

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

Appeal No. 367-01

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: NOEL M. DEERR

And

DEPARTMENT OF EXCISE AND LICENSE, and the city and County of Denver, a
municipal corporation.

NATURE OF APPEAL

The Appellant Noel M. Deerr, (Appellant) is a Career Service Employee and has challenged her dismissal from her position as a Business License Inspector with the Department of Excise and License (Agency). The Agency dismissed Appellant because of conduct that occurred on September 17th, 2001, September 26th, 2001, and October 4th, 2001. The Agency contends Appellant violated Career Service Rule (CSR) §§ 16-50 1), 3), 7), and 13); 16-51 2(, 5), 10), and 11).

Appellant contends the Agency violated CSR §§ 16-10; and 16-20 2). Appellant's reason for appeal is the punishment is not fair or too harsh for the offense.

INTRODUCTION

A hearing on this appeal was held before Michael A. Lassota, Hearing Officer for the Career Service Board. Appellant was represented by Hugh S. Pixler, Esq. The Agency was represented by Assistant City Attorney R. Craig Hess, Esq., with Helen C. Gonzales serving as the advisory witness for the Agency.

The following witnesses were called and testified at the hearing: Noel M. Deerr, Jeanette E. Morris, Rich Jankowski, Helen Gonzales, and Theodric Harrell.

Exhibits 1-16, B,E,H,K, and Q were admitted into evidence by my ruling and were considered in this decision.

ISSUES ON APPEAL

Whether the Agency proved by a preponderance of the evidence that Appellant violated provisions of the Career Service Rules.

If so, whether Appellant's dismissal was reasonably related to the seriousness of the offense(s), considering all of the circumstances, as required by the Career Service Rules.

Whether the Agency violated Career Service Rules.

JURISDICTION

The alleged conduct that gave rise to the disciplinary action by the Agency occurred on September 17th, 2001, September 24th, 2001, and October 4th, 2001. Appellant was notified of the Agency's contemplation of disciplinary action on October 23rd, 2001. A pre-disciplinary meeting was held on October 30th, 2001. Appellant was advised of the disciplinary action against her by letter dated November 7th, 2001. Appellant filed her appeal with the Career Service Hearing Office on November 8th, 2001. Neither party contested the jurisdiction of the Hearing Officer to hear and decide this appeal.

Based on these facts, I find that this appeal has been timely filed. And, under CSR §§ 19-10 (b) and 19-27, I have authority to affirm reverse or modify the actions of the Agency.¹

RELEVANT FACTS

1. Subsequent to suspicions regarding inaccuracies of mileage recording on Business License Inspectors daily logs, Jeanette E. Morris (Jenny), an administrator with the Agency, drove an Inspector's daily route to verify the log.

¹ CSR § 19-10 (b) provides:

Actions subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- b) Actions of an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

CSR § 19-27 provides:

The Hearings Officer shall issue a decision in writing affirming, modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.

2. Jenny Morris found this route to be approximately one-half the mileage the Inspector had recorded on their log.
3. Inspectors transfer the mileage from the daily log to a monthly mileage log.
4. Inspectors are paid for the mileage listed on the mileage logs.
5. Appellant signed her mileage logs claiming these miles as official miles driven, and that the log was a true and accurate copy.
6. Jenny Morris brought this mileage discrepancy to the attention of the Agency Director Helen C. Gonzales, who authorized an investigation of all the Business License Inspectors.
7. Kolb, Stewart and Associates, Inc. was retained to do this investigation.
8. The investigators were only given the basic information needed to enable them to identify the Inspectors, and proceed with their investigation. The video taping was initiated by the inspectors.
9. The investigators were told the order in which to follow the Inspectors and not to follow any Inspector on the same day of the week in successive weeks. In other words, if an Inspector was followed on a Tuesday one week, that Inspector would be followed on a different day the next time that Inspector was followed.
10. The mileage recorded for Appellant by the investigators conflicts with the mileage on Appellant's mileage log.
11. Because it was not determined when Appellant entered the starting and ending mileage for the day, it is impossible to determine if the Appellant's or the investigator's mileage is accurate, or if Appellant was charging for miles she was not entitled to.
12. On Monday, September 17th, 2001, Appellant's daily log records the activities for that day substantially different than do the investigators.
13. The same is true for Wednesday, September 26th, 2001, and Thursday, October 4th, 2001.
14. As a result of the investigation, on October 23rd, 2001, Appellant was given official notice that disciplinary action was being contemplated against her. A pre-disciplinary meeting was held on October 30th, 2001.
15. At the pre-disciplinary meeting Appellant appeared unrepresented and read a statement into the record admitting many of the allegations against her, and offering her side of the story.

16. On November 6th, 2001, Appellant was dismissed from her position as a Business License Inspector with official notification mailed to her on November 7th, 2001.

DISCUSSION AND CONCLUSIONS OF LAW

As a 15 year employee of the City and County of Denver and an 11 month employee of the Agency, Ms. Deerr has Career Status as a Career Service Employee and may not be disciplined without just cause.² Appellant is accused of violating the following Career Service Rules:

§ 16-50 Discipline and Termination

A. Causes for dismissal

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

- 1) Gross negligence or willful neglect of duty.
- 3) Dishonesty, including but not limited to: altering or falsifying official records or examinations; soliciting, or making a bribe; lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours; using official position or authority for personal profit or advantage, including kickbacks; or any other act of dishonesty not specifically listed in this paragraph.
- 7) Refusing to comply with orders of an authorized supervisor or refusing to do assigned work which employee is capable of performing.
- 13) Unauthorized absence from work, including but not limited to: when the employee has requested permission to be absent and such request has been denied; leaving work before completion of scheduled shift without authorization; or taking unauthorized breaks.

² CSR § 5-62 provides:

Employees in Career Status
An employee in career status

- 1) may be disciplined or dismissed only for cause, in accordance with Rule 16, Discipline.

§ 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.

- 2) Failure to meet established standards of performance including either qualitative or quantitative standards.
- 5) Failure to observe departmental regulations.

The Department of Excise and License Employee Handbook of Policies and Procedures regarding work hours states:

“Full time employees are required to work 40 hours per week....”

The Department of Excise and License Handbook of Policies and Procedures regarding breaks and lunch states:

“Two breaks of fifteen minutes each are permitted; one in the morning and one in the afternoon.... The two breaks may be combined with pre-approval from the supervisor. Breaks may not be saved for later use....”

The Department of Excise and License Employee Handbook of Policies and Procedures regarding vacation states:

“...An employee must submit a vacation leave request to his or her supervisor at least two days in advance (except in cases of emergency) in order to use vacation leave for leaves of less than five days. Supervisors have the authority to waive the advance notice requirement based on the needs of the office and workload....”

- 10) Failure to comply with the instructions of an authorized supervisor.

During your initial training your supervisor, Ms. Jenny Morris, directed you that you must obtain pre-approval from your supervisor prior to having any meetings away from the office. She also advised you that you were allowed two fifteen-minute breaks, one in the morning and one in the afternoon. Further, Ms. Morris informed you that your lunch break was for thirty minutes only.

- 11) Conduct not specifically identified herein may also be cause for progressive discipline.

The City Charter, §C5.25 (4) and CSR §2-104 (b)(4) require the Hearing Officer to determine the facts in this matter “de novo”. The Colorado Courts have held that this requires an independent fact-finding hearing considering evidence submitted at the *de novo* hearing and a resolution of the factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329, 535 P.2d 751 (Colo. App., 1975).

The party advancing a position or claim, in an administrative hearing like this, has the burden of proving that position by a “preponderance of the evidence”. To prove something by a “preponderance of the evidence” means to prove that it is more probably true than not (Colorado Civil Jury Instruction, 3:1).³ The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (Colorado Civil Jury Instruction, 3:5).⁴ The ultimate credibility of the witnesses and weight given their testimony are within the province of the Administrative Law Judge or Hearing Officer. *Charnes v. Lobato*, 742 P.2d 27 (Colo. 1987). As the trier of fact, the Hearing Officer determines the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In its dismissal letter, the Agency alleges Appellant violated the numerous Career Service Rules outlined above. Therefore, the Agency has the burden of proving the allegations contained in the letter of dismissal by a preponderance of the evidence.

The first allegation is the Appellant is guilty of “Gross negligence or willful neglect of duty” in violation of CSR §16-50 A (1). Neither Career Service rules nor their definitions define either “willful” or “gross”. These two words are interrelated and will be discussed together.

“Negligence” is a failure to use reasonable care or a failure to act in a reasonably prudent manner under the circumstances. *Lavine v. Clear Creek Skiing Corp.*, 557 F.2d 730 (10th Cir. 1977); *Metropolitan Gas Repair Service, Inc. v. Kulik*, 621 P.2d 313 (Colo. 1980); *Rice v. Eriksen*, 476 P.2d 579 (Colo. App. 1970). Gross negligence involves a higher form of culpability than mere negligence. “Gross” in this context means flagrant or beyond all allowance, *Lee v. State Board of Dental Examiners*, 654 P.2d 839 (Colo. 1982), or showing an utter lack of responsibility, *People v. Blewitt*, 192, Colo. 438, 563 P.2d 1 (1977). Willful neglect of duty transcends any form of negligence and involves conscious or deliberate acts. See *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 12541 (1975); *Drake v. Albeke*, 188 Colo. 14, 532 P.2d 335 (1975).

³ The notes on use of Instruction 3:1 state: Generally, in all civil cases, “the burden of proof shall be by a preponderance of the evidence,...: citing C.R.S. § 13-25-127.

⁴ The content of this instruction was approved as an instruction in *Swaim v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (e. Cleary 3 ded, 1984).

“Gross” has been generally defined as: “Glaringly obvious: egregious.”⁵

Black’s defines it as:

“Great; culpable. General absolute; not to be excused; flagrant; shameful; as a gross dereliction of duty; a gross injustice; gross carelessness.”⁶

Black defines “Gross negligence” as:

“The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. “Gross negligence: is substantially higher in magnitude than simple inadvertence, but falls short of intentional wrong. (Cite omitted).”⁷

“Willful” is generally defined as: “Said or done deliberately; stubborn.”⁸

Black’s defines Willful as:

Proceeding from a conscious motion of the will; voluntary. (Cite omitted). . . . Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary . . . A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. (Cites omitted).⁹

Helen Gonzales testified Appellant violated § 16-50 A (1) by falsifying documents, inaccurate reporting and not doing what was required. This was admitted by Appellant when she read her side of the story into the record at the pre-disciplinary hearing.

“I have worked with logs for many years. In my last job we never used it for any official business except to report where we were and what we did each day. . . . Therefore, I would not have considered them official documents or something I could be dismissed for.”

Appellant goes on to say that possibly all of her logs were inaccurate, and testified that she was never told to put inaccurate information into her logs. Jenny Morris testified that one of

⁵ Webster’s II New Riverside Dictionary, Office Edition, Berkley Books, New York; copyright 1984.

⁶ Black’s Law Dictionary, Fourth Edition; West Publishing Co. copyright 1951.

⁷ Black’s Law Dictionary, Fourth Edition; West Publishing Co. copyright 1951.

⁸ Webster’s II New Riverside Dictionary, Office Edition, Berkley Books, New York; copyright 1984.

⁹ Black’s Law Dictionary, Fourth Edition; West Publishing Co. copyright 1951.

the reasons Appellant was hired was her background at Parking Management where she was required to fill out a daily log.

§ 16-50 A (3). Gonzales testified Appellant violated this rule by taking unapproved extended breaks and claiming to go to businesses she did not go to. These allegations were confirmed by the investigators. Their investigative notes had Appellant at different locations than Appellant had listed on her log. Also, Appellant's logs show her not taking breaks when the investigator's notes indicate she did, when, and at what times.

§ 16-50 A (7). Gonzales testified Appellant violated this rule by not doing what she said she was doing as indicated on her logs, and not filling out paperwork correctly when instructed to. Jenny Morris testified Appellant was trained regarding the Policies and Procedures of the Agency. The investigator's notes show Appellant at different locations than her log indicates.

§ 16-50 A (13). Gonzales testified Appellant claimed working the whole day when in fact she did not. The investigators notes indicate Appellant took in excess of a three and one-half hour lunch break on October 4th, 2001, leaving Anthony's Pizza, in the vicinity of 7th and Broadway at 4:28 p.m. Appellant's daily log for the same day indicates a one-half hour lunch from 1:20 p.m. – 1:50 p.m.. Appellant's explanation was she worked longer hours that day to make up for the long lunch. Her log indicates she left her last stop, Good Times Drive Thru, at 3:30 p. m.

§ 16-51 A (2). Gonzales testified Appellant violated this rule by not doing the work she was supposed to and not working a forty hour work week, yet was paid for forty hours. This too was observed by the investigators. Their reports do not confirm what the Appellant's logs indicate she did on the days she was followed by them.

§ 16-51 A (5). Many violations of departmental regulations were violated by Appellant, according to Gonzales: Not working a forty hour week, combining breaks without authorization of a supervisor, and not submitting leave forms as required to cover the time for extended breaks.

§ 16-51 A (10). As Jenny Morris testified, Appellant was trained that pre-approval was necessary for any meetings away from the office. Appellant was observed by investigators, at Coors Field, meeting the other Business Inspectors. Appellant's explanation was that she was to be trained that day regarding problem vendors and to learn their identities. These vendors were not there that day because there was no ballgame.

§ 16-51 A (11). Lying was described by Gonzales during her testimony as the reason Appellant violated this rule. The Appellant admitted not filling out her logs correctly.

Appellant offered various explanations for the discrepancies between her logs and what the investigators reported. Regardless of these explanations, Appellant admitted that possibly all of her log sheets were inaccurate when she read her statement into the record at the pre-disciplinary hearing. And, Appellant testified that she was never trained to put

inaccurate information on her log sheets. Appellant further testified that she filled out her log sheet as the stops were made at the businesses she was checking on. This is highly improbable given the discrepancies between her logs and what the investigators observed on the days Appellant was followed.

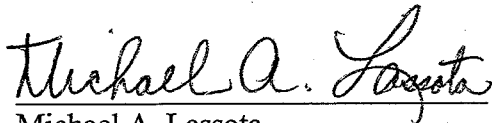
Appellant contends the Agency violated CSR §§ 16-10; and 16-20 (2).¹⁰ Appellant's contention is the punishment is not fair or too harsh for the offense. The testimony from Gonzales was there was no decision regarding termination or any other form of discipline until after the pre-disciplinary meeting where Appellant admitted all her logs could be inaccurate. Gonzales and Morris both testified that Appellant's lying and inaccuracies caused them to form the opinion that they could not trust the Appellant and had no confidence in her.

Progressive discipline is not required, only suggested, before an employee can be dismissed. After hearing the testimony of all the witnesses, I conclude that the Agency's witnesses testimony was more credible than Appellant's. More weight is given to their testimony than Appellant's. Therefore, the Agency has met its burden of proof regarding the Career Service Rules cited. The level of discipline, dismissal, in this appeal is reasonably related to the severity of the offense.

ORDER

The action of the Agency is AFFIRMED.

Dated this 28th, day of February, 2002.



Michael A. Lassota
Hearing Officer
Career Service Board

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¹⁰ § 16-10 Purpose

The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior and performance. The disciplinary action taken must be consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

§ 16-20 Progressive Discipline

2) Whenever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean progressive discipline must be taken before an employee may be dismissed.

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER by depositing same in the U.S. mail, postage prepaid, this 20th day of February, 2002 addressed to:

Hugh S. Pixler
Attorney at Law
1775 Sherman St. Suite 1775
Denver, CO 80203

Noel M. Deerr
2614 S. Decatur St.
Denver, CO 80219

I further certify that I have forwarded a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER by depositing same in the interoffice mail, this 20th day of February 2002, addressed to:

R. Craig Hess
Assistant City Attorney
Employment Law Section

Helen C. Gonzales
Department of Excise and Licenses

Viggo Granada