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

Appeal No. 61-05

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

EMMETT HOBLEY,
Appellant,

vs.

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

The hearing in this appeal was held on November 2, 2005 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Shaun C. Clark, Esq. The Agency was represented by Assistant City Attorney Robert D. Nespor. Lindsey Strudwick 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 herein.

INTRODUCTION

Appellant Emmett Hobley is a Vehicle Control Agent (VCA) for the Department of Public Works of the City and County of Denver (the Agency). Appellant appeals his termination which was imposed on May 27, 2005. The Agency's exhibits 1 – 4, 6 – 8, and 10 - 14 were admitted by stipulation. Appellant withdrew his exhibits A – C.

Appellant stipulated that he was involved in motor vehicle accidents on February 23, 2005 and March 30, 2005, and that he was issued a citation based upon the latter accident. Appellant also stipulated that he misplaced a city hand-held computer on March 22, 2005, and that his actions resulted in $1,656 worth of damage to another hand-held computer on April 20, 2005.

The issues presented herein are as follows:

1) Did the Agency establish that Appellant violated the cited section of the Career Service Rules (CSR), and

2) Was termination justified under the CSR's disciplinary rules?

FINDINGS OF FACT

The Agency dismissed Appellant for asserted violations of Career Service Rules (CSR) between February 23 and April 20, 2005. The letter of dismissal alleges that Appellant was involved in accidents on February 23rd and March 30th while driving a Vehicle Control Agent (VCA) city vehicle, and that he caused both accidents. The Agency also contends Appellant left his hand-held computer, used for writing parking tickets on top of his vehicle on March 21st and April 20th, resulting in the destruction of the computer on the latter occasion.

Appellant admits that he was involved in an auto accident on February 23, 2005 with a city vehicle, that he moved the vehicle before the Agency safety investigators arrived, and that the vehicle did not have the required insurance information in it. Appellant complied with the Agency's accident policy requiring immediate notification of his supervisor. Appellant testified the accident was not his fault, since he had a green arrow at the time he entered the intersection to turn left, but that an oncoming car struck him when it entered the intersection in violation of a red light. The other driver told the investigating police officer the light was yellow at the time of the accident. [Exh. 8, p. 3.] No citation was issued because of the conflicting statements. The Agency's Safety Review Accident Committee concluded that Appellant was at fault because he had not waited until all vehicles cleared the intersection before moving, and had failed to watch for other vehicles as well as the traffic lights. [Exh. 8, p. 5.] The Agency also contends that Appellant's failure to have the car insurance information in the vehicle violated Parking Management requirements. [Exh. 2, p. 4.]

The Agency asserts that Appellant violated its internal handbooks and safety training by moving the vehicle before the investigative team arrived, thus hampering their determination of fault. Appellant counters that he was constrained to obey state law, which requires vehicles involved in an accident on a divided highway to move the vehicle "as soon as practicable off the traveled portion." CRS § 42-4-1602. Appellant testified he moved his vehicle because the other driver left him vulnerable to oncoming traffic when she moved her car, and that she asked him to move his car because she felt unsafe. Appellant told his supervisor he moved the vehicle because they were blocking traffic. [Exh. 9, p. 1.]

Lindsey Strudwick, Assistant Director of Parking Management, testified that on March 21st, VCA Phil Lewis reported that Appellant's hand-held computer was missing. The next morning, it was returned undamaged to the office after having been found on top of a private vehicle by a city inspector. Phil Lewis reported to Mr. Moore that Appellant said someone took it from his vehicle, and Mr. Moore believed Appellant was thereby claiming it was stolen.

Appellant testified that on March 30th, he was backing up to check the tags on a car parked at an expired meter when a small car struck him on the rear driver's side of his vehicle. Appellant stated he had checked all his mirrors before easing the vehicle backward, but that the car must have been in a blind spot. He reported the accident,

and his supervisor drove him back to the office when she discovered that Appellant did not have his driver's license with him. Appellant was issued a citation for illegal backing. The next day, Appellant found he did not have the keys to the city vehicle. The keys were later located in the lock of the driver's side door.

On April 20, 2005, Appellant was assigned to street sweeping. When he arrived at his vehicle, he discovered it did not have a radio. Appellant placed the hand-held computer on the roof of the vehicle and returned to the office to obtain another radio. He drove off without retrieving the computer from the vehicle's roof. He later found the computer in a damaged condition under a parked car. [Appellant's testimony; Exh. 15.] Lindsey Strudwick testified that the manufacturer determined it was not repairable, and that cost of replacement is about $1,600.

Shortly after Appellant returned the damaged hand-held computer to his supervisor, he was called to meet with Mr. Strudwick to discuss the recent incidents. Appellant informed Mr. Strudwick that he was experiencing some personal problems. Mr. Strudwick placed him on investigatory leave and encouraged him to use the Employee Assistance Program to resolve the personal issues. [Exh. 4.] Appellant testified that he attended six counseling sessions during the investigatory leave, and received the letter notifying him that discipline was being contemplated against him. [Exh. 3.]

At the pre-disciplinary meeting held on May 12, 2005, Appellant admitted both accidents, and that he moved his vehicle after the Feb. 23rd accident and received a ticket for the accident on March 30th. Appellant also admitted that he lost his hand-held computer on March 30th and April 20th, and that on the latter occasion it was found damaged.

Anderson Moore, Director of Parking Management, testified that he made the decision to dismiss Appellant based upon the increasing frequency of the incidents demonstrating unsafe or careless behavior, and Appellant's failure to correct his behavior despite past discipline for similar incidents. Mr. Moore concluded that Appellant's mind was not on his duties, and that public safety would be endangered if this pattern could not be corrected. Mr. Moore also considered the amount of the city's financial loss caused by Appellant's actions.

Mr. Moore found that Appellant was grossly negligent in violation of CSR § 16-50 A. 1) because he believed each of these circumstances could have been avoided if Appellant considered his role as a city employee. Mr. Moore testified he believed Appellant's failure to concentrate on his job was progressively more negligent as the incidents occurred more frequently. He also concluded that Appellant destroyed city property in violation of CSR § 16-50 A. 2) by his lack of respect for city equipment and the resulting destruction of city property. He acknowledged that other employees have misplaced and damaged equipment and have had serious traffic accidents. The evidence was silent as to whether any employees had a similar number of accidents or previous discipline.

Mr. Moore found that Appellant's inability to maintain his equipment in working order caused him to be unable to perform his duties, and thus in violation of CSR § 16-50 A. 7), refusal to comply with a supervisor's orders. He testified that Appellant also falsely stated his computer had been taken out of his vehicle, in violation of this rule.

Mr. Moore determined that Appellant was in violation of CSR § 16-50 A. 14) and 16-51 A. 5) requiring compliance with departmental safety regulations on two occasions. On Feb. 23rd, he moved his city vehicle after the accident, preventing city safety personnel from conducting a thorough safety investigation. Mr. Moore testified that this regulation is in the Agency and VCA handbooks and its policies and procedures, and is the subject of training sessions throughout the year. Mr. Moore also stated that the Public Works handbook requires Appellant to have a valid driver's license, and Appellant failed to have his driver's license with him at the time of the March 30th accident.

Mr. Moore found Appellant was careless and neglectful of city property in violation of CSR § 16-51 A. 6) and 8) because he misplaced his hand-held computer twice in the space of two months, leading to the destruction of a computer. It was also found that Appellant failed to carry his driver's license, left the keys in the door lock of a city vehicle on a public street, rendering it and its equipment vulnerable to theft, and that after the Feb. 23rd accident Appellant failed to follow the Agency's procedure not to move the vehicle.

Mr. Moore reviewed Appellant's work history, including a 30-day suspension in April 2004 for two accidents with city vehicles resulting in damage, failing to have a valid driver's license, and abuse of sick and vacation leave. Mr. Moore was aware of the circumstances of this suspension, since he had imposed it. Appellant was also suspended for three days in 2002 for failing to have a valid license and other conduct, and was given a written reprimand in 2002 and a verbal warning in 2001 for failing to pay traffic tickets.

ANALYSIS

I. Career Service Rules

In this de novo hearing on the appropriateness of Appellant's termination, the Agency bears the burden of proof to show by a preponderance of the evidence both that Appellant violated the disciplinary rules as alleged, and that termination was within the range of discipline that can be imposed under the circumstances. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.); In re Gustern, CSA 128-02, 20 (12/23/02).

A. CSR § 16-50 A. 1) Gross negligence or willful neglect of duty

The Agency claims that Appellant was grossly negligent by the commission of four incidents of negligence within a two-month period, despite the warning of a long

suspension a year before these incidents. Appellant counters that gross negligence requires more than just repeated carelessness in order to establish willfulness or flagrant behavior, citing In re Owoeye, CSA 11-05 (6/10/05). That decision is inapposite, since its finding of gross negligence was based upon one serious incident.

"The only significance of multiple acts of negligence is that they may be evidence of the magnitude of the risk created by the defendants' conduct and the knowledge of the risk by the defendants." Sellers v. Henman, 41 F.3d 1100, 1103 (7th Cir. 1994), *citing* Farmer v. Brennan, 114 S. Ct. 1970 (1994). The Agency proved that Appellant failed to take advantage of the last clear chance to avoid an oncoming car, that he twice forgot to retrieve his hand-held computer from the roof of his vehicle, and that he failed to take precautions in backing up to avoid an accident with another car. All of those actions constitute ordinary negligence. The Agency established no additional facts tending to prove knowledge of the risk of harm or deliberate indifference to the creation of such risk, as required to prove gross negligence. In re Tennyson, CSA 140-02, 13 (12/26/02.) The Agency has failed to prove that Appellant acted with gross negligence by the cited behavior.

B. CSR § 16-50 A. 2) Theft, destruction, or gross neglect in the use of City and County property and or property of any agency or entity having a contract with the City and County of Denver; theft of property or materials of any other person while the employee is on duty or on City and County premises.

The Agency asserts that Appellant violated this rule because his forgetfulness caused the destruction of a city hand-held computer on April 20, 2005. Appellant argues that he did not act intentionally in causing such damage.

Appellant's testimony vividly described his state of mind on the morning in question. He arrived late, and felt rushed and frustrated by the change in assignment and vehicles. Appellant was carrying a number of personal and work items, and neglected to retrieve the computer from the top of the vehicle. In addition, he had been recently distracted by personal problems. The Agency did not rebut Appellant's account of his mental state, or supplement it by proof that Appellant's acts were willful or utterly lacking in responsibility. Under the evidence, I find that the Agency did not prove a violation of this rule.

C. CSR § 16-50 A. 7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work, which the employee is capable of performing.

Mr. Moore testified that he believed this rule was violated because Appellant failed to keep his equipment in working order, and therefore could not perform his job. This rule requires proof of an actual and willful refusal to do assigned work. In re Trujillo, CSA 28-04, 9 - 10 (5/27/04). The lack of equipment to perform one's duties is not a substitute for an act of willful refusal to do work. The Agency did not offer proof

that Appellant deliberately damaged his computer in order to avoid work, and therefore the evidence does not support a finding that Appellant violated this rule.

Mr. Moore also testified that Appellant's false statement that his computer was taken from his vehicle was a refusal to do work. I find that Appellant did not deliberately mislead the Agency by his statement that the computer must have been taken out of his vehicle, and that the Agency did not establish that Appellant failed to perform any duty as a result of this statement or the unavailability of a computer.

D. CSR § 16-50 A. 14) Failure to use safety devices or failure to observe safety regulations which: results in injury to self or others; jeopardizes the safety of self or others; or results in damage or destruction of City and County property.

The Agency supported this violation by the testimony of Mr. Moore, who stated that Appellant moved his vehicle after the accident on February 23, 2005, in violation of the Agency and VCA handbooks, policies, procedures, and training. The disciplinary letters did not quote the language of any policy prohibiting an employee from moving their vehicle after an accident. [Exhs. 2 – 3.] Further, the Agency failed to prove that Appellant's action in moving the vehicle and failing to have the insurance information in the vehicle resulted in injury, jeopardized the safety of anyone, or resulted in damage to city property, as required to prove a violation of this rule.

Mr. Moore also stated that Appellant violated the Public Works handbook requirement to "maintain the appropriate Colorado driver's license and required insurance." [Exh. 2, p. 3.] Appellant admits that he failed to have his driver's license with him at the time of the March 30th accident. However, the Agency did not establish that the policy also prohibited an employee from driving without their license on their person. The Agency does not dispute that Appellant had a valid driver's license at the time of the incident. In this case, also, the Agency did not establish that Appellant injured or jeopardized anyone or damaged city property. Therefore, the Agency has not proven that Appellant's failure to have possession of his driver's license violated this rule.

E. CSR § 16-51 A. 5) Failure to observe departmental regulations.

The Agency asserts that Appellant moved his vehicle after the accident on Feb. 23rd, in violation of department regulations. The Public Works Handbook quoted in the letter of dismissal does not contain a prohibition against moving a vehicle after an accident. Mr. Moore testified the prohibition was contained in the Agency and VCA handbooks, policies and training. Appellant contends that such a regulation was impossible to perform, since he was obligated to follow a state statute which requires a driver to move his vehicle "as soon as practicable off the traveled portion . . . of a divided highway." C.R.S. § 42-4-1602.

It appears that Mr. Moore believes the Public Works regulations contained language prohibiting moving vehicles after an accident and an employee's failure to

have a license on his person. The sections quoted do not contain those prohibitions. It is unlikely that they were inadvertently omitted, since the omission would have affected Appellant's notice of the charges against him and opportunity to be heard at the predisciplinary meeting. I find that the Agency has failed to establish a violation of this rule by a preponderance of the evidence.

F. CSR § 16-51 A. 6) Carelessness in performance of duties and responsibilities.

Appellant admits that he had two accidents with city vehicles within the space of six weeks, and misplaced his hand-held computer twice in one month. Appellant claims that the events were not willful, and that other employees had serious accidents and caused damage to property and were not terminated.

Carelessness is acting in the absence of that degree of care an ordinarily careful person would exercise under the circumstances. See Black's Law Dictionary 146 (Abridged 15th ed. 1991). Here, the circumstances include the Agency's emphasis on safety and the avoidance of accidents, the cost of the equipment being entrusted to Appellant, and the existence of significant past discipline meant to serve as both an opportunity to correct and a warning of future consequences if the behavior is not corrected. [Exh. 2, pp. 2 – 3.]

Appellant began this unfortunate period in his employment with the City by being struck by an oncoming car that by the driver's own admission proceeded through an intersection in the face of a yellow light. While executing a left turn, Appellant saw the car when it was two car-lengths away and was still moving. Appellant braked, and the other car braked but then appeared to speed up, according to Appellant. Although neither driver was ticketed, Appellant was deemed to be at fault by his Agency for failing to properly look out for other traffic in view of the position of the traffic lights. The Agency did not impose discipline at this juncture.

About a month later, Appellant left his hand-held computer on the roof of his vehicle, and later thought he'd left it in the vehicle. That action caused additional work for others to find and return the computer, monitor the loss, send and retrieve messages relating to the loss, and record the data from the computer the day after issuance of that day's tickets. At this point, Appellant should have known that his concentration on his job was lacking, and taken steps to correct his behavior. The Agency still did not issue discipline.

A little over a week later, Appellant backed into a car while attempting to check the license on a car parked at an expired meter. His supervisor discovered he did not have his license with him, and did not allow him to drive. Appellant left the keys to the vehicle in the door, exposing it and its equipment to theft or damage. At hearing, Appellant appeared more concerned about losing his house key than about the potential damage to expensive city equipment. Appellant was ticketed by the police, and the Agency concluded he was at fault for the accident, but still withheld discipline.

Three weeks later, Appellant again left his computer on the roof of his vehicle. This time, the computer slid off and was destroyed when it was apparently run over by another vehicle. Appellant stipulated that the amount of loss to the city was $1,656. Appellant was called in to speak with Mr. Strudwick, and admitted that personal problems were causing these recent events.

An ordinarily careful person would not have waited to request help or correct his behavior until called into the office after four serious performance lapse, especially in light of serious previous discipline for the same type of offense. I find that Appellant was careless in the performance of his duties in violation of the rule, and that Appellant did not establish that the Agency waived enforcement of the rule by treating similarly situated employees more favorably.

G. CSR § 16-51 A. 8) Neglect in care or use of City and County property.

For the same reasons as those explained above with regard to CSR § 16-51 A. 6). I find the Agency established that Appellant neglected city property by failing to protect the vehicles and equipment entrusted to his care, despite his experience and training in safety and the handling of equipment, and his previous discipline for similar misconduct.

H. CSR § 16-51 A. 10) Failure to comply with the instructions of an authorized supervisor.

In order to establish a violation of this rule, the Agency must prove that it gave Appellant reasonable notice of the instruction, and that Appellant failed to comply with that instruction. In re Martinez, CSA 19-05, 6 (6/27/05).

The Agency offered no argument in support of this asserted violation, and the evidence does not demonstrate that Appellant disregarded a work instruction. Therefore, I conclude the Agency failed to prove that Appellant violated this rule. See In re Lucero, CSA 162-04, 9 – 10 (4/15/05); In re Owens, CSA 139-04, 7 (3/31/05).

II. Penalty

Appellant next contends that the Agency failed to comply with Career Service Rules governing the imposition of progressive discipline. CSR §§ 16-10 and 16-20.

The relevant Career Service Rules state:

> 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 or performance.
>
> The disciplinary action taken must be consistent with this rule . . .

CSR § 16-10.

"Wherever 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 that progressive discipline must be taken before an employee may be dismissed." CSR § 16-20 (2).

Appellant claims that termination is an inappropriate penalty because Appellant's only offense was inattention to detail, and that others had not been fired for the same offenses: i.e., losing hand-held computers and having accidents with city vehicles. Appellant also argues that the vehicular accidents were not his fault. He supported the latter argument by his testimony that he had the right-of-way in the Feb. 23rd accident, and that in backing up on March 30th, he acted in accordance with Agency training. [Testimony of Cindy Sierra.]

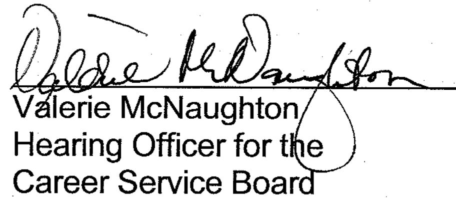
An agency must determine the level of discipline in accordance with the gravity of the misconduct, in view of the employee's past disciplinary history. Here, the Agency reasonably determined that the increasing frequency of Appellant's careless and costly acts of negligence placed it in danger of future liability, and placed the public and other employees in danger of damage to property or personal injury. By means of a thirty-day suspension issued the year before, Appellant was clearly placed on notice that inattention to his duties leading to damage to city property would not be tolerated. [Exh. 11, p. 6.] In 2002, Appellant was suspended for three days, and given a written reprimand. In 2001, he was verbally reprimanded for failing to pay a speeding ticket. [Exhs. 12 – 14.] It cannot be found that the discipline was not within the range of discipline that could be imposed by a reasonable administrator.

Termination was reasonably related to the seriousness of the offense in conformity with CSR § 16-10. It is essential for the safe operation of the Parking Management Division that employees driving city vehicles and using city equipment act with reasonable care. Failure to do so not only renders their service inefficient, it also threatens the city with liability for damage or injuries. Under the circumstances present here, the Agency acted reasonably in determining that dismissal was warranted.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer AFFIRMS the Agency action dated May 27, 2005.

Dated this 19th day of December, 2005.



Valerie McNaughton
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the U.S. mail, postage prepaid, this 20th day of December, 2005, addressed to:

Shaun C. Clark, Esq.
Dana A. Temple, Esq.
The Temple Law Offices, LLC
837 E. 17th Ave., #102
Denver, CO 80218

Emmett Hobley
4865 Crystal Street
Denver, CO 80239

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION AND ORDER** by depositing same in interoffice mail this 20th day of December, 2005, addressed to:

Robert D. Nespor
City Attorney's Office
Litigation Section
201 West Colfax Avenue Dept. 1108
Denver, CO 80202

Bill Miles
Department of Public Works

Jim Anderson
Parking Management Division