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

Appeal No. 54-03

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**FINDINGS AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**TAMARA WATKINS**, Appellant,

Agency: Denver Department of Human Services, and the City and County of Denver, a municipal corporation.

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Hearing in this matter was held before Hearing Officer Michael S. Gallegos, on September 2, 2003, in the Career Service Hearings Office, 201 West Colfax, 1st Floor, Denver, Colorado 80202. Appellant, Tamara Watkins, appeared in person and represented herself. The Agency was represented by Assistant City Attorney, Niels Loechell.

Within these Findings and Order, the Hearing Officer refers to Tamara Watkins as "Appellant"; the Denver Department of Human Services as the "Agency" and the Career Service Rules as "Career Service Rules" or "CSR". The Career Service Rules are cited by section number and are those currently in effect unless otherwise indicated.

For the reasons set forth below, the action taken by the Agency in this matter is **AFFIRMED**.

## ISSUE FOR HEARING

Whether the Agency's action, requiring Appellant to take 8 hours of vacation leave for non-attendance at work due to inclement weather, was arbitrary, capricious or contrary to rule or law.

## BURDEN OF PROOF

In an appeal of a non-disciplinary, administrative action, the burden is on Appellant to prove, by a preponderance of the evidence, the Agency's action was arbitrary, capricious or contrary to rule or law. (See *Renteria v. Department of Personnel*, 811 P. 2d 797 (Colo. 1991) and *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).)

## PRELIMINARY MATTERS

The Agency stipulated to the acceptance into evidence of Appellant's Exhibits A, B, C, E and F. Appellant's Exhibits D and H were accepted into evidence over the Agency's objection as to relevancy. Appellant's Exhibit G, a copy of merit-system rules for "Absences During Inclement Weather", was not accepted into evidence as irrelevant to the issues for hearing.

The Agency's Exhibits 3, 5 and 6 were accepted into evidence without objection from Appellant.

The Hearing Officer takes judicial notice of the following: A blizzard occurred in the Denver area, with snowfall beginning on March 18, 2003. Aurora is a city adjacent to Denver and within the Denver area. Due to the blizzard, non-essential City of Denver offices, including the Agency, were closed for business on March 19 and 20, 2003. City of Denver offices, including the Agency, were open for business on March 21, 2003.

## FINDINGS OF FACT

Based on the evidence presented at hearing, the Hearing Officer finds the following to be fact:

1. Prior to 1999, the Agency was under merit-system rules as a state agency. In 1999, the Agency became a city agency subject to Career Service Rules. Appellant is an Agency employee in career status. In March 2003, she lived in Aurora, Colorado.

2. On the morning of March 18, 2003, Appellant called in to work and spoke to her supervisor, Roxann Chieger (Chieger). Appellant reported that it was snowing heavily in Aurora and that she felt it was not safe to drive in to work that day. Chieger advised Appellant that she would have to take a vacation day if she didn't make it in to work. Appellant advised Chieger that she would not be in to work that day and, instead, took 8 hours vacation leave for Tuesday, March 18, 2003.

3. Snow continued to fall in the Denver area from March 18, 2003 through March 19, 2003. Due to the amount of snowfall, all non-essential city services, including the Agency, were closed for business on March 19 and 20, 2003. Non-essential Career Service employees were paid for March 19 and 20, 2003 but were not required to come in to work.

4. On the morning of March 21, 2003, Appellant called in to work and spoke to her supervisor, Chieger. Appellant asked Chieger if she (Appellant) could work at home on March 21, 2003 because she couldn't get her vehicle out of the driveway due to the volume of snow on the ground. Appellant had no means of transportation other than her vehicle. Chieger said that she didn't know if she had the authority to grant a work-at-home day.

5. Appellant did not go in to work on March 21, 2003. However, she did check her work (telephone) messages from home and determined that there was nothing urgent or requiring her immediate response. Appellant did not request vacation leave, compensatory time or any other type of leave for March 21, 2003.

6. Appellant requested and collected information, regarding applicable law and policy, from the Agency's Human Resources section, the Career Service Authority and the Mayor's office. She presented the information she collected to her supervisor who candidly and honestly considered it. After considering the information gathered by Appellant, Chieger advised Appellant that she was required to take 8 hours vacation leave for March 21, 2003.

7. On March 27, 2003, Appellant filed a first-level grievance stating that she had "[d]iscussed options with my direct supervisor. Policy states annual/vacation leave must be used if cannot work."

8. On April 16, 2003, Appellant filed her appeal and later responded to the Agency's Motion to Dismiss. A Memorandum dated, October 13, 1998 and entitled "Compensatory Time", was attached to Appellant's Response to the Agency's Motion to Dismiss and to Appellant's Pre-hearing Statement.

9. By Memorandum dated October 13, 1998, the Agency limited compensatory time for all (overtime) exempt employees. The Memorandum states, in pertinent part: "Employees that work partial days will be paid for the full day without having to use up time in their sick or annual leave banks. Time off must be requested through and approved by the exempt employee's immediate supervisor." (*See* Exhibit H.)

10. The policy stated in the Agency's October 13, 1998 Memorandum on Compensatory Time (comp time) was a "transitional policy" designed to cover comp time issues during the Agency's transition from state agency to city agency. Although it was never rescinded, it was not an active Agency policy in March 2003.

11. In March 2003, the City's leave policy, including leave for inclement weather, required a Career Service employee to call his or her supervisor prior to taking leave, then take whatever type of leave is appropriate for the situation, *e.g.,* vacation leave, sick leave, leave without pay. For example, administrative leave is appropriate as a reward for exemplary performance but it is not appropriate for weather-related absences.

12. In March 2003, the Agency did not have a written policy regarding what type of leave, if any, was available if an employee could not get in to work due to inclement weather.

13. In March, 2003, Chieger's supervisor was Randy Martinez (Martinez). In his response to Appellant's first-level grievance, Martinez states, "Career Service Rules are very clear in terms of appropriate use of leave time". However, he does not cite the rule to which he refers. At hearing, Martinez testified that he didn't know which rule was applicable to this situation. Rather, he relied on the Agency's Human Resource staff person, Diana Smith, and Julie Maerz (Maerz), a Senior Agency Personnel Analyst, to advise him regarding applicable rules.

14. Career Service Rules provide, in pertinent part: "An employee who is excused from work for the day or any part of the day when the work program is interrupted (*e.g.,* because of weather) shall be considered to have worked the number of hours included in his regular daily schedule." CSR 10-14.

15. It is Maerz' interpretation of Career Service Rules that CSR 10-14 applies, in weather-related situations, only when an employee works a partial day at work, then needs to go home due to weather conditions. At hearing, Maerz interpreted the 1998 policy as having the same applicability. That is, an employee must have worked a partial day at work before requesting and receiving a supervisor's approval to leave work and charging the rest of the day to comp time.

16. Chieger's interpretation of CSR 10-14 and the Agency's 1998 comp time policy is a reasonable interpretation. As per Chieger's interpretation of CSR 10-14 and the Agency's 1998 comp time policy, answering telephone messages from home does not constitute a partial day of work.

## DISCUSSION

**1. Authority of the Hearing Officer:** The City Charter and Career Service Rules require the Hearing Officer to determine the facts, by *de novo* hearing, in "[a]ny grievance which results in an alleged violation of...the Career Service Personnel Rules." (City Charter C5.25 (4) and CSR 19-10 d).) The term "grievance" means "an issue raised by a Career Service employee relating to the interpretation of rights, benefits or conditions of employment." (CSR 18-10 A.) A *de novo* hearing is one in which the Hearing Officer makes independent findings of fact, credibility assessments and resolves factual disputes. (*See Turner v. Rossmiller,* 35 Co. App. 329, 532 P.2d 751 (Colo. App.1975).)

**2. Applicability of CSR 10-14:** Career Service Rules provide, in pertinent part: "An employee who is excused from work for the day or any part of the day when the work program is interrupted (*e.g.,* because of weather) shall be considered to have worked the number of hours included in his regular daily schedule." CSR 10-14. In this case, the Agency's comp time policy was no longer in effect and the Agency did not have a written policy regarding what type of leave, if any, was available if an employee could not get in to work due to

inclement weather. (*See* Findings of Fact, paragraphs 10 and 12.) Therefore, the Agency relied on the overall City policy regarding leave during inclement weather and upon CSR 10-14, as interpreted by Maerz, a Senior Agency Personnel Analyst. (*See* Findings of Fact, paragraphs 11 and 15.) The Hearing Officer concludes that such reliance on Career Service Rules and the over all City policy, where there was no Agency policy to cover Appellant's situation, was a reasonable course of action.

3. **Arbitrary, capricious or contrary to rule or law:** In determining whether an agency's action is arbitrary or capricious, the trier-of-fact must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency did not abuse its discretion. (See *McPeck v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996). An arbitrary or capricious exercise of discretion can arise, by Agency action, in only three ways: (1) by failing to use reasonable diligence and care to procure such evidence as it is authorized by law to consider; (2) by failing to candidly and honestly consider the evidence before it; (3) by exercising its discretion, based on the evidence, in such a manner that reasonable people, fairly and honestly considering the evidence, must reach a contrary conclusion. (See *Van de Vegt v. Board of Commissioners*, 55 P.2d 703,705 (Colo. 1936) and *Lawley v. Department of Higher Educations*, 36 P.3d 1239 (Colo. 2001).)

In this case, Appellant requested and collected information regarding applicable law and policy. She presented the information she collected to her supervisor, who candidly and honestly considered it. (*See* Findings of Fact, paragraph 6.) In reviewing the Agency's action, based on the evidence presented to Appellant's supervisor and at hearing, the Hearing Officer concludes that reasonable people, fairly and honestly considering the evidence, would not be compelled to reach a contrary conclusion. Additionally, Appellant presented no rule or law that was contrary to the Agency's action. Therefore, Appellant did not meet her burden to prove, by a preponderance of the evidence, that the Agency's action was arbitrary, capricious or contrary to rule or law.

4. **Request for other type of leave:** In its Motion to Dismiss and at hearing, the Agency argued that Appellant did not request administrative leave or leave without pay and, therefore, her appeal should be dismissed. Appellant responded that, on March 21, 2003, by telephone call to her supervisor, Appellant requested authority to work from/at home, that she had the ability to do so and that she performed at least one of her job duties from home on March 21, 2003. However, the Hearing Officer finds Appellant's argument (that she worked a partial day on March 21, 2003 and, therefore, is entitled to compensatory time as per the Agency's compensatory time policy dated October 13, 1998) to be without merit. That is, based on Chieger's reasonable interpretation of Career Service Rules and/or the Agency's comp time policy, Appellant's answering

telephone calls does not constitute a partial day of work. (See Findings of Fact, paragraph 16.)

## CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction over this matter and authority to make and issue Findings and Order in this matter.

2. The Appellant did not meet her burden to prove, by a preponderance of the evidence, the Agency's action was arbitrary, capricious or contrary to rule or law.

## ORDER

Therefore, for the reasons stated above, the Agency's action in requiring Appellant to take 8 hours of vacation leave, for March 21, 2003, is **AFFIRMED**.

DATED this 29th of October 2003.

M. Gallegos

Michael S. Gallegos
Hearing Officer
Career Service Board