

DECISION AND ORDER

IN THE MATTER OF THE APPEALS OF:

ANDREW COOK and MONTE K. BROWN, Appellants,

vs.

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

The hearing in these consolidated appeals was held on Feb. 4 and Apr. 5, 2011 before Hearing Officer Valerie McNaughton. Appellants were present throughout the hearing and were represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Andrea Kershner, and the Agency's advisory witness was Ground Transportation Manager Michael Percy. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE APPEAL

Appellants Monte Brown and Andrew Cook, Landside Service Agents II for Ground Transportation Landside Services within the Department of Aviation (Agency), challenge their dismissals imposed on Nov. 22, 2010. Appellants' motion to consolidate the appeals was granted on Dec. 21, 2010 for administrative efficiency based on the similarity of facts and issues and the overlap of witnesses in these appeals. Agency Exhibits 1 - 5, 10 - 17 and Appellants' Exhibit A were admitted on stipulation. Agency Exhibits 21- 24 and Appellants' Exhibits B and C were admitted during the hearing.

II. ISSUES

The issues in this appeal are as follows:

- 1) Did the Agency establish by a preponderance of the evidence that Appellants' conduct justified discipline under the Career Service Rules (CSR), and
- 2) Did the Agency establish that dismissal was within the range of penalties that could be imposed by a reasonable administrator for the violations established by the evidence?

III. FINDINGS OF FACT

Appellant Cook was hired on Nov. 6, 2006 as a Landside Service Agent II (LSA) with the Department of Aviation at the Denver International Airport (DIA). Appellant Brown has served in that same capacity since Sept. 16, 1999. As LSAs, their duties included monitoring transportation contract compliance and facilitating customers' use of ground transportation on Level 5 and the commercial holding lot. As a part of their job, LSAs hold security clearance to all secured areas of the airport. At the time of this incident, LSAs also handled substantial amounts of money from token machines and cash changers. [Exhs. 2-3, 11-3.]

On Nov. 22, 2010, Appellants Cook and Brown were dismissed from their positions based on Agency findings that Cook was late for work on Oct. 14, 2010, and Brown used Cook's Kronos time card to punch him in at the beginning of his shift at Cook's request. [Exhs. 2, 11.] Both filed appeals challenging these disciplinary actions.

The evidence in this case presents few factual issues about the sequence of events, but two different interpretations of their significance. On Oct. 14, 2010, LSA Tommy Berzinkas punched in near the Level 6 break room at 2:30, the start of his shift. Berzinkas testified that he was assigned to Level 5-West or 5-East, and went there immediately after punching in. Observing that nothing was going on, he went back up the stairs to Level 6 to retrieve his water bottle. While walking in a diagonal line across the atrium, Berzinkas saw Appellant Monte Brown in front of the Kronos time clock. "He slid a card into the Kronos machine, then walked away." [Berzinkas, 2/4/11, 9:38 am.] On cross-examination, Berzinkas admitted that what he saw was Brown holding a card that looked like a Kronos card and moving it toward the Kronos machine. [Berzinkas, 2/4/11, 10:06 am.] Brown looked at Berzinkas, and then walked hurriedly towards the escalator. Berzinkas "thought it was strange" because Brown's start time was 1:30 pm. He suspected that Brown's friend Cook may be involved because Cook was the only one whose start time was 2:45 pm. Berzinkas followed Brown to the top of the escalator and watched him from over the railing, as Brown walked down the escalator and put a Kronos card in his wallet. [Berzinkas, 2/4/11, 10:03 am.] Berzinkas then radioed his supervisor. After receiving no response, he called Landside Supervisor Greg Smith at 2:50 pm and asked him if Brown had adjusted his schedule. Smith told him he had not, and requested that he stay in the area around the breakroom and report back as to whether Cook arrives and punches in. Berzinkas waited in the area and went into the breakroom a couple of times, but saw no one else. Berzinkas relayed this information to Smith, then radioed Ms. Espinoza to inform her he was delayed. He left Level 6 at 3:05 pm. [Berzinkas, 2/4/11, 9:42 am.] Other evidence indicated that Berzinkas was actually assigned to relieve Tammy Espinoza at the South Counter in the main terminal from 2:30 to 3:30 pm. [Cook, 4/5/11, 9:19 am; Exh. C.]

Berzinkas and Cook initially enjoyed a good working relationship. However, after Cook made several attempts to sell various products to Berzinkas, he became annoyed and stopped talking to Cook. Brown noticed the two avoided one another in recent months, but he was unaware of the reason for the change. Cook and Brown are friends at work who often eat and work out together. [Brown, 4/5/11, 11:15 am.] Fellow LSA Antoine Weeks testified that he noticed Berzinkas was hostile toward Cook,

and heard him make critical comments about Cook, "saying things that shouldn't be said over the radio, [and] to other employees." Weeks noticed that Berzinskas shares his opinions about how the job should be done with everyone, not just Cook: "he gives it to everyone". Weeks did not recall ever hearing Berzinskas make up facts to try to get someone in trouble. [Weeks, 4/5/11, 1:06 pm.]

At the hearing in this appeal, Cook testified that he rides RTD to work daily from the park-and-ride in Westminster, near his home. He usually arrives an hour early and waits until 2:45 to clock in. Cook believes he took the 1901 AB bus, which arrived that day at 1:59 according to airport records. [Cook, 4/5/11, 9:31 am; Exh. A-36.] Cook brings his backpack with snacks and workout clothes, and stores it in his locker. The previous work day, he had left his safety vest at the holding lot. Safety vests must be worn when LSAs are working in traffic. On Oct. 14, Cook did not get another vest from the locker room when he checked in because he intended to retrieve his vest from the holding lot, and he was not scheduled to be in traffic before then. After he arrived at work, he bought a lotto ticket and a magazine at an airport shop, then went to find keys for a city vehicle. He clocked in at 2:45 and looked over the railing by the escalator at the south counter, where he saw Espinoza. Cook knew Berzinskas and Espinoza had switched assignments that day, and so he expected to see Berzinskas at the south counter by 2:30. Cook thinks he saw Brown at the Kronos machine, but does not recall seeing Berzinskas there. He proceeded to Level 5 and met up with Brown in front of door 506. Brown told him he had just misplaced his new expensive cell phone. Cook recalls teasing him about that. [Cook, 4/5/11, 10:20 am.]

Brown testified that Thursdays are always very busy for him, as he is one of only a few LSAs who work a ten-hour shift, and shift overlaps are short. On Oct. 14th, things were "hectic right away". He first helped Pat Tamborino find keys in the break room, and assisted with the East and West gates because Mr. Tamborino was tied up righting construction signs that had blown over. Brown then went to the break room, intending to give Cook his schedule and tell him he had a vehicle for their use during their 3:30 assignment at the holding lot. Brown repeated at hearing that he went to the Kronos machine because he was worried he had forgotten to clock in because of the early rush. When he pulled out his Kronos card, he noticed he was missing his new \$400 cell phone. He vaguely remembers seeing Berzinskas walking in his direction. He and Berzinskas used to be friends. In recent months Berzinskas showed animosity toward him for reasons unknown to Brown, and they now merely nod to one another. The change in their relationship did not interfere with their ability to work together. Brown believes that it was commonplace for Berzinskas to be late, and that he often took every other Sunday off. [Brown, 4/5/11, 11:13 am.]

The Kronos machine is located on the left wall inside the first doorway shown on Exhibit B. After noticed his phone was missing, Brown hurried down the escalator and returned to his City vehicle, where he located his cell phone. He then assisted passengers on the Level 5-West curb and headed to door 506, a busy bus drop-off location. He met Cook in front of 506, where he was assisting people standing on the curb. Cook was carrying a fitness magazine and was wearing his radio. [Brown, 4/5/11, 11:21 am.] Brown denied that he accepted Cook's badge to clock him into his shift. "I wouldn't do such a thing . . . absolutely not . . . I was a little disappointed in that I really

didn't have an opportunity to sit down and find out exactly what the allegations were . . . I would have liked an opportunity to sit down and see what could have happened." [Brown, 4/5/11, 11:27 am.]

After receiving Berzinskaskas' call in his car at about 2:50 pm, Greg Smith drove to Level 5-West, and parked his city vehicle at Island 2 in front of door 514. He observed Brown and Cook standing by a bus talking in front of door 506, a regular passenger drop-off location for buses. He noticed Cook was not wearing his safety vest as required, and his radio and earphones were not visible. [G. Smith, 2/4/11, 10:18 am; Exh. C.] Smith went in door 512, looked back outside through the glass walls toward door 506, and saw Cook and Brown walking toward door 510. Smith testified that Cook did not wear a safety vest at all that day. [G. Smith, 4/5/11, 1:35 pm.]

Smith then went to his office and checked the Kronos records, which showed that Brown clocked in at 1:30 and Cook at 2:45 pm, their usual start times. Brown was scheduled to work Mobile 30, which meant he was to monitor the 45-minute parking lot and respond to accidents on either side of the airport. Cook was scheduled to work the west side. [Exh. C.] At 3:20, Smith saw Cook enter the break room with Brown. Smith knew the two were friends, and had previously told them not to ride around together if they were not assigned to the same area. [Smith, 2/4/11, 10:11 – 10:19 pm.]

Later that day, Smith attended a meeting with his supervisors Francine Crusan and Terry Smith, and reported what Berzinskaskas told him as well as his own observations at door 508. Crusan and Terry Smith were concerned that Brown may have clocked in for Cook, and so they reported the situation to Ground Transportation Manager Michael Percy. [G. Smith, 2/4/11, 10:21 am.] They asked Greg Smith to check the RTD schedule and Omnicast video footage at Door 508 to determine if Cook arrived late to work. [G. Smith, 2/4/11, 10:23 am.] Smith checked the arrival of the AB route bus scheduled to get to the airport at 2:40 pm daily, the bus he believed Cook usually rode to work, and informed his supervisor that the bus was delayed that day by mechanical problems. Smith submitted a report of his investigation to his supervisors. [G. Smith, 10:22 pm.] That report was not offered in evidence. Percy, Crusan and Terry Smith also met with Berzinskaskas to learn more about the incident. [Percy, 2/4/11, 2:19 pm].

Smith reviewed and bookmarked the video footage of the camera at Door 508 for the time between 2:30 pm and 3:25 pm, and saw at least five buses drive past. [Smith, 4/5/11, 1:18 pm.] Smith viewed the tape of door 508 from 2:30 to 3:30 pm, and saw Cook and Brown only between 3:07 and 3:11 pm. [G. Smith, 4/5/11, 1:25 pm.] The video was also viewed by Francine Crusan, Michael Percy, Terry Smith and Dorothy Harris. Crusan viewed the video that day and printed four photos from it. She testified that the video showed Brown walking in one direction. A bus drove by, and a few minutes later Cook and Brown were seen walking in the opposite direction. A photo printed from the video footage shows Brown walking north at 3:07 pm in front of door 508, heading in the direction of door 506. In a picture taken eight seconds later, a bus is shown driving south, obscuring the camera's view of door 508. Four minutes later, at 3:11 pm, another photo shows Brown and Smith walking south in front of door 508. [Exh. 5.] The stills show Cook carrying something white - a bag or magazine - and wearing dark pants and jacket, "the basic pieces of the uniform." [Crusan, 2/4/11, 11:21 am;

Exh. 5-2.] Crusan recalled that Cook had asked her for at least two shift adjustments over the past several months based on changes in RTD bus service. Fourteen days later, in the absence of any request to preserve the tape, the video was automatically erased under the procedures then in effect. [G. Smith, 4/5/11, 1:17 pm.] The four still images printed by Crusan are the only remaining evidence of the video's contents. [Crusan, 2/4/11, 11:22 am; Exh. 5].

A week later, on Oct. 21st, GT Manager Michael Percy, Francine Crusan, Greg Smith and Terry Smith met separately with Brown and Cook. When asked how he got to work on Oct. 14, Cook replied that he took either the AB or AS bus. He stated he could not recall the exact details of the day or his arrival time, but denied that Brown used his Kronos badge, adding he would have no reason to provide his card to another employee. Brown told the four managers that he did not recall the day, and denied that anyone gave him a Kronos badge or asked him to punch in for them. [Percy, 2/4/11, 2:24 pm; G. Smith, 10:26 am; Exhs. 2-4, 11-3.] Both were later placed on investigatory leave. [Percy, 2/4/11, 2:26 pm.]

In the past, Cook complained to Greg Smith that he saw Berzinskas talking to cab starters away from his duty station, but Smith never informed Berzinskas about that complaint. Cook also made comments to Greg Smith, Regina Witherspoon and Richard Wilson about what he believed was favoritism shown to Berzinskas. [Cook, 4/5/11, 9:12 am.] Others had also complained to Greg Smith about Berzinskas' tardiness, but Smith took no action on those complaints because he was not his supervisor. [Smith, 2/4/11, 10:46 am.]

On Oct. 22, Senior Human Resources Specialist Racheal Bland interviewed Brown. Bland recalled that Brown told her either that he didn't recall that day, or that he never swiped anyone else's badge. [Bland, 2/4/11, 1:08 pm.] That same day, Bland interviewed Cook, who told her he took either the AB or AS bus to work on Oct. 14th, and that he personally swiped his badge at the beginning of his shift. He denied giving his badge to Brown for the purpose of having Brown clock him in. [Exh. 21.] At hearing, Ms. Bland added that Cook was hesitant to sign his statement, and appeared nervous: shaking, sweating, and texting during the thirty minutes it took him to decide to sign the statement. Ms. Bland stated he told her he did not know what to do, and asked her what would happen if he signed it. She told him to tell the truth, and asked him to review it to make sure it was accurate. If it was not, she said she would allow him to change it. [Bland 2/4/11, 1:08 pm.] In her investigative report, Bland concluded that "[t]hroughout the investigation, both individuals have changed their stories of this event", and were dishonest with their supervisors and the investigator. [Exh. 12-2.] Bland testified that she believed Brown's denial that he clocked in for Cook was inconsistent with his denial that he misused a Kronos badge. [Bland, 2/4/11, 2:14 pm.]

The signed interviews in evidence indicate that the sessions were recorded by LaToya Linzey. The written statements show that the Cook interview consumed a total of 22 minutes, and Brown's interview was completed in 12 minutes. [Exhs. 21, 22.] The investigative report submitted on Nov. 22, 2010 contains no mention of a 30-minute delay on Cook's part in deciding whether to sign the statement. The recordings of the

interviews which would have definitively resolved this issue were not placed into evidence.

At some point thereafter, Greg Smith looked into the arrival time of AB buses on Oct. 14th, since he believed Cook regularly took the AB bus to work. The front of the bus that appeared in the video was not visible, and so its bus route could not be determined. [Exh. 5-4.] Smith learned that the AB bus runs every hour at that time of day, but on Oct. 14th the bus scheduled to arrive at 2:40 pm was late because of mechanical difficulties. [Smith, 2/4/11, 10:23 am.] Smith compiled his findings in a report and submitted it to his supervisors. That report was not produced at hearing. [G. Smith, 2/4/11, 10:23 am.] The Agency presented the security records showing the arrival times of AA, AB and AS buses from 2:30 onward, which showed that one AB bus driver arrived at the airport at 3:05 pm, and three AS buses arrived between 1:58 and 2:43 pm that day. [Exh. 24.] The Agency concluded from its investigation that Cook arrived on the bus shown in Exh. 5-4, and gave Brown his Kronos badge so he could clock him in on time. The Agency therefore began the pre-disciplinary process against both Appellants. [Crusan, 2/4/11, 11:39 am; Exhs. 5-4.]

The Agency held a pre-disciplinary meeting for Cook on Nov. 8, 2010. Cook repeated that he did not recall the details of that day, but did have his Kronos badge and had not given it to Brown to punch him in early. [Exh. 3.] On Nov. 19, Brown appeared at his pre-disciplinary meeting with his representative Ed Bagwell, and read a prepared statement. In that statement, Brown said he was planning on meeting Cook at the Kronos clock at 2:45, Cook's shift start. When he got to the break room, he was concerned that he had forgotten to punch in and took his Kronos card out of his wallet. He then realized he did not have his new cell phone, and retraced his steps to his city vehicle parked on Level 5. After retrieving his cell, he helped passengers along the curb toward door 506, where he met Cook, who was in uniform and also assisting airport customers. He added that buses commonly unload between doors 510 and 506. By 3:11 pm, the two walked away from door 506 to head to their next work assignment at the holding lot. [Exhs. 13, 14, C.]

After the pre-disciplinary meetings, Michael Percy, Rachael Bland and Dorothy Harris met to discuss the disciplinary decision. Percy did not review the Kronos records, or read Bland's investigative report. He testified he was troubled by Bland's account of her interview with Cook that he was nervous and hesitant to sign his statement. Harris, Percy and Bland determined that Cook and Brown appeared to be holding something back and their explanations made no sense. [Percy, 4/5/11, 2:36 pm.] Percy and Harris concluded that the Agency could no longer trust Appellants based on their actions, justifying termination despite the absence of any previous discipline. [Percy, 4/5/11, 2:43 pm.]

IV. ANALYSIS

The Agency bears the burden to establish violations of the Career Service Rules by a preponderance of the evidence, and to show that the discipline was within the range that can be imposed under the circumstances. In re Gustern, CSA 128-02, 20 (12/23/02); Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975).

1. Neglect of duty under § 16-60 A.

This rule is violated where an employee neglects to perform a duty which the employee knows he is supposed to perform. In re Campos, CSB 56-08, 2 (6/18/09). The Agency asserts that Cook neglected his work duties by arriving late and not wearing his safety vest on Oct. 14th. Brown is alleged to have violated the rule by not being where he was supposed to be, and using Cook's Kronos card to log him in to work. [Percy, 2/4/11, 3:38 pm; Harris, 2/4/11, 4:26 pm.]

The evidence is in conflict on the central issue in these disciplinary actions: whether Brown used Cook's Kronos card at 2:45 pm. Berzinkas stated he saw Brown make a motion as if he was using a Kronos card at that time. Berzinkas was not interviewed as a part of the investigation, and the information he provided to Percy, Crusan and Terry Smith was not recorded or placed into evidence. At hearing, Berzinkas said he was "a few minutes into his shift" when he decided to return to Level 6, and saw Brown before he got to the break room door. On that evidence, Berzinkas would have arrived on Level 6 several minutes earlier than 2:45, the beginning of Cook's shift. Berzinkas then watched Brown ride down the escalator, made two calls to report the incident, and went in and out of the break room. The Agency presented no other evidence to rebut Cook's account and Kronos records that he indeed clocked in at 2:45 pm. Brown testified consistently with both his Nov. 12th written statement and his comments at the pre-disciplinary meeting that he was at the Kronos machine to meet Cook and to make sure he had himself clocked in. He left hurriedly without using his Kronos card because he realized his expensive new cell phone was missing.

Other evidence indicates that Berzinkas was not in a position to see whether Brown physically swiped a Kronos card while he was walking across the atrium. A photo of the area and testimony of witnesses reveals that the break room door is recessed inside a narrow hallway. [Exh. B.] The Kronos machine on the left wall is not visible from the angle of Berzinkas' walk that morning. The sight of Brown in front of the Kronos machine would not have been visible to Berzinkas until he was close to the door of the small hallway. Brown's right hand would not have been even partly visible until Berzinkas was in front of the door itself, looking down the narrow hallway. I find that Berzinkas' evidence by itself is insufficient to prove that Brown used Cook's Kronos card on Oct. 14th.

As noted above, the Agency did not produce available contemporaneous reports, or oral and video recordings that could have corroborated its version of the facts. The evidence does not contain an account of the managers' interview with Berzinkas right after the incident in question, or the recording of Bland's interviews with Cook and Brown. In addition, the Greg Smith report on bus arrivals and videos of the doors at and around door 508 are not in evidence. Finally, the videos of the doors that could have shown whether Cook arrived by bus at 3:00 pm were not offered as evidence.

Most persuasively, the Agency's theory of the facts is inconsistent with practical considerations. The Agency determined that Cook arrived on an AB bus that was

scheduled to arrive at 2:40, but was delayed by mechanical difficulties. The Agency found that Cook gave Brown his Kronos card in order to avoid the disciplinary or financial consequences of being late. However, Cook had no physical opportunity to deliver his Kronos card to Brown by the time he would have known he was going to be delayed, as Brown was at work since 1:30, and Cook was on the bus. As Cook could not have reasonably anticipated that he would be delayed by his bus' mechanical problems, he would have had no reason to give Brown his Kronos card in advance of that event.

I have also considered the facts that both Cook and Brown are long-term employees who acknowledged the obvious facts that misuse of a Kronos card is a serious offense and would jeopardize their jobs. Neither has ever been disciplined during their combined 15 years of employment. In balancing the risk of losing their jobs for dishonesty against a small loss of pay or minor discipline for one of them, it is unreasonable to conclude they would take that risk for either a friend or for themselves. As the circumstantial evidence is equally consistent with both versions of the facts, and contemporaneous evidence in the possession of the Agency was not presented, I find that the Agency has failed to prove Brown misused Cook's Kronos badge by punching in at Cook's request.

The Agency failed to establish that Brown was not where he was supposed to be. Brown's assignment was Mobile 30, which required him to respond to accidents in all airport locations, as transmitted to him by radio. Thus, Brown was not out of his work area or unresponsive at any of the times in question.

As to the assertion that Cook arrived late, the evidence is again mixed. The Agency did not order preservation of the video it claims established that Cook arrived by bus after 3 pm, despite the fact that it was conducting an investigation into the matter while it existed. Five managers recognized the significance of the video by personally viewing it. Videos of the other doors, especially the bus drop-off point at door 506, could also have been reasonably anticipated to present relevant evidence, but they were not offered as evidence. In addition, the Agency failed to present a copy of Greg Smith's report showing the actual arrival of various buses that day. The Agency had sole custody of that evidence, and has the burden of proof as to the facts establishing asserted rules violations. It can be inferred from the failure to produce that evidence that it would have been unfavorable to the Agency. AmJur Evidence § 257. Under the circumstances of this case I do not make that inference, but conclude only that in the absence of that evidence, the Agency failed to meet its burden of proof as to these facts.

The surviving photos from the video are equally consistent with Cook's version of events. They show that Cook was at his duty location on the west side, in uniform except for his safety vest, and without the backpack with which he usually arrives. The absence of that backpack tends to show Cook had arrived earlier at work and put the backpack in his locker. The low-resolution security photos taken from across the street do not show the required radio and earphones on either Cook or Brown, but both wore garments that could have easily concealed a six-inch radio. [Exhs. 5-1 to 5-3.] Cook

testified that he wore his radio on the left side of his pants and the microphone on his shirt. [Cook, 4/5/11, 8:56 am.] Only Cook's right side is visible in the security pictures.

The Agency did not offer Greg Smith's report to prove the actual arrival time of the 2:40 pm AB bus that experienced mechanical problems, despite Agency reliance on that report to conclude that Cook was late. The security records show that only one AB bus arrived between 2:30 and 3:11 pm. However, one AS bus arrived at 2:43 pm, and two arrived during the hour before that. [Exh. 24.] Cook testified without contradiction that he normally arrives about an hour before the start of his shift, and believes he came in a little after 2 pm that day. Ms. Crusan did recall that when Cook requested a later start time earlier that year, he informed her he could if necessary take a bus that would put him at the airport an hour early. Cook's last request for a change in schedule was denied. [Crusan, 4/5/11, 11:50 am.] Cook testified that he used the extra time before he could punch in at 2:45 to purchase the magazine visible in the photos and noticed by Brown. [Exhs. 5-2, 5-3; Cook, 4/5/11, 8:58, 9:25 am; Brown, 4/5/11, 11:21 am.]

Mr. Berzinkas' credibility is adversely affected by his statement that he went to Level 6 only a few minutes after the start of his shift, placing him there at least ten minutes before the beginning of Cook's shift, not at 2:45 as he stated at hearing. The acknowledged ill will between Berzinkas and Cook appeared to have been caused by Cook's repeated efforts to sell him various products. Berzinkas reluctantly admitted on cross-examination that he actually saw only a motion consistent with a Kronos swipe, modifying his original statement that he witnessed the card itself being swiped. This indicates that his testimony was not completely objective, and it must be evaluated on that basis. In addition, Berzinkas testified he was assigned to Level 5 at the time he saw Brown. In fact, the schedule showed he was assigned to the south counter from 2:30 to 3:30. [Exh. C.] His observations on Level 6 delayed him for 35 minutes in relieving the employee then at the counter, contrary to the Agency's stated need for the importance of having employees promptly report to their work stations to relieve those coming off their shifts. [Crusan, 2/4/11, 11:25 am.]

As to the issue of whether Cook's failure to wear a safety vest constituted neglect of duty, the disciplinary letter gives Cook no notice that he was being charged with a separate safety violation or other infraction based on a failure to be in uniform. The Agency admitted at hearing that it did not intend to charge Cook with a separate disciplinary violation based on his failure to wear a vest, but that it considered that fact some evidence that Cook had arrived after 3 pm, and thus late for his 2:45 shift. Cook rebutted that evidence by his testimony that he was not scheduled to work in traffic early in his shift, and the vest was only necessary to protect an LSA in traffic. The Agency did not respond to that evidence.

Based on the totality of the evidence, I conclude that the Agency failed to prove that Appellants neglected their duties in violation of this rule.

2. Carelessness in performance of duties under § 16-60 B.

This rule is violated where an employee is heedless of an important work duty, resulting in potential or actual significant harm. In re Mounjim, CSA 87-07, 5 (7/10/08), rev'd on other grounds. Mr. Percy testified that he relied on Brown's presence in the bus area when he was on Mobile 30 duty that day. In light of the testimony that Mobile 30 covers both east and west sides of the airport, I do not find that Brown was careless in the performance of his duties by being on 5-West at 3 pm on Oct. 14th, where he assisted passengers in the bus drop-off locations. Likewise, Cook was performing the same duties at the time both were shown at 5-West. [Exh. 5.]

3. Dishonesty, including lying to superiors as to official duties under § 16-60 E.

This rule is violated where an employee makes any knowing misrepresentation within the employment context. In re Mounjim, *supra* at 6.

The Agency claims that Appellants were dishonest in their statements during the interviews. Senior HR Professional Racheal Bland testified she considered Brown's statement that he did not swipe a Kronos card inconsistent with his later statement that he did not misuse a Kronos card. [Bland, 2/4/11, 2:08 pm.] I do not find these statements inconsistent, as the alleged Kronos misuse was swiping Cook's card into the machine to indicate he was present when the Agency asserts he was not. In any event, Brown answered "no" to the question, "[o]n that same day did you clock Andrew in for Work?" [Exh. 22-2.] When asked on Oct. 21st if he "had been given another employee's KRONOS card and / or asked to punch in for anyone else, your response was 'no' on both accounts." [Exh. 11-3.] Percy confirmed that this was an accurate report of that meeting. [Percy, 2/4/11, 2:23 pm.] These statements are consistent. An employee who denies a general allegation is not dishonest if he later gives a more complete account of an incident in response to an agency's details of the incident. In fact, the pre-disciplinary letter is designed to provide an employee notice of the allegations sufficient to allow an employee to present a full account of the events at the pre-disciplinary meeting. Thus, I find that the Agency failed to prove the Appellant gave conflicting version of the facts during the investigation.

In addition, the Agency argues that Appellants' statements were dishonest in that Cook asked Brown to clock in for him, and Brown did so. As determined above, I have found that the Agency did not establish those allegations. Moreover, Percy's conclusion that Cook was dishonest relied heavily on Bland's description of Cook's hesitation to sign his statement on Oct. 22, 2010. This account was not included in the investigative report, despite its importance to the Agency's ultimate conclusion of dishonesty. In any event, Cook could not have delayed his signature for 30 minutes, since the entire interview, including a lengthy introduction and the statement itself, consumed only 22 minutes. [Exh. 21.] Finally, the Agency failed to produce its recording of that interview, which would have resolved the issue.

The Agency decision-makers acknowledged that they previously had great working relationships with Cook and Brown, and believed both employees respected the rules. Neither had ever been found to have incurred any discipline. "I was

shocked" by the misconduct, noted Ms. Crusan. [2/4/11, 11:35 am.] That lack of previous discipline and positive working relationships are persuasive that Appellants did not here act inconsistently with their previous positive behavioral pattern.

4. Failure to comply with the lawful orders of a supervisor under § 16-60 J.

This rule prohibits violation of a reasonable order communicated by a supervisor. In re Sawyer and Sproul, CSA 33-08, 9 (1/27/09).

The Agency contends that Cook violated this rule because Crusan had advised him on Oct. 11th that he was late. [Percy, 2/4/11, 3:29 pm.] The evidence is undisputed that on the Monday before the day of this incident, Oct. 11th, Cook arrived late and called Crusan to report his tardiness. Based on that call, Crusan badged Cook in at the beginning of his shift, and Cook punched out on time that day. [Crusan, 2/3/11, 11:42 am.]

A manager's knowledge of previous behavior such as lateness does not establish that the manager thereby intended to or did thereby issue an order prohibiting future such behavior. A statement must be reasonably understood to be an order, or the rule becomes too vague to enforce. Moreover, I have found that Cook was not late on Oct. 14, 2010. Therefore, the Agency failed to prove that Cook violated this rule.

5. Failure to observe agency regulations under § 16-60 L.

This rule is violated where an agency provides notice to an employee of a clear, reasonable, and uniformly enforced policy, and the employee fails to follow the policy, regardless of the employee's intent. In re Mounjim, *supra* at 6.

The Agency contends that Cook violated departmental regulations regarding punctuality, unauthorized absences and conduct prejudicial to the department. As previously determined, I do not find Cook was tardy or absent from his work station at any of the times in question. Further, the Agency failed to prove that Cook engaged in any conduct that was prejudicial to the Agency. Thus, it is found that the Agency did not establish that Cook failed to observe any agency regulations in violation of this rule.

Brown's disciplinary letter cites the Landside Services Policy and Procedures Handbook requiring employees to "adhere to the rules and regulations applicable to their duties and the procedures prescribing the manner of performance of their duties. Ground Transportation employees shall not indulge in conduct prejudicial to the efficiency, good name, and reputation of the City and County of Denver". The Agency failed to prove its allegation that Brown misused the Kronos time card of another employee by punching Cook in when he was not present. The only other allegations against Brown were that he was dishonest during the investigation and was out of his work area on Oct. 14th. As the Agency failed to prove both of those charges, it likewise did not establish that Brown was guilty of infractions of any agency regulations in violation of this rule.

6. Unauthorized absence from work or tardiness under CSR §§ 16-60 S and T.

As detailed above, I have found that Cook was not late or absent from work on Oct. 14, and Brown was not absent from his work station on that same date. I therefore find that the Agency did not establish that either Appellant violated the above rules.

7. Conduct violating the Charter, Rules, Denver Revised Municipal Code, Executive Orders or other legal authority under § 16-60 Y.

This rule is violated where an employee's conduct causes some actual or reasonably perceived harm that is not specifically provided for in the agency's notice of discipline. In re Sawyer and Sproul, CSA 33-08, 14 (1/27/09).

The Agency cited the Code of Ethics and CSR Code of Conduct which require employee to uphold high levels of ethical conduct "so that the public will have confidence that persons in positions of public responsibility are acting for the benefit of the public." Denver City Charter § 1.2.1; CSR § 15-20. The Agency asserts that Brown was guilty of time card fraud. For the reasons set forth above, I find the Agency failed to prove either Brown or Cook engaged in misuse of a Kronos card or time card fraud, or otherwise violated the Code of Ethics or Code of Conduct cited in the disciplinary letters.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency's dismissal actions dated November 22, 2010 are REVERSED.

Dated this 6th day of June, 2011.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 *et seq.*, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.

I certify that on June 6, 2011, I delivered a copy of this Decision and Order to the following via email:

Monte K. Brown, montebrown22@gmail.com	(via email)
Michael O'Malley, Esq., Michaelomalleylaw@hotmail.com	(via email)
Kathy Hand, Kathy@legalnavigators.net	(via email)
City Attorney's Office at Dfiling.litigation@denvergov.org	(via email)
HR Services, HRServices@denvergov.org	(via email)



