

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

Appeal No. 124-05

DECISION

IN THE MATTER OF THE APPEAL OF:

MICHAEL BRITTON,
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Deputy Michael Britton, appeals a 40 hour suspension assessed by his employer, the Denver Sheriff's Department (Agency), for violation of specified Career Service Rules. The suspension was served November 6 through November 9, 2005. A hearing concerning the appeal was conducted by Bruce A. Plotkin, Hearing Officer, on March 7, April 16, May 9, and July 13, 2007. The Agency was represented by Robert A. Wolf, Assistant City Attorney, while the Appellant was represented by Reid Elkus, Esq. Agency exhibits 1-13 and Appellant's exhibit A were admitted. The Agency presented the following witnesses: Major Phil Deeds; Director William Lovingier; and Manager Alvin LaCabe Jr. The Appellant testified on his own behalf and presented no other witnesses.

All citations to the Career Service Rules (CSR) in this Decision refer to the Rules as they were in effect on the date the Appellant filed this appeal, October 31, 2005. Substantial substantive and numerical changes have since occurred.

II. ISSUES

The only issues presented for appeal were whether the Appellant violated any of the following Career Service Rules: 16-50 A. 13); 20; 16-51 A. 3); 5) and 11).

III. FINDINGS

Beginning in 2003, the Agency came under pressure from the Denver Office of Budget Management to reign in its sick-leave use. In response, the Agency implemented a new department order in May 2004 which restricted Agency employees' unplanned use of sick leave to 7 days per year without consequence. Under the new order, an eighth sick day, even if earned, would result in a verbal reprimand, a ninth day would result in a written reprimand, and a 10th day of unplanned sick leave would require a pre-disciplinary meeting and might result in more severe disciplinary action up to and including dismissal.

The Appellant is a deputy sheriff at the Agency. Between October 2004 and September 2005, he took sick leave on the following days:

10/10/04
10/19/04
10/31/04
11/07/04
11/30/04
12/19/04
12/20/04
12/26/04
12/27/04
01/02/05
02/27/05
06/05/05
08/31/05
09/12/05
09/25/05

The listed absences through 12/27/04 resulted in a verbal warning which the Appellant did not appeal. The next absence, 1/2/05 resulted in a written warning which the Appellant did not appeal. The remaining five listed absences formed the basis of the Agency's decision to suspend the Appellant in the present case.

On October 13, 2005, the Agency conducted a pre-disciplinary meeting attended by the Appellant and his attorneys Reid Elkus and Don Sisson. The Appellant stated that beginning November 2004, he took sick days to attend his wife's obstetric appointments or to attend court appearances related to his divorce or child custody.

The Appellant and his wife had begun acrimonious divorce and custody proceedings beginning October 2004. [Exhibit 13, p.3]. During the last week of October or first week of November 2004 the Appellant's wife,

one month pregnant with twins, developed complications relating to her pregnancy. One of the twins she was carrying died *in utero*. She gave birth to the remaining twin on June 3, 2005.

When the Appellant's spouse and doctor forbade the Appellant from attending her obstetric appointments, the Appellant went anyway. She then obtained a restraining order to prohibit his attendance at her appointments. The Appellant continued to appear at her appointments, even though he was forbidden from entering the exam area. The Appellant also took some of the sick days cited above to attend court appearances related to his divorce or custody proceedings.

On October 26, 2005, the Agency notified the Appellant that he would be suspended for 40 hours, from November 6 through November 9.¹ The Appellant filed his appeal on October 31, 2005.

IV. ANALYSIS

A. CSR 16-50 A. 13) Unauthorized absence from work...

Manager LaCabe, who was decision maker in assessing discipline, affirmed in the following exchange, that there was no basis upon which to discipline the Appellant under this rule. Question: "Do you have any evidence before you, when rendering the decision to discipline Deputy Britton, that he in fact violated that very specific policy?" Answer: "No sir." [LaCabe cross-exam]. Accordingly, I deem this claim withdrawn.

B. CSR 16-50 A. 20) Conduct not specifically identified herein may also be cause for dismissal.

LaCabe stated "I did not find anything in this case that would be a violation of that [rule] to the extent that I sustained that [violation under this rule]." He explained that between the time of lodging the original charge and the hearing date, In re Espinoza, CSA 30-05 (1/11/06) issued, causing him to change his assessment of this rule. [LaCabe cross exam]. He concluded "I would not find at this time, given the interpretation of how this rule is to be used, that there is a violation of 16-50 A. 20)." Accordingly, I deem this claim is withdrawn.

C. CSR 16-51 A. 3) Abuse of sick leave...identified in Rule 11 Leave.

This rule specifies the permissible uses of sick leave, and is subject to the Family and Medical Leave Act of 1993. The issue to decide is whether the Agency proved the Appellant's stated reasons to take sick

¹ Deputy Sheriff's work four 10-hour shifts per week.

leave failed to comply with the “necessary care and attendance” clause of the rule as claimed by the Appellant.

LaCabe stated he assessed discipline under this rule because the Appellant’s attendance at his wife’s obstetric appointments and his attendance at court hearings concerning custody of his children were not complying conditions under the “necessary care and attendance” requirement of CSR 16-51 A. 3). The Appellant posits that attendance at his wife’s obstetric appointments was a proper use of sick leave. At hearing, he denied ever using sick leave to attend court appearances.

1. Necessary care and attendance. The most important facts here are: none of the dates in question were for the Appellant’s personal illness; the Appellant’s child was born on June 3, 2005; and the Appellant did not claim he needed to look after or care for his wife or for his newborn after June 3. Based on these facts, after June 3 the Appellant had no cause under the “necessary care and attendance” clause of CSR 11-32 to use sick leave for June 5, August 31, September 12, or September 25. The Appellant admitted as much.

Question: To the extent that your wife gave birth on June third of '05, the absences for August and September obviously weren't related to anything regarding your wife's health, correct?

Appellant: That's correct.

[Exhibit 13].

In addition, the Appellant stated his motivation to attend his wife’s appointments as “I still have to attend these appointments that I’m going to because I’m not going to go into court with someone claiming abandonment,” [Exhibit 13, p.5, lines 17-20], and “[t]he only thing I was concerned about was to protect my job, to maintain some type of stature so she doesn’t get sole custody of them.” *Id* at p. 8, lines 19-21]. These statements, and those above, prove by a preponderance of the evidence, that the Appellant’s attendance at his wife’s obstetric appointments did not meet the sick leave requirements under the “necessary care and attendance” clause.

2. Court Appearances. A plain reading of CSR 11-32 does not support using sick leave to attend court appearances. At hearing, the Appellant denied he used any of the sick days in question to attend court appearances. However, during his pre-disciplinary meeting, both the Appellant and his attorney, Reid Elkus, referred extensively to the Appellant’s use of sick days to attend court appearances.

Elkus: I don't know if you meant this, Chief, but with respect to all these dates here, I don't think my client is saying that every one of these dates is involving a court appearance. Some of these are involving medical issues involving his wife's pregnancy issues and some of them are involving the court appearances.

...

Chief Foos: Could you provide documentation to support those court appearances, medical health...What I'm saying is, can you mitigate the days that we have here with court appearances and medical issues?

Appellant: Yeah. I can talk to my attorney, but I mean, as far as the medical issues, I can't get you anything.

Elkus: I think the only thing we may be able to get for you, it sounds like it's just the issue of all the court dates... we'll try to supplement with this panel, as soon as possible, with respect to the court dates that he was available. And we will try to the best of our ability to try to get you some medical dates.

The Appellant's apparent acknowledgement of using sick leave here and his later denial of it at hearing cannot both be true. I find the Appellant's offer to seek proof of his court appearances and failure to do so, more compelling than his later blanket denial.

At hearing Elkus attempted to separate his own statements from those of his client, but the exercise is inconsequential. Both he and the Appellant had offered to provide proof of which sick days were for court appearances, and the Appellant's failure to repudiate his attorney's statements ratified them. Because the Appellant used some of the above-specified days to attend court appearances, and such use of sick leave is improper under CSR 11-32, the Agency proved the Appellant's use of sick leave to attend court appearances failed to comply with the "necessary care and attendance" clause of CSR 16-51 A) 3.

D. CSR 16-51 A. 5) Failure to observe departmental regulations.

The Agency claimed the Appellant violated the following department regulations.

- 100.1** Deputy Sheriff [sic] and employees will not be absent from duty without authorized leave. Any such absence will constitute cause for dismissal or other

disciplinary action as provided by Career Service Authority Rules.

The same elements that proved the Appellant violated CSR 11-32, above, apply here to prove the Appellant violated Sheriff's Department Order #100.1.

100.3 Deputy Sheriffs and employees, after individual and specific notification, shall abide by any special orders and procedures required of them related to calling in sick, providing doctor's excuses, reporting their movements while on sick leave or periodic checks by authorized personnel.

There was no evidence the Agency gave any special order to or required the Appellant to follow any special procedure. The Agency failed to prove this claim.

200.12 Deputy Sheriff [sic] and employees will not disobey, neglect or refuse to obey, any lawful order of a supervisor.

This department order contains similar proof to CSR 16-50 A. 7), Refusing to comply with the instructions of an authorized supervisor...

As with the Career Service Rule, it is insufficient for the Agency merely to claim all Agency rules are orders or instructions from an authorized supervisor, since the proof for violating this rule would then become simply the proof the employee violated any other department rule. The Agency presented no evidence of any direct order to the Appellant that he failed or neglected to obey. Therefore the Agency failed to prove this violation.

2053.1. Employee Use of Sick Leave. This order is subject to the standards set forth in CSR 11-32, see In re Espinoza, CSA 30-05 (1/11/06), which define the conditions under which sick leave may properly be taken. The first portion of CSR 11-32 defines the employee's own medical conditions for which leave is allowed. The second portion defines the conditions under which sick leave may be taken to tend to a family member. The third portion restates an employee's right, under federal law, to take qualifying family medical leave. Since the Appellant denied any of the dates at issue were for his own medical issues and he did not obtain family medical leave, the key to this violation is whether the Appellant's use of sick leave constitutes "necessary care and attendance during sickness, or for death, of a member of the employee's immediate family...". For reasons stated

above in the discussion under “CSR 11-32,” I find the Appellant did not use sick leave within the meaning of the “necessary care and attendance” clause. Therefore the Agency proved the Appellant violated this rule by a preponderance of the evidence.

While the Appellant’s absences after June 3 were sufficient to invoke a penalty under this rule² there are additional reasons for concluding the Appellant’s use of sick leave violated this rule. During the pre-disciplinary meeting, when the Appellant’s attorney plainly stated some of the Appellant’s absences were attributed to court appearances, those statements called for a strong denial, but the Appellant - who otherwise never hesitated to speak out – ratified his attorney’s statements, as indicated in the exchange cited above and additionally in the following exchange.

[Unidentified Agency representative] ...if we could get an affirmative statement as to which dates you’re saying were specifically related to that which you COULDN’T get the documentation...but then, more specifically, the court dates that occurred. [emphasis in original].

Elkus: ...we’ll try to supplement with this panel, as soon as possible, with respect to the court dates that he was available.

[Exhibit 13].

The exchanges cited above and here make it clear that, despite his later denial, the Appellant sought to use sick leave to attend court appearances related to his divorce or custody issues. This use of sick leave fails to comply with the “necessary care and attendance” clause under CSR 11-32.

In addition, during the pre-disciplinary meeting, the Appellant stated “[o]n Tuesday I was going to have to call in sick again because now an emergency hearing was being held in Arapahoe District Court and luckily we had some additional staffing and Steve Shelton gave me a comp on that day.” While the Appellant was referring to a date close to the October 13, 2005 pre-disciplinary meeting, rather than one of the dates in question, the notable point is the Appellant said he was going to have to take a sick day “again,” to attend a court hearing, inferring he had previously taken sick day(s) to attend court. Therefore, it was not only the Appellant’s attorney’s statements that inculcate the Appellant, but the Appellant himself.

² If the Appellant had taken sick leave on June 3 to attend the birth of his child, that would have been a legitimate use of sick leave under CSR 11-32, as such leave is permitted under the FMLA.

Finally, the Appellant claims the Agency's count of sick days is incorrect. He counts nine absences between May 12, 2004, the first absence after implementation of 2053.1, and May 12, 2005. He concludes those nine absences do not fall under the mandatory disciplinary provision of Rule 2053.1. [Exhibit 13, p.13, lines 11-23]. The rule, however, explicitly states an employee shall be disciplined for 10 or more absences in "any" consecutive 12 month period, so the Appellant's selection of May 2004 to May 2005 is not a limitation imposed by the rule.

E. CSR 16-51 A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

Where discipline was determined under specific disciplinary rules, it becomes moot to determine whether that conduct was not specifically identified elsewhere. In re Smith, CSA 17-05, 7 (7/07/05). The Agency alleged and proved the Appellant violated other, specific provisions under the Rules, therefore I do not consider this claim.

V. CONCLUSIONS

The Agency proved the Appellant violated CSR 16-51 A. 3), and CSR 16-51 A. 5) via Sheriff's Department Orders 100.1 and 2053.1. The Agency failed to prove the Appellant violated Department Order 100.3 and 200.12. The Agency withdrew, *de jure*, its claims under CSR 16-50 A. 13, 20), and I did not consider its claim under CSR 16-51 A. 11) for reasons stated earlier. What remains is whether the Agency's assessment of a five-day suspension against the Appellant conformed to the purpose of discipline under CSR 16-10.

VI. PROPRIETY OF DISCIPLINE

The purpose of discipline under the Career Service Rules is to correct inappropriate behavior. CSR 16-10. In determining the degree of discipline, appointing authorities must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-20. In re Ortega, CSA 81-06, 16 (4/11/07).

A. Severity of Offense. In 2003, the Denver Office of Budget and Mgt. required the Agency to control an evident abuse of sick-leave within the department. Abuse of sick leave costs to the Agency included: excessive overtime pay, loss of agency morale, and increasing the duties of the deputies covering for absent colleagues. In re Espinoza, CSA 30-05 (1/11/06). Thus the Agency's goal of reining in excessive sick leave use became vitally important for the Agency, resulting in

implementing Sheriff Department Rule 2053.1. Thus, a violation of that rule is a significant offense.

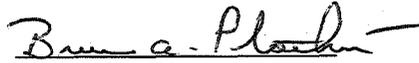
B. Past record. The Appellant claims his impeccable employment history should have mitigated the Agency's choice of discipline. However, the Appellant received a verbal reprimand on December 28, 2004 for excessive use of sick leave, then a written reprimand on February 16, 2005. He was therefore on ample notice of the issue.

C. Penalty most likely to achieve compliance. Despite the assessment of a verbal reprimand then a written reprimand for the same causes, the Appellant continued to misuse sick leave. Thus, the earlier two disciplinary actions were ineffective in achieving compliance. In light of the severity of the offenses, the failure to achieve compliance with lesser penalties, and the Appellant's continued non-complying use of sick leave, the Agency's assessment of a 40 hour suspension complied with the purpose of discipline under CSR 16-10, Purpose of Discipline.

VII. ORDER

The Agency's assessment of a 40-hour suspension against the Appellant, from November 6-9, 2005, is AFFIRMED.

DONE on July 25, 2007.


Bruce A. Plotkin
Hearing Officer
Career Service Board