

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

JOAQUIN GONZALES, Appellant,

vs.

COMMUNITY PLANNING AND DEVELOPMENT,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal commenced on Sept. 26, 2011 and concluded Oct. 17, 2011 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and represented by Joseph Salazar, Esq. The Agency was represented by Assistant City Attorney Robert Wolf. Having considered the evidence and arguments, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order.

I. STATEMENT OF THE APPEAL

Appellant Joaquin Gonzales was a Chief Inspector for Community Planning and Development (Agency). He appeals his Apr. 15, 2011 termination for asserted violations of eleven Career Service Rules, and also claims that the termination was based on his national origin, Hispanic. Prior to hearing, the Agency withdrew the allegation under CSR § 16-60 D. Agency Exhibits 1 – 5, 7-11, 14-15, 18-30, 32-33, 35, 37 and 40 were admitted by stipulation or motion. Appellant's Exhibits A, K, M-O, Q-R and BB were also admitted.

II. ISSUES

The issues in this 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 dismissal was within the range of penalties that could be imposed by a reasonable administrator for the proven misconduct?

III. FINDINGS OF FACT

Appellant Joaquin Gonzales was employed by the City and County of Denver since Nov. 16, 1984, and had incurred no discipline prior to his termination. As one of two Chief

Inspectors for the Zoning and Neighborhood Inspection Service (NIS) within the Agency, Appellant supervised a crew of inspectors who conduct on-site inspections to enforce zoning and building codes and other municipal ordinances related to real property. Chief Inspector Tim Kristofek supervised the other crew of city inspectors, and both worked together to administer the unit.

On Mar. 9, 2011, Appellant notified Inspection Services Manager Michael Sizemore that he wanted to schedule both inspection crews to attend a bulk plane training for Friday, Mar. 11. That training never occurred, as Appellant authorized the crews to leave a couple of hours early on that date. [Stipulations of parties, June 9, 2011.] Chief Inspector Tim Kristofek was in on Mar. 9, but was out on leave on Mar. 11, the day scheduled for training.

At about 9:00 am on Friday, Mar. 11, Appellant called a meeting of the inspectors in both crews and informed them there was scheduled training at 1:00 pm, but that they should take their personal vehicles because they would be allowed to leave early. At the end of the meeting, Appellant told them all to come back to the office from the field by 12:30 pm, and they would then be allowed to leave for the day. [Fernandez, 10/17/11, 11:21.] Appellant said he would log his crew out on the Kronos time and pay system. Senior Inspector Amelinda Whitley, a member of Kristofek's crew, asked Appellant if he was going to let Kristofek know about this. Appellant replied, "[d]on't worry about it", and said he would take care of it. Later that day, Whitley asked him again if he wanted her to email Kristofek, and he assured her he would "take care of it". [Whitley, 10/17/11, 10:51; Exh. 18-3.] At the end of the morning meeting, Appellant asked Whitley to call the four inspectors who were already in the field and tell them to enter training from 1 to 3 pm on their log sheets, but that they could leave for the day once they returned to the office. [Exh. 18.] Most of the inspectors left the office by about 1 pm, entered training from about 1 to 3 pm on their daily logs, and did not log out on Kronos. [Exhs. 20 – 29.] Appellant entered work hours for all the inspectors on his crew from 1 pm to the end of the shift, 3:30 pm.

The following Monday, Kristofek noticed his crew had not punched out on Friday. When he asked Inspector Daniel Amador about it, Amador hesitated, then said "[w]e had training." Kristofek was surprised because he had arranged all previous training for both inspector crews, and always emailed an invitation to Appellant and Sizemore before training was held. [Kristofek, 9/26/11, 9:13; Exh. 11-2.]

Soon thereafter, Appellant approached Kristofek and asked him to log his crew out at the usual time for Friday in Kronos because they had been in training. [Exh. 4-3.] Kristofek did so. Shortly thereafter, Inspector Anna Valdez asked him if Appellant had informed him they did not do the training. Kristofek replied that Appellant told him the training had been held. Valdez stated it was confusing, and people didn't know what to do, but that they did not go to training. Kristofek then questioned Inspector Whitley. She confirmed that Appellant told them Sizemore had approved the training, but Appellant authorized them to go home instead. [Exh. 11-3.] Kristofek became very concerned, as he had entered false work hours on his crew's pay records based on Appellant's statements. He was aware that he was still on probation, having started as Chief Inspector less than five months ago, and that his manager was out of the office until Thursday. Kristofek was not sure how to handle the situation, but ultimately decided he needed to discuss it with Appellant.

The next day, Kristofek asked to meet with Appellant in his cubicle. Kristofek told Appellant he had learned the training had not been held. "The next time you let my people go, you need to let me know. You can't lie to me. I am trying to build a relationship with my people and you are undermining me." [Kristofek, 9/26/11, 9:27.] Two hours later, Appellant approached him and apologized for lying to him about the training. Kristofek was still not sure what to do, but felt strongly that he did not want "to be a tattletale" on his fellow Chief Inspector. [Kristofek, 9/26/11, 9:30.] Later that day, Kristofek overheard one of Appellant's inspectors warn an inspector on his own crew that Kristofek had found out the training had not occurred. Kristofek thereafter noticed "dirty looks" and division between the two crews. Kristofek finally decided he needed to report the matter to Sizemore on Thursday when he returned to the office. [Exh. 11-3.]

On Mar. 17, 2011, Kristofek informed Sizemore that the bulk plane training had not occurred, but that Appellant had nonetheless asked him to enter training hours into Kronos for his crew. Sizemore later asked Appellant how the training had gone. Appellant responded that it had gone well. Sizemore concluded that something was wrong, and asked Whitley if she had done the training. She replied that she had not.

Sizemore was very concerned that Appellant's conduct may adversely impact his own ability to improve the culture at NIS. When that division was placed under his supervision in June 2008, Sizemore had been informed by his manager Peter Barton that the group's daily work with the public and city council on sensitive property issues required a heightened degree of teamwork and ethical standards, but that both were in need of improvement. Sizemore then met with each inspector. He learned from those interviews that the teams were divided into cliques, and lacked the cohesiveness needed to work as one unit in performing consistent enforcement throughout the city neighborhoods.

At that time, Kristofek was one of half dozen inspectors who had complained of favoritism when there were three chiefs, one of which was Appellant. As a result of various meetings, management emphasized to NIS personnel the importance of internal communication and working together as a team to accomplish the work of the unit with consistency and fairness. [Kristofek, 9/26/11, 9:05.] Neighborhood Inspections was thereafter put under Appellant as the sole Chief Inspector for about five years. In Aug. 2010, Kristofek was promoted to a second Chief Inspector position. Sizemore met with both and emphasized that they must communicate and work as a team in order to correct the past perceptions of favoritism that had pervaded the unit.

Likewise, Inspector Whitley recalled when Tom Kennedy managed NIS under a different philosophy, in which he strove "to make everybody happy". She observed that Kennedy would sometimes let an employee go home early. When others learned of this, they would get upset, and so he would let them leave, creating a "snowball effect." When Sizemore became the head of NIS, Whitley remembered one incident that set a different tone: an acting Chief Inspector entered his office and said his crew was leaving early. Sizemore replied, "[a]bsolutely not", and told him he would never be allowed to act as chief again. [Whitley, 10/17/11, 10:56.]

In July 2008, shortly after Sizemore took over management of the NIS and completed his interviews with all of the inspectors, he developed an action plan which targeted six

areas for improvement: 1) accurate time reporting, 2) elimination of favoritism by supervisors, 3) development of more trust and respect for supervisors, 4) encouragement of ethical conduct, 5) improvement of cohesion among the teams, and 6) regular meetings every two weeks to promote teamwork and emphasize this new direction. In addition, Sizemore separately met with Appellant about the lack of teamwork he had uncovered during the interviews, and counseled him about the need for the improvements outlined in the action plan. [Sizemore, 9/26/11, 10:03.] Sizemore acknowledged at hearing that major changes take time to implement in a large organization, but stated he has sought to convey a consistent message to NIS personnel about the importance of trust and teamwork to the work of the NIS. [Sizemore, 9/26/11, 10:34.]

After learning about the cancelled training in Mar. 2011, Sizemore consulted with his supervisor and with Human Resources, and decided to place Appellant on investigatory leave. [Sizemore, 10:52.] Fifteen employees were interviewed, including Appellant. [Exhs. 4 – 19¹.] The Agency thereafter initiated pre-disciplinary proceedings. Sizemore made the decision to terminate, despite Appellant's lack of previous discipline, after concluding that Appellant's acts in urging inspectors to falsify their time records and lying to Kristofek had sent a message to NIS staff that was inconsistent with his action plan, harming the Agency and internal relationships in ways that could not easily be repaired. [Sizemore, 2:50; Exh. 1.] Appellant filed a timely appeal of the Agency termination.

IV. ANALYSIS

In appeals of discipline brought before the Career Service Hearing Office under CSR § 19-10, an agency bears the burden to prove by a preponderance of the evidence that the conduct violated the Career Service Rules as alleged in the disciplinary letter. An agency must also establish that the penalty is within the range of discipline that can be imposed by a reasonable administrator under the circumstances. See Adkins v. Division of Youth Services, Dept. of Institutions, 720 P.2d 626, 628 (Colo.App. 1986).

1. Neglect of duty under § 16-60 A.

To sustain an allegation under this rule, an agency must establish that an employee failed to heed an important work duty, resulting in significant potential or actual harm. In re Lottie, CSA 132-08, 2 (3/9/09). An employee must be on notice of the duty and the manner in which the agency expects it to be performed. In re Mestas et al., CSA 64-07, 21 (5/30/08).

Here, the Agency found that by leaving early on Mar. 11, Appellant had failed to perform his work duties. [Sizemore, 9/26/11, 11:19.] However, Appellant had already worked 40 hours that week before he left that day, since he attended a meeting after work on Tuesday regarding a specific project. [Sizemore, 1:03; Appellant, 3:20.] The Agency presented no evidence that Appellant had left any specific work duties undone during his two hours' absence on Friday afternoon. Therefore, the evidence does not support a finding that Appellant violated CSR § 16-60 A.

¹ Five of those interviews were not offered or admitted into evidence: Exhibits 6, 12, 13, 16 and 17.

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

An employee performs his duties carelessly in violation of § 16-60 B when he does an important work duty poorly, resulting in potential or actual significant harm. In re Mounjim, CSA 87-07, 5 (7/10/08). Here, Sizemore concluded Appellant violated this rule because he carelessly told crew members to "forge" training hours on their daily activity log. [Sizemore, 9/26/11, 11:20 am.] However, it is clear from the evidence that Appellant intended to instruct the inspectors to list the remaining two hours of their shift as training, and did not issue that instruction carelessly. Since intentional acts fall outside the scope of this rule, Appellant's purposeful order to record their absence as work hours does not prove a careless performance of his duties. See In re Mounjim, CSA 87-07, 6 (7/10/08).

3. Theft, destruction or neglect in the use of City property under §16-60 C.1.

The Agency argues that Appellant misused City property by allowing 22 employees to leave two hours early and get paid as if they had worked those hours, costing the City lost productivity and about \$1,500 in pay. [Sizemore, 9/26/11, 2:42, 3:00 pm.] The evidence of the daily work logs shows that nine inspectors reported almost 19 hours of training leave, at an approximate cost of \$646 in City funds. [Exhs. 20 – 30.]

The issue then is whether §16-60 C.1. gives notice to employees that this type of conduct is prohibited. A failure to use reasonable care in the use of City property which results in property damage has been held to violate the rule as it was amended in 2006. That amendment lowered the standard needed to prove a violation from gross neglect to neglect. In re Lewis, 37-11, 4 (9/22/11); compare 16-60 C.1. and former §16-50 A. 2. Prior decisions under the former rule have required proof of a willful act or an utter lack of responsibility causing damage to City property. See In re Hobley, CSA 61-05, 8 (12/19/05) (neglect of City property was proven by two accidents with City vehicles within six weeks, despite training and experience, but neglect was not demonstrated by the same employee's failure to retrieve a hand-held computer from the roof of his City vehicle prior to driving off). The current rule prohibits a lesser degree of neglect in the use of City property.

Here, Appellant is charged with neglect in committing City payroll funds by allowing nine employees to leave early, but paying them for the hours they had not worked. The Agency contends that Appellant misused his supervisory authority by falsifying hours and lying to employees, a supervisor, and his manager in order to ensure that the inspectors were paid for the time they had not worked. Sizemore admitted that a supervisor has authority to permit employees to leave early, but argues that Appellant should have sought approval from him before allowing the entire inspection staff to leave two hours before the end of their shift. Thus, it appears that the fact that Appellant authorized employees to leave early is not the misconduct being targeted in the disciplinary action, but that Appellant's deceptions are at the heart of the charged offense. I find that this rule does not give notice to an employee that dishonesty in the process of granting work hours constitutes neglect in the use of City property. Dishonesty is covered by a separate disciplinary rule, § 16-60 E.

4. Dishonesty, including falsifying Kronos records, lying to supervisors and false reporting of work hours under §§ 16-60 E.1.; 3.

An employee violates this rule by making a knowing misrepresentation within the employment context. In re Clayton, CSA 111-09, 4 (4/16/10); In re Mounjim, CSA 87-07, 5-6 (CSB (1/8/09)). The Agency claims Appellant lied to the crews by telling them their time off was authorized, falsified Kronos time records by reporting work hours for time not worked by the inspection crews, lied to Chief Inspector Kristofek by telling him the training had occurred, and lied to Manager Sizemore by leading him to believe the training had been held. Appellant denies all of these allegations.

As to the first asserted incident of dishonesty, the Agency presented the testimony of Senior Inspector Whitley. Appellant called an early morning staff meeting for both crews, and asked Whitley for a good training site address. She suggested 461 South High Street. Appellant then announced they would be doing bulk plane training at 1 pm at that location. Later in the meeting, he advised them he was going to let them leave early. [Whitley, 10/17/11, 10:48.] Appellant asked Whitley to call those already in the field and have them take their personal vehicles back to the office. Whitley asked him for clarification about whether the training would be held. Appellant replied, "[t]ell them that means go home, not to training." [Exh. 18-3.] Since Whitley was a member of Kristofek's crew and he was out that day, she asked Appellant if he wanted her to call Kristofek to let him know about the training. Appellant told her he would "get in touch with him and let him know what is going on." [Exh. 18-3.] Whitley then called the four inspectors in the field, and

instructed them to . . . put on their log sheet at 461 High Street . . . training from 1:00 to 2:45 or 3:00 pm. . . . I told them to take their personal vehicle per Joaquin because there is no way to document mileage. This is what Joaquin said. My log entries were false. I entered what I was told.

[Exh. 18-3.]

Inspector Claudia Willis confirmed this account in her March statement to the Agency and in her testimony seven months later. Willis was one of the four inspectors in the field who Whitley called that morning at Appellant's request. She recalled that Whitley told her Appellant was allowing them to go home early.

We were supposed to put on our log that we were at an address on S. High Street. I asked her 'what' she said Joaquin said to put on your log that you were going to be at a training at 1:00. I was in the field in a city vehicle. At 1:00, I called Joaquin because I wasn't comfortable. Asked him what's going on? I wasn't comfortable. He said you guys have been working so hard, I'm going to let you go home at 1:00. I said I don't want no mess. Once I leave here, I have to pick up my sister for dialysis. He said don't worry, I already have this cleared through Mike [Sizemore]. When he said he cleared it with Mike, I was fine.

[Exh. 19-2, 19-3. See also Willis testimony, 10/17/11, 10:06 am; Exh. 10-3; Fernandez statement; and Fernandez testimony, 10/17/11, 11:28 am.]

Appellant testified that he did not make the decision to cancel the training until about noon, and did not tell the crew they would be released early until they came back to the office at around that time. [Appellant, 10/17/11, 3:14; Exh. 4-2.] In contrast, Whitley and Willis testified consistently and credibly that at around 9 am Whitley communicated Appellant's contradictory instructions: Willis was to go to training at 461 South High Street at 1 pm, but in fact she and the rest of the crew could go home before then. [Willis, 10/17/11, 10:01.] Whitley also informed Willis that inspectors should take their personal vehicles "because there is no way to document mileage", a clear indication that the training was to be a subterfuge. [Exh. 18-3.] I find Whitley and Willis more credible because their statements have been consistent throughout this process, and the other inspectors at the meeting corroborated their account of events. [Exhs. 20 – 30.]

Appellant denied that he told the inspectors that Sizemore had authorized his actions, but conceded in his statement that he told Kristofek's group he would talk to Kristofek on Monday. [Exh. 4-3.] The entire NIS unit was conscious that the current NIS manager was seeking to correct past complaints of favoritism and the inaccurate reporting of work hours. Against this backdrop, Claudia Willis' efforts to confirm that the time off was actually authorized is persuasive evidence that both Whitley and Appellant assured her it had been authorized by Sizemore. Willis was so concerned that she called Appellant directly to confirm it, even after Senior Inspector Whitley had assured her Appellant had given them permission to leave early. I find that Appellant lied to Whitley and Willis by representing that Sizemore had authorized their early departure as paid training hours, in violation of this rule.

Next, Appellant is charged with lying to his fellow Chief Inspector by telling Kristofek the training had occurred. Appellant admits he made this statement and that it was false, but said he intended to tell Kristofek the truth later when they were alone. [Appellant, 10/17/11, 3:25.] One day later, Appellant had still not told Kristofek his crew had left early. By that time, the work hours he asked Kristofek to add had been entered and finalized in the City payroll system, based on Appellant's admittedly false statement that the crew had attended training. Appellant's false statement to Kristofek directly led to an inaccurate reporting of training hours for Kristofek's crew. Both the false statement and the false reporting of work hours violated this rule.

The Agency also contends that Appellant lied to Sizemore on Thursday, when he asked about the training, by replying that it "went fine". Appellant testified that he made this statement because he assumed Sizemore was asking about a training held Tuesday or Wednesday with Inspector Sandoval. [Appellant, 10/17/11, 3:29.] This appears unlikely, since the bulk plane training was the only training about which Sizemore had been informed. In addition, Appellant's statement contradicts that claim. [Exhs. 4-3, 4-4; 5.] By Thursday, Kristofek had conveyed to Appellant that he was angry about his deception and concerned about the effect it may have on his crew's ability to trust him. The fact that Appellant evaded Sizemore's question even after Kristofek confronted him about his falsehood indicates Appellant chose to avoid responsibility for his actions, despite the emphasis Sizemore placed on trust and teamwork within the unit. As a result of this further act of deception, Sizemore lost confidence in Appellant's willingness to comply with his leadership standards.

Finally as to this allegation, section E.3. of this rule is violated by the false reporting of work hours. The Agency contends Appellant violated this section by authorizing work hours for

his employees after letting them leave for the day, and asking Kristofek to add those hours for his crew, based on Appellant's misrepresentation that the training had occurred. Appellant conceded at hearing that he falsified the Kronos records of his own crew to show work hours for the two hours after he let the crews leave early. [Appellant, 10/17/11, 3:42.] Appellant also admits that he asked Kristofek to do the same, but contends that both were accepted methods of recognizing exemplary performance, and that others did the same without being disciplined.

The previous NIS Manager, Tom Kennedy, allowed employees to leave early at various times. Sizemore testified that he became aware of these past practices shortly after he started at NIS, but that his action plan was intended to notify the staff that stricter and more consistent standards were now in effect in order to correct perceptions of favoritism and promote teamwork.

The Career Service Rules authorize a grant of administrative leave for exemplary performance. CSR § 10-67 B.2. As manager of NIS, Sizemore has the authority to grant or approve time off for Agency purposes, including exemplary performance. [Kristofek, 9/26/11, 9:39; Sizemore, 10/17/11, 11:29.] Sizemore also allowed his supervisors to grant a few hours' early release for employees if it was staggered to assure office coverage. [Sizemore, 9/26/11, 1:34.] Appellant does not claim the appointing authority delegated to him the power to grant leave under this rule. The Agency contends Appellant's actions violated these practices for several reasons: Appellant did not obtain authorization from his manager, he concealed his actions by lying to his fellow Chief Inspector and his manager, and the office was left with no coverage for two hours when Appellant excused the entire inspection staff at the same time.

Appellant asserts that that he had the authority to reward the crews for their hard work in completing 100,000 inspections, and states that others did the same thing without disciplinary repercussions. Appellant argues that rewarding employees by granting a few hours off was common practice. He cites the grant of two hours' early release during the 2010 holidays by himself and Kristofek, without approval by Sizemore. However, in that instance, Sizemore was on short-term disability leave, and Appellant and Kristofek staggered the times off to assure office coverage. In addition, Kristofek was a new supervisor acting in the absence of his manager, relying on Appellant's eleven years of experience in that job to guide him about NIS practices. "I thought that was the way we kind of did it." [Kristofek, 9/26/11, 9:40.]

Appellant also points to Sizemore's actions in permitting time off. In Aug. 2010, Sizemore allowed several employees to leave a team-building picnic about an hour early because they had done setup and cleanup for the event. At another time, Sizemore allowed Ron McWee to have four hours off the day after he worked two to four hours on a Saturday night on a special project listening for excessive noise because McWee was the only one available to do it. Sizemore concedes that those hours may have been recorded as work hours in Kronos, just as Appellant recorded the Mar. 11 training hours. [Sizemore, 9/26/11, 1:28, 1:56.] The grant of less than an hour for the setup and cleanup crew at the picnic, and time off for McWee in return for his night inspection, do not prove that Appellant was following an established practice in granting time off for the entire inspection staff. Moreover, such a practice would contradict the credible testimony of Sizemore, Kristofek, Willis, Whitley, Fernandez, and Rodriguez that the Agency requires time records to be accurate, and does not permit a

supervisor to excuse an entire work crew without permission. Most importantly, the fact that Sizemore, in his capacity as Inspection Services Manager, granted a few hours off does not establish that Sizemore's subordinate supervisors, including Appellant, have similar authority.

The evidence shows that Appellant's grant of time off was not consistent with the Agency policies, and Appellant was given clear notice of those policies. Sizemore counseled Appellant in 2008 against favoritism, in the face of allegations against Appellant made by inspectors during their interviews with Sizemore when he began as NIS Manager. He emphasized to both Appellant and Kristofek in 2010 that he intended to prohibit favoritism and enforce stricter standards with regard to work hours. Appellant was specifically instructed to work as "one person" with his fellow Chief Inspector in supervising the crews, yet he lied to Kristofek and concealed his actions from their manager. Moreover, Appellant's actions went well beyond the cited examples by excusing the entire inspection staff without authority from the manager, and obtaining work pay for that time by making false statements to his fellow chief. Thus, the evidence does not demonstrate that the Agency's policies or this rule were interpreted inconsistently against Appellant. Appellant admitted that he falsified the Kronos records of his own crew to show work hours for the time he let the crews leave early. [Appellant, 10/17/11, 3:42.] I therefore find that Appellant falsified work hours for his subordinates and asked Kristofek to do the same for his crew based on his misrepresentation, in violation of this rule.

In sum, the Agency established that Appellant lied to members of both inspection crews by telling them their time off was authorized, lied to Chief Inspector Kristofek by telling him the training had taken place, lied to Manager Sizemore by stating the training "went fine", and falsified or caused false work hours to be recorded for 19 hours of work time, proving that Appellant violated § 16-60 E. 1. and 3.

5. Using official position or authority for personal profit or advantage under § 16-60 F.

The Agency argues, in support of this violation, that Appellant permitted the inspectors to go home early so he could himself leave for the day. This argument is contradicted by the evidence that Appellant had already worked 40 hours that week, and was therefore entitled to leave when he did if he had informed his manager. Thus, Appellant cannot be said to have been motivated by his own personal advantage in authorizing the crews to leave before the end of their shift. In addition, two inspectors corroborated Appellant's testimony that he told them the time off was a reward for their hard work. [Rodriguez, 10/17/11, 11:58; Exh. 19-2.] The Agency therefore failed to prove Appellant violated this rule.

6. Failing to meet established standards of performance under § 16-60 K.

An employee violates this rule when an agency clearly communicates a standard of performance, and the employee fails to meet that standard. In re Bernal, CSA 54-10, 11 (3/11/11). This discipline was imposed based on the Agency's conclusion that Appellant failed to 1) ensure that his subordinates make timely field inspections, 2) maintain complete records of work performance, and 3) review the daily worksheets of his subordinates, as required by his Performance Enhancement Program Reports dated Nov. 2, 2010. [Exh. 37.]

The Agency argues that Appellant's early release of the crews resulted in the absence

of any inspector needed to perform an inspection for the final two hours of the shift. However, the evidence indicated that inspections are performed during the first half of the shift, and paperwork, including completion of logs, was to be done upon the inspectors' return to the office at around 12:30 pm. [Kristofek, 9/26/11, 9:00 am.] The Agency did not prove that Appellant failed to ensure the daily inspections were completed in a timely and courteous manner, as required to show Appellant violated this performance standard.

Next, Appellant must maintain complete performance records. Sizemore testified that Appellant violated this standard by recording in Kronos that the inspectors worked from 1 to 3 pm on Mar. 11, when in fact he had released them early. However, this standard specifically refers to the performance of work, which required Appellant to assure his crew's records reflect the work they did in an accurate and complete manner. Kronos records only the number of work and leave hours, not the type of work performed during work hours.

The third standard requires Appellant to review the daily worksheets, orders, summonses and permit activity of his inspectors. The Agency presented no evidence or argument on this allegation. In sum, I find the Agency failed to prove Appellant violated any of the identified performance standards.

7. Failure to observe departmental procedures under § 16-60 L.

The disciplinary letter cites its Inspector Operations Manual, § III A. 2. and 15., which require inspectors to continue to work until 3:30, and accurately complete their daily worksheets and mileage reports. The manual governs the conduct of an inspector, not a chief inspector, which was Appellant's classification. Therefore, the Agency failed to prove that Appellant violated these procedures.

8. Failure to maintain satisfactory work relationship under § 16-60 O.

This rule is violated by conduct an employee knows or reasonably should know will harm or significantly impact a working relationship. In re Burghardt, CSA 81-07, 2 (CSB 8/28/08). The Agency found that Appellant violated the rule in two respects: by asking Kristofek to falsify Kronos, and instructing several inspectors to show hours not worked on their worksheets.

As I have found above, Appellant lied to inspectors, Kristofek and Sizemore with regard to various facts surrounding his early release of the crew on Mar. 11, and falsified work hours. The issue here is whether Appellant should have known those actions would harm his working relationships as a crew supervisor within NIS.

Sizemore testified that Appellant's actions, in lying to both crew members and his fellow Chief Inspector, severely undermined Appellant's ability to supervise the inspectors as a part of a team, an essential part of his job to perform the enforcement work of the NIS. Appellant knew that his actions would force inspectors to choose between disobeying his instructions and falsifying their logs, and would create division between the two inspection crews. Appellant's false statement to Kristofek caused distrust between himself and his fellow Chief Inspector. "You can't lie to your peer when you're trying to be a team, they both [Appellant and Kristofek] understood that." [Sizemore, 9/26/11, 11:26.] Kristofek testified he had "no trust

whatsoever" in Appellant after this occurred. "I pretty much falsified documents based on what Mr. Gonzales told me. I felt awful. I mean, I was still on probation." [Kristofek, 9/26/11, 9:25 am.] He described the working situation thereafter as very difficult. [T]here was such a division after that happened that it made it very hard. I mean, there was times where I really . . . if I had the chance I would have just wanted to go back to being an inspector and not having to deal with this, because it was just total chaos." [Kristofek, 9/26/11, 9:42.] The incident adversely affected the team and has continued to do so. Kristofek stated that he is still dealing with a couple of individuals "and their anger about what happened." [Kristofek, 9/26/11, 9:43.]

Sizemore observed that the high profile work of NIS attracts frequent complaints against inspectors, one of the reasons why setting an honest and ethical tone is a key supervisory duty. In Sizemore's opinion, it would have been difficult for a large group of NIS employees to accept Appellant as their supervisor again, after he had asked the inspectors to lie. "Frankly, I think it would have torn the whole thing apart" if Appellant had not been fired. "It's difficult to manage that group anyway . . . They're getting it now. . . We probably would have gone back to square one " in their efforts to enforce higher standards if the Agency had not taken this action against lying and favoritism. [Sizemore, 11:12.]

Appellant conceded that he asked Kristofek to clock his employees out at the usual time, and told him inaccurately that they had attended training the previous Friday. He noted that his later apology to Kristofek was for "stepping on his toes" and not giving him better information, not for lying to him. [Appellant, 10/17/11, 3:26.] He admitted that he did not tell Kristofek the truth that the training had not occurred, but said he intended to do so once they were alone. The fact that Appellant never did offer the truth to Kristofek, until the latter confronted him, is persuasive evidence that he did not intend to do so. That is also consistent with Appellant's failure to notify Kristofek of the training on Mar. 9 when he told Sizemore about it, and his failure to inform Sizemore on March 11 of his own early departure and that of the rest of the crew, despite Sizemore's availability in the office that day. Appellant's failure to communicate honestly with the team over the two weeks covered by this incident was a pattern of behavior that was inconsistent with trusting and satisfactory working relationships, and resulted in serious harm to all of those relationships.

In similar fashion, Appellant did not tell Sizemore the truth when he was given a clear chance to do so three days later. Appellant told Sizemore he "screwed up" only because Sizemore "reacted in surprise" during their meeting. [Appellant, 10/17/11, 3:32.] Appellant failed to notify his peer or his manager, even retroactively, that he had authorized the early departure of both his own and Kristofek's inspection crews. As a predictable result, resentment built between the crews, the nascent efforts to encourage teamwork were damaged, and Appellant lost the trust of both his fellow Chief Inspector and his Manager. A reasonable person in Appellant's position should have known that lying and falsifying work hours would harm his working relationships. In fact, Appellant admitted with no surprise that Kristofek "seemed cold" towards him after this incident, and Sizemore did not speak to him. [Appellant, 10/17/11, 3:46.] Thus, Appellant violated this rule by lying to Kristofek, asking him to add hours he knew were not worked into Kronos, concealing the truth from Sizemore, and instructing inspectors to list hours not worked on their worksheets.

9. Unauthorized absence from work § 16-60 S.

The Agency supports this allegation with evidence that Appellant left before 3:30 pm on Mar. 11, 2011. Sizemore testified that his supervisors need to check with him prior to leaving, and Appellant did not do so. Appellant countered that he had already worked 40 hours that week. As a salaried employee, Appellant was paid for 40 hours of work, but this does not resolve the issue of whether Appellant's absence during the inspectors' work shift was unauthorized.

Appellant also argued that he believed he was still working as long as he was available by cell phone. There is no evidence that management agreed with that assumption. [Appellant, 10/17/11, 3:46.] He did not deny that supervisors are required to inform their manager prior to leaving, and in fact acted in conformity with that practice during the 2010 picnic. I find his failure to inform Sizemore that he was leaving early is consistent with his desire to conceal his actions from Sizemore. I also find that his early departure that day was an unauthorized absence from work in violation of this rule.

10. Conduct which violates the Denver City Charter under § 16-60 Y.

The disciplinary letter found that Appellant violated the City Charter's general municipal policy exhorting its employees to "adhere to 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. The Agency had not alleged that Appellant violated any specific ethical rule. Since the Agency did prove violations of more specific Career Service Rules, violation of this general municipal policy is not at issue. In re Abbey, CSA 99-09, 11 (8/9/10).

11. Conduct prejudicial to good order and effectiveness of the Agency under § 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 harm to the Agency mission or affected its ability to achieve it. The evidence therefore does not establish a violation of the rule.

12. Appropriateness of Disciplinary Action

In evaluating the appropriate degree of discipline, an agency must consider the severity of the misconduct, an employee's past employment and disciplinary history, and the penalty most likely to achieve compliance with the rules. CSR § 16-20. An agency's determination of penalty must not be disturbed unless it is clearly excessive, or based substantially on considerations not supported by the evidence. In re Owens, CSA 69-08, 8 (2/6/09); Adkins v. Div. of Youth Services, 720 P.2d 626 (Colo.App. 1986).

NIS Manager Michael Sizemore made the decision to terminate based on his findings that Appellant's conduct violated several Career Service Rules, including, among the most serious accusations, dishonesty and failure to maintain satisfactory work relationships. The evidence supported his determination as to the most egregious charges. Sizemore considered the misconduct critically harmful to the operation of the Agency because of the nature of Appellant's position, which required him to work as one team with Kristofek to supervise both inspection crews. He found that Appellant's actions created division between the crews and destroyed Kristofek's trust in his fellow Chief Inspector. The Agency's lengthy and recent history of favoritism and misreported work hours rendered Appellant's actions especially harmful to Sizemore's ongoing efforts to avoid allegations of favoritism and enforce stricter and more consistent standards of behavior.

Kristofek observed that it is impossible to do the enforcement work without integrity and honesty, and that the situation was "total chaos" for awhile after these events. At the hearing six months later, he testified that he was still dealing with some employees' anger over this situation. He was so upset by Appellant's conduct that he contemplated resigning from his position as Chief Inspector and returning to his job as an inspector. Sizemore testified that the misconduct nearly caused all of his progress in developing higher standards to fail, and feared that if Appellant had not been fired "it would have torn the whole thing apart". The conflict observed between the inspector crews the following week was immediate evidence of the seriousness of the misconduct, and demonstrates the importance of trust to the group's proper functioning. Based on the nature of the Agency's work and Appellant's position within the Agency, Sizemore appropriately considered Appellant's conduct to be seriously damaging to the Agency.

Sizemore noted that Appellant was respected within the unit for his substantive knowledge developed during his eleven years as Chief Inspector. He considered carefully the fact that Appellant had no previous discipline. Sizemore concluded however that Appellant's continued dishonesty toward Kristofek, the crews, and himself, and his failure to acknowledge that his behavior was wrongful, indicated that no lesser punishment would correct the behavior.

The evidence established that Appellant violated three disciplinary rules, §§ 16-60 E 1. and 3., O., and S. based on his falsification of work hours, dishonesty, failure to maintain satisfactory work relationships with the entire team, and unauthorized absence. I find that the Agency reasonably considered the seriousness of the misconduct in the entire context of the employment relationship, including Appellant's past employment and disciplinary history, and appropriately imposed termination, consistent with the principles of progressive discipline.

V. NATIONAL ORIGIN DISCRIMINATION CLAIM

Appellant argues that he was disciplined for the same behavior engaged in by white employees: granting time off for exemplary performance. Sizemore permitted the picnic crew to leave early, and granted time off to McWee for his hours on a night noise inspection. Appellant claims that these are similar to his actions in rewarding the inspectors for their 100,000 inspections. In addition, Appellant presented evidence that the previous NIS manager, Tom Kennedy, also permitted employees to leave early, without suffering discipline.

A national origin discrimination claim raised in a termination appeal is established where an appellant demonstrates by a preponderance of the evidence that he is a member of the protected group, and the termination action was motivated by his national origin.

It is undisputed that Appellant is a member of a protected group as a Hispanic male, and that he was terminated. Appellant argues that a white employee, Michael Sizemore, engaged in the same conduct and was not terminated, proving that Appellant was treated differently based on his national origin. Disparate treatment is established by evidence of a high degree of similarity in the conduct being compared. "Individuals are considered 'similarly-situated' when they (1) have dealt with the same supervisor; (2) were subjected to the same work standards; and (3) had engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." MacKenzie v. City and County of Denver, 414 F.3d 1266, 1277 (10th Cir. 2005), citing Mazzella v. RCA Global Communications, Inc., 642 F.Supp. 1531, 1547 (S.D.N.Y.1986), *aff'd*, 814 F.2d 653 (2d Cir.1987); see also Lanear v. Safeway Grocery, 843 F.2d 298, 301 (8TH Cir. 1988).

Here, Sizemore is not supervised by the same person as Appellant; in fact, Sizemore is Appellant's supervisor. As the NIS Manager, Sizemore is not subject to the same work standards regarding the granting of leave for exemplary performance. Sizemore has authority to grant early dismissal without obtaining the approval of his supervisor, whereas Appellant was required to seek Sizemore's approval prior to recognizing exemplary performance in a subordinate. Tim Kennedy's grants of time off were governed by the previous standards, not the policies set by Sizemore and in effect at the time of this employment decision. Finally, Appellant's actions were not similar to the actions of Sizemore. Appellant excused the entire inspection staff at the same time, and concealed that fact from his co-chief and his manager. Sizemore excused the work crew during a team-building picnic, and gave one employee time off for working one night, without deception. Thus, Appellant failed to prove his termination was disparate treatment based on his national origin.

Appellant did testify that Sizemore once mistook him for another Hispanic employee, and commented that, "you guys all look alike." However, Appellant stated he does not rely on that evidence in support of his discrimination claim. [Appellant, 10/17/11, 3:53.] The evidence as a whole does not establish that the dismissal was motivated by an intent to discriminate against Appellant based on his national origin.

VI. ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered that

1. The Agency's termination dated April 15, 2011 is AFFIRMED, and
2. Appellant claims of national origin discrimination is DISMISSED.

Dated this 1st day of December, 2011.


Valerie McNaughton
Career Service Hearing Officer