

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

Appeal No. 21-05

DECISION

IN THE MATTER OF THE APPEAL OF:

TERRELL EDWARDS,
Appellant,

vs.

DENVER DEPARTMENT OF HUMAN SERVICES and the City and County of Denver, a
municipal corporation,
Agency.

The hearing in this appeal was held on December 29 - 30, 2005 and concluded on January 9, 2006 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Teresa A. Zoltanski, Esq. The Agency was represented by Assistant City Attorney Dianne Briscoe. Linda Maldonado served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the following findings of fact, conclusions of law and order are entered herein.

I. INTRODUCTION

Appellant Terrell Edwards is an Administrative Support Assistant II (ASA II) for the Department of Human Services (Agency) who is assigned to the Family and Adult Division. Appellant appeals her suspension for five days imposed on March 10, 2005. The Agency's Exhibits 2 – 11 were admitted into evidence. Appellant's Exhibits A, C, D, H, K – M, P, R-1 and R-1 were also admitted.

The issues presented herein are as follows:

- 1) Did the Agency establish that Appellant violated the cited section of the Career Service Rules (CSR), and
- 2) Was a five-day suspension justified under the CSR's disciplinary rules?

II. FINDINGS OF FACT

The Agency suspended Appellant based upon its claim that Appellant's absences in January and February 2005 violated a number of Career Service Rules. This appeal asserts that Appellant was denied family medical leave in violation of the Family Medical Leave Act (FMLA), 29 USCS 2612, and that she was improperly disciplined for requesting sick leave for family and personal illnesses.

Linda Maldonado, Supervisor ASA I and Appellant's supervisor since September 2004, testified that Appellant requested sick leave in violation of attendance rules on January 4 - 7, 13, 14 and 24, and February 3 and 4, 2005. She asserted that Appellant was absent without authorization on January 27, 28 and 31, and February 10 and 11, 2005. Those absences led to the imposition of 61.5 hours of unauthorized leave, and a letter that discipline was being contemplated.

After a pre-disciplinary meeting on February 24, 2005, Appellant was suspended for violations of specific Career Service Rules. Three previous verbal reprimands, one written reprimand and a three-day suspension were considered in determining the level of discipline to be imposed pursuant to CSR § 16-20. In addition to the five-day suspension, Appellant was ordered to comply with a work plan which required her to provide a doctor's statement for all sick leave used, and to meet with her supervisor weekly for the next thirty days. [Exh. 3.]

Appellant does not dispute the dates and times of her absences. Appellant testified that she applied for intermittent FMLA leave in October 2004 for her undiagnosed abdominal pain and nausea. [Exh. D.] The FMLA coordinator requested additional information, including the time frame covered by the request, an explanation of how the abdominal pain and nausea met the criteria of a serious health condition under the Act, and whether it was a request for intermittent use or future need. [Exh. 8.] In response, Appellant submitted her doctor's notes summarizing the history of treatment. [Exh. L.] The application was denied on December 13th. [Exh. M.]

Appellant learned about the denial from Staff Attorney Nora Nye, Esq., of the Colorado Federation of Public Employees, who then exchanged a series of e-mails and letters with Deputy Manager Kevin Patterson disputing the denial. [Exhs. 5, P.] Appellant testified she relied on Ms. Nye's advice in deciding not to submit the additional information requested by the Agency in support of her FMLA application. [Exh. P.]

Ms. Nye testified that she is generally familiar with the requirement of the FMLA as a part of her practice in employment law. Ms. Nye stated she based her recommendation not to submit the information on her opinion that FMLA requires approval of leave by an employer when a physician certifies that a condition qualifies as a serious health condition, unless the employer pays for a second opinion under 29 USCS § 2613 (c) and 29 CFR 825.306, ¶¶ 1 & 2(i).

Appellant's treating physician Dr. Sereena Coombes testified by telephone that Appellant was sometimes seen two or three times a month during this period for a recurring infection requiring antibiotics, and therefore needed family medical leave for absence plus treatment. Dr. Coombes stated the condition was later diagnosed as vaginal cysts, but that at the time of the application for leave, only the symptoms were medically certain. She confirmed that Appellant filled out the certification form's first five questions, including the section requiring a description of the medical facts, in which Appellant wrote "abdominal pain and nausea." [Exh. D.] Appellant returned to the doctor's office in November with a request that the doctor list the dates of other treatment. The doctor did so. [Exh. L.]

Senior Agency Personnel Analyst Paul Sienkiewicz testified that as Agency FMLA coordinator he checks applications to make sure they contain the medical facts needed to qualify for family medical leave. On November 12, 2004, he requested clarification of the dates of coverage, whether it was a request for intermittent or continuous leave, and an explanation of how the listed symptoms qualified as a serious health condition. [Exh. 8.] In response, Appellant submitted Dr. Coombes' note listing other dates of treatment, and informed Mr. Sienkiewicz that she would not be submitting any other information. The committee decided Appellant had not answered the questions in the November 12th letter, and denied the application for leave. [Exh. M.]

Deputy Manager Kevin Patterson testified that he was a part of the committee that reviewed and denied Appellant's application for leave because it did not indicate a serious health condition. He also stated it was the policy of the Agency to give leave without pay (LWOP) if there is a pattern of abuse of sick leave, and that doctor's notes were to be submitted as soon as the employee returned to work. In the Family and Adult Division, employees with leave balances under 40 hours were required to obtain pre-approval for certain types of leave.

Appellant testified that when Ms. Maldonado became her supervisor in Sept. 2004, they discussed her excessive use of leave. Appellant informed Ms. Maldonado that she goes to the doctor a lot, and Ms. Maldonado responded with a suggestion that she apply for FMLA. "She was protecting my job," stated Appellant. Appellant was placed under stricter attendance rules on November 9, 2004 because her supervisor believed she was taking excessive time off. Those rules required her to give her supervisor at least 24 hours notice of any request for sick leave, obtain her immediate supervisor's permission before she left work, and submit a doctor's verification that she was ill and unable to work when requested. [Exh. C.] Ms. Maldonado discussed the new rules with Appellant, gave her the original and placed a copy in her file. In addition, all employees under Ms. Maldonado were instructed to call her at home when sick, and to keep a sick leave balance of at least 40 hours. Ms. Maldonado met with Appellant in January on her attendance issues in an attempt to impress Appellant with the seriousness of the problem.

Appellant admitted the following facts with regard to her leave requests. On Jan.

4th she left a message on Ms. Maldonado's work number that she was home sick, then called the backup supervisor and asked that the message be forwarded to Ms. Maldonado. On Jan. 5th, she left a voice mail message for Ms. Maldonado that a co-worker named Bernadine gave her permission to go home early because of an upset stomach. On Jan. 6th and 7th, she left a message that she was sick. She informed Ms. Maldonado that she did not go to the doctor on those days because she could not afford to pay for the medications that would be prescribed. On Jan. 13th, Appellant called in sick because of abdominal pains. On Jan. 14th, Appellant was again off sick and went to her doctor, who agreed only to provide her with a note that said, "stated she has been ill from 1-3 to 1-14." [Exh. 11, p. 3.] Ms. Maldonado did not accept that note as justification for approved sick leave. On Jan. 24th, Appellant called in sick. On Jan. 27th, Appellant left early after informing a co-worker that her daughter was sick. On Jan. 28th and 31st, Appellant arrived at work late. On Feb. 3rd, Appellant telephoned Ms. Maldonado that she had been seen in the emergency room the night before and would not be in. Appellant called in sick on Feb. 4th because the emergency room doctor recommended that she stay off work for 48 hours. The emergency room documents were turned in to her supervisor late because Appellant had left them in her father's truck. [Exh. R.]

Appellant testified that when she asked to leave early to attend court on Feb. 2nd, Ms. Maldonado "was at her rope's end with me," and refused. Appellant then asked for Feb. 10th and 11th off so she could attend a court appearance made necessary by her failure to appear on Feb. 2nd, or there would be a warrant out for her arrest. At Ms. Maldonado's urging, Appellant produced a document related to that request. After reviewing it, Ms. Maldonado told her the document did not indicate Appellant needed to be off work for those two days, and so that request too was denied. At the hearing, Appellant admitted she needed the time off on Feb. 2nd to pay her rent by 3:00 p.m. rather than go to court, since it was then two months' overdue. Ms. Maldonado testified that the court documents given to her by Appellant showed that the Feb. 10th matter was in fact an answer date rather than a hearing or trial.

As a result of her absences on the above fourteen days, Appellant received 61.5 hours of unauthorized leave without pay, all of which was caused by denial of sick leave, and an additional 40 hours of LWOP. [Exhs. 11, H.] At the beginning of the year, Appellant had a sick leave balance of eight hours. At the end of January, that increased to twelve hours. [Exh. H, p. 1.]

III. ANALYSIS

In this de novo hearing on the appropriateness of the five-day suspension, the Agency has the burden to show by a preponderance of the evidence that Appellant violated the disciplinary rules as alleged, and that the discipline was within the range of discipline that can be imposed under these circumstances. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.); In re Gustern, CSA 128-02, 20 (12/23/02).

The absences used to support the discipline include nine days for which Appellant requested sick leave and was given unauthorized leave without pay, and one day for which Appellant claims the right to use FMLA leave to care for her daughter. The absences also include two instances of tardiness and two days when Appellant informed her supervisor she would be absent to attend to a legal matter. Appellant claims that if the FMLA leave had been granted, the discipline would not have occurred.

A. Sufficiency of FMLA Certification

Appellant contends that the Agency was required to accept the doctor's certification that her condition met the definition of a serious health condition under the Act, or to pay for a second opinion under 29 USCS § 2613(c). The Agency argues that the certification must include all information required by paragraph (b) of that statute in order to be sufficient, and that Appellant's certification did not explain either the nature of the leave requested or facts sufficient to conclude that the symptoms indicated a serious health condition under the Act.

"A certification is presumptively valid if it contains the required information and is signed by the health care provider." Harcourt v. Cincinnati Bell Tel. Co., 383 F.Supp. 2d 944, 956 (S.D. Ohio 2005). Thus, the certification must include "the appropriate medical facts within the knowledge of the health care provider regarding the condition", and, if a request for intermittent leave, the dates and expected duration of treatment and the medical necessity for such leave. 29 USCS § 2613(b)(3) and (6); 29 CFR § 825.306(b)(1). An employer "is entitled under the FMLA to seek further information with specific medical facts and verification of its employee's request for leave." Woods v. DaimlerChrysler Corp., 409 F.3d 984, 992 (8th Cir. 2005). An employer's failure to ask for a complete medical certification may be deemed a waiver of its right to require it. Pendarvis v. Xerox Corp., 3 F.Supp. 2d 53 (D.C. Dist.Col. 1998).

Here, Appellant's certification was incomplete by virtue of its failure to indicate the existence of a serious medical condition. "Abdominal pain and nausea", the medical facts listed on the Form WH-380, approved for use as the certification of the health care provider under 29 CSR § 825.306(b), were determined at hearing to have been written by Appellant. Appellant's doctor testified that those are physical symptoms that may be minor and short-lived. The regulations specifically list an upset stomach as an example of a condition which would ordinarily be excluded from coverage as a serious health condition. 29 CFR § 825.114(c.) The Agency was entitled to request further information from which it could determine whether the condition was serious, as well as whether it was a request for intermittent leave. Appellant's failure to provide that information justified the Agency's denial of leave under the FMLA.

In addition, since Appellant did not submit a timely request under CSR § 11-153 that the Jan. 27th absence be treated as family medical leave for care of her daughter, Appellant may not now claim that she is entitled to protection under the FMLA for that absence.

B. Violation of Career Service Disciplinary Rules

Appellant also claims the Agency failed to prove that her January and February absences violated the rules cited in the disciplinary letter. The Agency bears the burden to prove these violations by a preponderance of the evidence. In re Roberts, CSA 179-04, 3 (6/29/05.)

- i. CSR § 16-50 A. 1), Gross negligence or willful neglect of duty; and CSR § 16-51 A. 6), Carelessness in the performance of duties.

The Agency claims that Appellant was grossly negligent and careless based upon the number of her absences in January and February. Since the Agency did not present any evidence that Appellant failed to perform any assigned duty when she was at work, I find that Appellant violated neither rule. In re Martinez, CSA 19-05, 6 (6/27/05.)

- ii. CSR § 16-50 A. 3), Dishonesty

The Agency argues that Appellant was dishonest when she informed Ms. Maldonado she needed Feb. 10th and 11th off to appear in court or an arrest warrant would be issued against her. Ms. Maldonado learned by reviewing the pleading given to her by Appellant that Appellant had an answer date for a forcible entry and detainer (FED) action to avoid eviction. Ms. Maldonado concluded that Appellant did not need an entire day to file an answer, and denied the request. Appellant's submission of the court paperwork indicates she was simply unfamiliar with the nature of the proceedings rather than intentionally deceptive. The Agency submitted no additional evidence in support of this allegation.

- iii. CSR § 16-50 A. 7), Refusal to comply with instructions

The Agency established that Appellant was ordered in November to give Ms. Maldonado 24 hours' notice of any request for sick leave, and that Appellant called in sick on eight occasions in January and February (Jan. 4th, 6th, 7th, 13th, 14th, 24th, and Feb. 3rd and 4th) without prior notice to her supervisor. Appellant left her work station without informing her supervisor on Jan 5th, and Jan 27th, in violation of Ms. Maldonado's order to inform her directly if she had to leave. On this evidence, I find that Appellant refused to comply with her supervisor's orders on attendance.

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

The Agency next asserts that Appellant violated the above rule by virtue of the January and February absences. Of those fourteen occasions, the Agency proved that Appellant failed to report for work on Feb. 10th and 11th despite her supervisor's denial of her leave request, in violation of this rule. The Agency also established that Appellant left work early without authorization on Jan. 5th and 27th. Appellant has admitted these absences, but stated she believed notifying her co-workers before

leaving work was sufficient on Jan. 5th and 27th since she could not locate a supervisor. Ms. Maldonado credibly testified that there is always a backup supervisor present to whom Appellant should have reported her need to leave, and that supervisors must be informed that an employee is leaving in order to provide staff coverage for the division's lobby.

v. CSR § 16-51 A. 1), Tardiness

The Agency proved that Appellant reported to work after the scheduled start time of her shift on Jan. 28th and 31st, and she was given two hours' unauthorized LWOP therefor. Appellant presented no facts that would have excused that tardiness. I find the Agency has established this violation.

vi. CSR § 16-51 A. 3), Abuse of leave

An abuse of leave requires some evidence that Appellant knowingly took paid leave to which she was not entitled under CSR Rule 11. Appellant acknowledged at the hearing that she had no accrued sick leave during this period, and that she was forced to take unpaid leave when she became sick. The leave history shows that Appellant in fact had a sick leave balance of eight hours on January 1st, and twelve hours on January 31st, but was not allowed to use it in January or February. Appellant did take not abuse the employment benefit of paid leave in violation of this rule merely by informing her supervisor that she would not be in because she was sick, since the Agency did not grant any paid leave for those absences.

vii. CSR § 16-51 A. 10), Failure to comply with instructions

Finally, the Agency claims Appellant failed to comply with her supervisor's instructions. It is conceded that Ms. Maldonado instructed Appellant to call her at home two hours before the start of the shift when she was ill, and to submit a doctor's note as soon as she returned. Appellant failed to comply with these rules on Jan. 4th, 6th, 7th, 13th and 24th, as well as on Feb. 3rd and 4th. The Agency also proved that Appellant left her work station without notifying her immediate supervisor on Jan. 5th and 27th, in violation of the November 2004 expectations. The Agency therefore proved Appellant violated this rule.

C. Appropriateness of Penalty

The Agency proved that Appellant violated the rules prohibiting unauthorized absence from work, tardiness, refusal to obey orders and failure to comply with instructions. The final issue is whether the Agency's imposition of a five-day suspension was in conformity with the Career Service Rules regarding progressive discipline. CSR §§ 16-10, 16-20.

The Agency considered that Appellant had received three verbal reprimands, a written reprimand and a three-day suspension during the past three years of her

employment. [Exhs. 3, p. 4; J.] Two of those were for similar misconduct: unauthorized leave on Nov. 9, 2004 led to one verbal reprimand, and the sole written reprimand was imposed for negligence and refusing to comply with her supervisor's orders. In addition, Appellant was given ample notice of the seriousness of her absenteeism and of its adverse effect on the work of the Agency when she was informed in November 2004 of her new and stricter attendance expectations. That message was reinforced throughout January and early February by her supervisor's denial of authorized leave for nonconforming absences. After every unauthorized absence, Appellant was given the opportunity to improve, and failed to do so. It is apparent that a more severe penalty was a reasonable attempt on the part of the supervisor to correct the pattern of absenteeism and obtain Appellant's compliance with attendance rules. In addition, although the work plan imposed as a part of the discipline is unchallenged, I find that it was designed to assist Appellant in improving her attendance.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer AFFIRMS the Agency action dated March 10, 2005.

Dated this 22nd day of February, 2006.


Hearing Officer for the
Career Service Board