]. Further, Rock did not mention retaliation in her pre-disciplinary meeting, or in her original appeal filing.

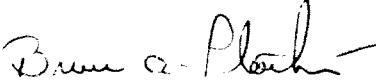
B. FMLA retaliation claim.

Rock also contended the Agency retaliated against her for taking leave under the FMLA in September 2009 and October 2009. [Exhibits 5-7]. Franssen and Novavich stated they knew Rock was on FMLA leave for shoulder surgery before the Agency's contemplation letter issued, two days after Rock's second FMLA leave. [Franssen, Novavich testimony]. Novavich testified her managers told her, in August 2009, to draft a contemplation letter to Rock based on Rock's pattern of sick leave. [Novavich Testimony]. Since Rock did not request FMLA leave until September, there could not have been a causal connection between the Agency's decision to discipline Rock and her FMLA request. Rock did not rebut Novavich's recollection of the timing of the Agency's decision, and she offered no other evidence that might establish a causal connection. Rock's FMLA retaliation claim fails for those reasons.

VII. ORDER

- A. The Agency's two-day suspension against Rock, on February 26 and 27, 2010, is **REVERSED**.
B. Rock's retaliation claims are **DISMISSED**.

DONE October 5, 2010.


Bruce A. Plotkin
Hearings Officer
Career Service Board