

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

ANTHONY COOPER, Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS, FLEET MAINTENANCE DIVISION, and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Oct. 31, 2011 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Jennifer Jacobson, and Director of Fleet Maintenance Ernest Ivy 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 in this appeal.

I. INTRODUCTION

Appellant Anthony Cooper is a Fleet Maintenance Engineer for the Denver Department of Public Works, Fleet Maintenance Division (Agency). This is his appeal of the Agency's imposition of a one-day suspension imposed on July 22, 2011 based on three incidents in which Appellant is alleged to have fallen asleep during separate business meetings. The parties stipulated to the admissibility of all proposed exhibits, which are Agency's Exhibits 1 – 11, and Appellant's Exhibit A.

II. ISSUES

The issues presented in this disciplinary appeal are as follows:

- 1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR), and
- 2) Did the Agency establish that a one-day suspension was within the range of penalties that could be imposed by a reasonable administrator for the violations proven as stated in the disciplinary letter?

III. FINDINGS OF FACT

Appellant Anthony Cooper has been employed by the Fleet Maintenance Division for almost 15 years as an Automotive Engineer with responsibility for the city's vehicles, including the development, analysis and evaluation of products and services related to Denver's vehicle fleet. [Exh. A.] On June 28, 2011, Appellant was served with a pre-disciplinary letter asserting that he violated three CSA rules because he was observed sleeping at meetings between May 16 and June 13, 2011. The initial pre-disciplinary meeting was reset since it was scheduled during his vacation, and a second meeting was rescheduled at Appellant's request. At the July 19, 2011 pre-disciplinary meeting, a police officer preceded Appellant and his union representative Ed Bagwell into the room and directed them to specific seats. Appellant was permitted time to orally respond to the allegations in the June 29th letter, and submitted a written response a few days later. [Exhs. 3 - 5.] On July 22, Agency Director Ivy personally delivered the notice of suspension to Appellant. [Exh. 3.]

1. May 16, 2011 meeting with Wastewater Management

The Agency alleges that the first sleeping incident occurred during a May 16th division meeting with Wastewater Management, a separate division within the Public Works Department. One item on the agenda was a proposal to retrofit old Ryder trucks with sewer jet equipment. Ivy testified that Appellant was seated across the table from him, and he observed that Appellant had his head propped on his hand and his eyes were closed. At one point while the Director of Wastewater Management was speaking, Ivy noticed that Appellant's head dropped and he appeared to be sleeping. Ivy was embarrassed by this conduct from his staff, and remarked to Appellant at the conclusion of the meeting, "[y]ou can wake up now; the meeting is over." Appellant waved his hand in the air and said nothing, although he felt humiliated by his manager's public reproach.

Ivy and other senior staff had previously spoken to Appellant about sleeping during their weekly staff meetings, but Ivy had decided not to discipline him at that time because the meetings were strictly internal and he was hopeful that his warnings would correct the behavior. Since that time, one of Appellant's duties has been removed, and in its place he will be required to attend external meetings with higher level city officials, vendors and public officials from other cities. [Ivy, 10:35 am.]

Shortly thereafter, Ivy told Appellant's supervisor Ron Latreille about the incident. Ivy asked Latreille "to speak to Tony about his sleeping during meetings and that I would not tolerate this behavior in the future." [Exh. 8; see also Ivy testimony, 10:30 am.] However, Latreille did not convey that message to Appellant, but simply asked him whether he was sleeping during the May 16th meeting. [Exh. 6; Appellant, 9:50, 11:05 am.] Appellant denied sleeping, and responded that he may have put his chin on his hand but he was listening the entire time. To demonstrate that he was awake during the meeting, Appellant mentioned several topics that were discussed. On May 20, 2011, Latreille relayed that information back to Ivy. [Exh. 6.]

2. June 9, 2011 meeting with Dadee Manufacturing

On June 9, 2011, Appellant attended a four-hour vendor presentation held by Dadee Mfg. to introduce its Scorpion refuse truck, along with about fifteen other employees from Denver and other area cities. Lead Operations Manager Felix Espinoza was seated next to Appellant but was facing the other way to see the speaker during most of the meeting. When Espinoza did turn around, he noticed that Appellant was "fighting to keep awake but still dozing off at times." [Exh. 9.] Manager 1 Gary Bales, who was serving as Acting Director in Ivy's absence, also observed Appellant sleeping during the meeting. [Exh. 7.] Neither reported the incident at the time.

3. June 13, 2011 meeting with Blue Sun BioDiesel

The following Monday, Appellant, Bales and Espinoza were at another vendor presentation, this time featuring a drive-over device designed to measure vehicle tire conditions. Bales noticed that Appellant twice had his eyes closed and his head lowered for 15 or 20 seconds, apparently sleeping.¹ Espinoza tapped his foot under the table to wake him. Appellant raised his hand in response, and the behavior did not recur.

The next day, Bales reported both June incidents to the Director because he believed Appellant's actions did not positively represent the Division to the metro area fleet managers and business owners who were at the meeting. [Exh. 7.] Ivy asked Espinoza to send him a written statement of his observations, and Espinoza did so. [Exh. 9.] Ivy later emailed his own recollection of the May 16th meeting to the Agency's Human Resources representative Gwen Ferrari, and disciplinary action was initiated. [Exhs. 1, 8.]

At the pre-disciplinary meeting, Ivy requested the presence of a police officer, who directed Appellant and his representative to their seats but otherwise remained silent. Appellant stated only that he was not sleeping. His representative from the Teamsters Union, Ed Bagwell, challenged the age and relevance of the prior discipline cited in the pre-disciplinary letter, two of which were issued ten years ago. The recording indicates that the meeting became heated, with Ivy and Bagwell sometimes speaking over one another. Ivy described his observations of Appellant at the May meeting as sitting back in his chair and slouched down. He stated, "if I would have went . . .", then physically demonstrated how Appellant looked by leaning back in his chair with his tongue out and arms over the sides of the armrests. Bagwell replied, "I would have wondered if you had a heart attack." [Exh. 4; Bagwell, 10:57 am.]

Thereafter, Ivy found that Appellant had slept at the three meetings, and that this constituted neglect of his duties to act professionally at meetings and pay attention to the information presented in order to do his job. Ivy issued a one-day suspension in

¹ Bales also testified that Appellant's head fell off his hand at one point. I find that Espinoza's testimony on this point is more persuasive, as the latter was seated next to Appellant and observed him for a period of time. In addition, Bales did not mention this important fact in his statement written the day after the incident. [Exh. 7.]

light of the seriousness of the conduct, previous discipline, and prior counseling for sleeping at meetings. [Exhs. 3, 11.] Although Ivy considered a lesser penalty, he rejected that option based on Appellant's failure to correct his conduct after previous warnings. He imposed the minimal suspension in an effort to change the behavior. "My expectations are to include him in high level meetings in the future if this behavior can be corrected." He stated that he considered a one-day suspension to be the next level of progressive discipline after the written reprimand issued to Appellant in April 2011. [Ivy, 10:36 am; Exh. 11.]

Appellant testified that he closed his eyes during the first meeting to visualize how the proposed retrofitting would work in engineering terms, given the trucks' heavy use and the shortage of expert mechanical staff. He was the only one who took notes at the first meeting, and he used those notes at hearing to refresh his memory about additional details of the topics covered at the meeting affecting his work. Appellant admitted that he shut his eyes for five to eight seconds at the June product presentations, but stated he did so in order to think. [Appellant, 9:31 am.] Appellant denied that anyone ever told him he should not close his eyes at meetings. He added that he has used that method to concentrate at meetings for years, without generating comment in his performance evaluations or anywhere else, and received no complaints about his work arising from those meetings. [Appellant, 9:50, 11:05.]

Appellant contends that this action was motivated by bias against him, as shown by Ivy's decision to have a police officer attend the pre-disciplinary meeting. Appellant testified that the officer stared at him throughout the meeting, causing him stress. Bagwell noticed that Appellant appeared shaken by the presence of the officer. He added that he has never seen a police officer in the hundreds of City pre-disciplinary meetings he has attended as union representative for 900 city employees and sheriffs, even in cases alleging violence in the workplace. [Bagwell, 10:54 am.]

IV. ANALYSIS

A. Disciplinary Violations

The Agency bears the burden to establish that Appellant violated the Career Service Rules as cited in the letter of dismissal by a preponderance of the evidence, and show that the penalty was within the range of discipline that can be imposed for the proven violations. In re Gustern, CSA 128-02, 20 (12/23/02); Adkins v. Division of Youth Services, Dept of Institutions , 720 P.2d 626 (Colo. App. 1986).

1. Claimed irregularities during pre-disciplinary meeting

Initially, Appellant argues that the Agency's decision was motivated by Ivy's bias against him, as shown by Ivy's hostility at the pre-disciplinary meeting as well as the intimidating and unnecessary presence of a police officer. Ivy conducted the meeting and made the disciplinary decision.

In implementing discipline, public agencies separate the enforcement and adjudication functions to assure the neutrality of the fact-finder whose job it is to review

agency action. Keith Werhan, *Principles of Administrative Law* 192 (2008); citing the Administrative Procedure Act, 5 USC § 554(d)(C). This procedure allows an appointing authority to consider an employee's response to the written allegations before making the disciplinary decision. The constitutional requirement of pre-deprivation notice and opportunity to respond does not require that the official presiding at this meeting have the neutrality of an adjudicator, since that meeting is simply "an initial check against mistaken decisions". Cleveland Board of Education v. Loudermill, 470 US 532, 545 (1985); see also Concrete Pipe v. Construction Laborers Pension Trust, 508 U.S. 602, 618 (1993). Under Loudermill, a simplified pre-disciplinary hearing is adequate to provide the employee with procedural due process when a full administrative hearing is later available.

Here, the decision-maker had some personal knowledge of the events alleged in the pre-disciplinary letter. Ivy observed at the meeting that Appellant was slouched in his chair and apparently sleeping during the first incident. Appellant made only one comment: "I would like to state I was not sleeping." His representative engaged in sometimes heated conversation with Ivy during the remainder of the ten-minute meeting. When asked if he wanted to add anything, Appellant replied, "[n]o, I'm okay." [Exh. 4.] The presence of the police officer was highly unusual, especially as there is no indication that the Agency reasonably anticipated a breach of the peace. However, Appellant denied that he was intimidated at the meeting, and there was no evidence or argument that these circumstances harmed his effort to present his version of events at the meeting. [Appellant, 8:54.] Appellant was given and exercised his pre-deprivation right to respond to the allegations, and thereafter had the advantage of a full evidentiary hearing before a neutral hearing officer under CSR § 19-10. The evidence does not support an expansion of due process to include either a meeting without a police presence or a decision-maker without any knowledge of the facts alleged. Therefore, this pre-disciplinary meeting afforded Appellant all the process due before his one-day suspension. Finally, the evidence does not support a claim that the discipline was the product of bias or prejudice based on Appellant's membership in any protected class.

2. Neglect of duty under § 16-60 A.

An employee violates this rule when he neglects to perform a job duty he knows he is supposed to perform. In re Compos, CSB 56-08A, 2 (6/18/09).

The Agency found that Appellant neglected his duty based on his failure to conduct himself in a professional manner by staying awake during three business meetings in May and June of this year. Appellant's duties as automotive engineer require him to attend product presentations and division meetings in which a wide variety of issues relevant to his job are discussed. Appellant's primary duties are to develop time-sensitive specifications, manage special projects, evaluate automotive products, and create work reports. Service, teamwork, accountability and ethics, respect for self and others, and safety are obligations of all city employees. [Exh. A.] The Agency argues that the testimony of witnesses and Appellant's own admissions established that he neglected these important duties.

The evidence of three credible witnesses established that Appellant briefly dozed off during presentations at three high level meetings in May and June 2011. Appellant admitted that he closed his eyes at the first meeting, and that he regularly closes his eyes at meetings for brief periods when attempting to think or picture a solution to a problem. He acknowledged at hearing that the Director publicly criticized him for appearing to be asleep at the May 16th meeting, and that Fleet Manager Espinoza nudged his foot to wake him up at the June 13th meeting. This is persuasive evidence that Appellant was in fact asleep during these meetings, and that he was on notice that this behavior was unacceptable. Appellant was invited to the meetings in order to make reliable product recommendations based on the facts presented at the meetings, a central responsibility of his job, and he was aware of the importance of this task. Appellant therefore neglected his duty to attend to those facts by falling asleep.

In addition, Appellant failed in his duty to conduct himself in a professional manner by staying awake, reflecting poorly on the Agency he represented at the three meetings. Appellant does not dispute that professional behavior requires participants at a meeting to remain awake and demonstrate attentiveness.

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

An employee is careless when he fails to exercise reasonable care in performing an assigned duty, resulting in potential or actual significant harm. See In re Mounjim, CSA 87-07, 5 (7/10/08). A person exercises reasonable care when he acts with that degree of care a reasonable person would use under similar circumstances. In re Feltes, CSA 50-06, 6 (11/24/06).

The Agency presented no evidence or argument that Appellant performed any duty carelessly. Therefore, this allegation was not proven.

4. Conduct prejudicial to good order and effectiveness of Agency, §16-60 Z.

This rule requires proof that Appellant's conduct caused harm to the Agency's mission, or negatively affected the manner in which it achieves its mission. In re Sawyer, CSA 33-08, 15 (1/27/09), *citing In re Simpleman*, CSA 31-06, 10 (10/20/06). Here, the Agency presented no evidence that Appellant's conduct was observed by anyone outside the Agency, or that it caused anything but embarrassment to the Agency officials who observed it. That evidence does not meet the Agency's burden to prove harm to the Agency's mission or its means of achieving it under this rule.

B. Appropriateness of Penalty

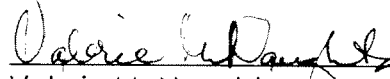
In evaluating the appropriate degree of discipline, an agency must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. In re Norman-Curry, CSA 28-07 and 50-08, 23 (2/27/09). An agency's determination of penalty may not be reversed or modified unless it is clearly excessive or based substantially on unsupported considerations. In re Owens, CSA 69-08, 8 (2/6/09).

The Agency established that Appellant neglected his duties to act professionally and pay attention at three high level meetings, in violation of § 16-60 A. In determining the appropriate penalty, the Fleet Maintenance Director considered reasonable and relevant factors, including the seriousness of the misconduct, the importance of the duties neglected to both Appellant's job and the Agency's mission, and the nature of Appellant's previous discipline. Ivy also considered the fact that he had personally warned Appellant not to sleep at internal meetings. Ivy demonstrated his urgent need to improve Appellant's conduct by his testimony that Appellant's duties had recently diminished, and that he sought to have Appellant attend external meetings to supplement his remaining duties if Appellant could correct his tendency to fall asleep at meetings. These factors are business-related considerations that a reasonable administrator would weigh in imposing discipline under these circumstances. Further, a one-day suspension complies with the principles of progressive discipline, as Appellant's last disciplinary action was a written reprimand in April 2011. Thus, the suspension was within the range of penalties that a decision-maker could reasonably impose given the proven facts.

V. DECISION AND ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency's suspension dated July 22, 2010 is AFFIRMED.

Done this 14th day of November, 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 November 14, 2011, a copy of this Decision and Order was delivered to the following in the manner indicated:

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