



CLOSED CASE SUMMARY

ISSUED DATE: JUNE 24, 2018

CASE NUMBER: 2017OPA-0886

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	4.040 - Sick Leave 11. Employees Require Permission to Leave Their Place of Recovery	Not Sustained (Management Action)
# 2	4.100 - Family and Medical Leave 2. Employees May Use Family and Medical Leave for One or a Combination of Reasons	Not Sustained (Management Action)

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

It was alleged that the Named Employee violated Department policy when she took a vacation while on leave pursuant to the Family Medical Leave Act (FMLA) and without seeking prior approval for that vacation from SPD.

ADMINISTRATIVE NOTE:

OPA initially found that the Named Employee’s failure to notify the Employment Services Lieutenant prior to taking a vacation while out on FMLA leave violated Department policy. As such, OPA recommended that Allegation #1 be Sustained. However, based on discussions with the chain of command and after further consideration, OPA herein amends its decision. This amendment is due to OPA’s belief that the policies at issue are insufficiently clear to support a Sustained finding. Accordingly, OPA now issues a Management Action Recommendation.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

4.040 - Sick Leave 11. Employees Require Permission to Leave Their Place of Recovery

SPD Policy 4.040-POL-11 requires that employees who are unable to work due to illness or injury seek permission from the Department prior to leaving their place of recovery. Specifically, it requires employees to notify the Employment Services Lieutenant for approval. At the time the employees make the request, they must provide “certification from their health care provider stating the employee cannot work but their recovery from the illness/injury is not impeded by the employee leaving their place of recovery.”

Named Employee #1 (NE#1), who formerly worked for SPD as a Data Technician, requested and was granted medical leave under the FMLA. Her FMLA leave was to last from May 12, 2017 through June 8, 2017. The FMLA leave was granted for a “serious medical condition,” and was purposed to permit the Complainant to take “care” of herself during that time. NE#1’s timesheets for that period showed her marked out on FMLA leave.

The Department became aware that NE#1 traveled to Las Vegas on May 31, 2017. This was confirmed by Facebook postings that showed NE#1 in Las Vegas and apparently on vacation. Prior to doing so, NE#1 did not seek the permission of the Employment Services Lieutenant and/or provide a certification from her health care provider. This was confirmed by SPD Human Resources.

During its investigation, OPA tried to interview NE#1 on multiple occasions, including trying to contact her via email, telephone, and letter. She ultimately did not make herself available for an interview. NE#1 did, however, send the assigned OPA investigator an email containing some explanations for her conduct, as well as threats of litigation and allegations that she was the victim of a conspiracy to “oust” her from her position. She contended that her health care providers told her that she was fit to travel and asserted that one health care provider believed the trip to be “good therapy for [her] recovery.” She also stated that with her on the trip were her mother, who is a nurse, and her sister, who is an occupational therapist.

She also argued that the provisions of the FMLA and federal law “supersedes” SPD policy. While not necessarily clear, OPA interprets her as arguing that SPD’s policy precluding recreational travel while an employee is out on FMLA leave and requiring advance permission prior to an employee doing so is void as preempted by some unspecified provisions of federal law.

In OPA’s opinion, SPD is justified in placing reasonable limitations on its employees who are out of FMLA leave. If these employees are significantly sick or injured enough to miss substantial time from work, it is logical for the Department to restrict those employees from taking vacations unless it has given them prior approval to do so and has been assured that the vacation will not impair the employees’ recovery and return to work. Were these restrictions not in place, FMLA leave could be abused (as it appears to have been here), which is certainly contrary to the purpose and function of the law. Moreover, the policy does not state that an employee can never take vacation when on FMLA leave, it simply requires that they seek advance permission to do so and provide a certification from a medical provider.

Here, NE#1 indisputably did not notify the Employment Services Lieutenant that she was seeking to take a vacation during her FMLA leave. She further did not submit a certification from her medical provider to the Department. While NE#1 may very well have been traveling with family members who had medical training, that did not excuse her from complying with this policy. Moreover, if her medical provider thought this trip would benefit her recovery, as NE#1 asserted, it is unclear why NE#1 did not obtain this opinion in writing and provide it.

Based on the above, OPA initially recommended that this allegation be Sustained. However, since that decision, OPA has again analyzed the Department’s policies in this area and no longer believes that the prior recommended finding is appropriate. This is due to OPA’s belief that the relevant policies and associated leave paperwork are unclear. First, SPD Policy 4.040 does not reference FMLA leave or explicitly state that the restrictions set forth in that policy apply to such leave. As such, and even though I think it logical that this policy would apply to all types of medical leave, I cannot definitively state that this is the case. Second, SPD Policy 4.100, which does concern FMLA leave, only addresses the taking of that leave, not its abuse. Third, the FMLA paperwork used by the Department does not contain a reference to the restriction on “leaving the place of recovery” that is set forth in SPD Policy 4.040.

Given the above, even though I believe that NE#1 abused her FMLA status when she went on vacation while on medical leave and without notifying the Employment Services Lieutenant, I find that SPD’s policies and paperwork in this area are insufficiently clear and cannot support a Sustained finding. For these reasons, I amend my prior DCM in this case and issue the below Management Action Recommendation.

- **Management Action Recommendation:** The Department should consider modifying SPD Policies 4.100 and 4.040 to specifically address expectations for SPD employees’ usage of FMLA leave. To the extent the Department deems it appropriate, it should add language regarding employees leaving their place of recovery with using FMLA leave, as well as a requirement that employees should notify the Employment

Services Lieutenant (or a successor to that position) prior to doing so. If the Department institutes these changes it should make clear that non-compliance constitutes a violation of policy that can result in discipline.

Recommended Finding: **Not Sustained (Management Action)**

Named Employee #1 - Allegation #2

4.100 - Family and Medical Leave 2. Employees May Use Family and Medical Leave for One or a Combination of Reasons

In the initial version of this DCM, OPA recommended that this allegation be removed. However, given that OPA now recommends a policy change, I issue the above Management Action Recommendation for this allegation as well.

Recommended Finding: **Not Sustained (Management Action)**