

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

RYAN LEWIS, Appellant,

vs.

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

The hearing in this appeal was held on Aug. 26, 2011 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and represented himself. The Agency was represented by Assistant City Attorney Andrea J. Kershner. 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 Ryan Lewis appealed his one-day suspension based on an Apr. 8, 2011 accident causing property damage. Appellant is an Equipment Operator Specialist at the Department of Public Works' Solid Waste Division. The parties stipulated to the admission of Agency Exhibits 1 - 6, and Appellant's Exhibits A and B. Exhibit 7, consisting of six pictures from another accident, was offered by the Agency but was not 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 a one-day suspension was within the range of penalties that could be imposed by a reasonable administrator for the violations established by the evidence?

III. FINDINGS OF FACT

Appellant Ryan Lewis has been employed with the City and County of Denver since 2002, and has been an Equipment Operator Specialist (EOS) for the past four years. His duties include driving a side-loading dumpster truck to collect residential solid waste on an

assigned route. On Apr. 13, 2011, a resident on Appellant's route reported damage to a fence behind a dumpster in the alley behind 2532 High Street in Denver. An investigation concluded that Appellant had failed to fully engage one side hook before lifting the dumpster, causing it to tip and hit the fence. Appellant was determined to be responsible for the accident. [Exh. 6.] The Agency initiated pre-disciplinary proceedings, and ultimately imposed a one-day suspension based on its conclusion that Appellant's conduct violated CSR §§ 16-60 A, B, C, J, K, L and V. [Exh. 2.] At the commencement of the hearing, the Agency moved to withdraw Outcome 1 under § 16-60 6K, and the entire allegation under § 16-60 L. [Exh. 2-1, 2-2.] That motion was granted.

On Friday, Apr. 8, 2011, Appellant was collecting trash using his side-loading truck in the alley at 25th and High Streets. He lifted a trash dumpster using the mechanical lift and grappler arms, then saw a hole in the fence behind it. Appellant set the dumpster back down and continued on his route without reporting it to his supervisor, Ruben L. Gutierrez.

Equipment Operators are given annual training on safety and accident procedures, since driver-caused accidents cost the Agency substantial amounts in property claims and equipment downtime. Drivers are instructed to report all damage to their supervisors immediately so the incidents can be promptly investigated. [Gutierrez, 10:45.] They are also ordered not to service and to report any movement of the dumpsters if in their new location they cannot be emptied in a safe manner.

Gutierrez has performed more than one hundred accident investigations over the past 20 years. As an investigator, Gutierrez has cleared Agency drivers of responsibility, uncovered false claims, and determined that other commercial vehicles caused reported accidents. Shortly before this incident, Gutierrez had informed his drivers that they need to take particular care to avoid accidents because the Agency had already spent its damage budget for the year. Gutierrez had also recently investigated and cleared Appellant of two accidents based on the Agency's decision to give Appellant the benefit of the doubt over causation, but warned Appellant that he needed to be more careful in the field. [Gutierrez, 9:08.] Over the past seven years, Appellant has received one verbal and two written reprimands for three vehicular accidents. [Exh. 2-3.]

Appellant argued at hearing that it was more probable that a recycle bin caused the damage during the recycle collection process a few days earlier. He testified that the dumpster had been moved a few feet, and the recycle bin usually located between the dumpsters was now to one side of them. Appellant also stated that a 300-lb. falling dumpster would have caused greater damage, and that the hole in the fence was not directly behind the back right side of the dumpster, indicating that a narrower bin must have caused the damage. Appellant admitted that he did not report the damage or rearrangement of the bins until five days after the accident, in response to Gutierrez's statement that a resident had reported damage to her fence. [Appellant, 10:34 – 10:43; Exhs. 5, 6-4.]

In response to Appellant's allegations, Gutierrez testified that a recycle truck's claw is designed to lift the smaller recycle bins, and could not have moved a dumpster without breaking off. His review of Agency records showed no request to move the dumpster, as is required before a dumpster may be relocated. Gutierrez concluded that the dumpster

had not been moved, and the damage had not been caused by a recycle truck or bin. [Gutierrez, 9:28.] The location and nature of the damage indicated to Gutierrez that it occurred when the truck's right grappler arm did not cleanly grasp the hook on the right side of the dumpster. The dumpster then caught on the fence on the way up or down, causing damage at two locations defining the exact width of the dumpster. [Gutierrez, 9:08; Exh. 6-4.]

Solid Waste Management Director Lars Williams has reviewed accident and property damage reports throughout his 29 years of employment with the City, and is a member of the accident review committee. Williams reviewed the report of this accident, and concurred with its conclusion that Appellant caused the damage. Williams then referred the matter to the accident review committee, which recommended a finding that Appellant was chargeable with responsibility for the accident. [Williams, 9:56.]

After the pre-disciplinary meeting, Williams determined that Appellant had neglected his duties, failed to obey orders and failed to do assigned work by not notifying his supervisor of the fence damage or completing an accident report, in violation of §§ 16-60 A and J. Williams found that Appellant caused preventable property damage, and therefore was careless in the performance of his duties, contrary to § 16-60 B. For the same reason, he found Appellant neglected his duty to use care while using Agency property, in violation of § 16-60 C.(1). Finally, Williams concluded that Appellant failed to follow safety and accident procedures, in violation of his performance standards and § 16-60 V. [Williams, 9:59.] Williams considered Appellant's reprimands for three previous vehicular accidents, his otherwise good employment record, and the Agency's desire to reinforce to Appellant his need to take precautions to avoid property damage. Williams imposed a one-day suspension as the minimum level of progressive discipline beyond a reprimand. [Exh. 2.]

IV. ANALYSIS

The Agency bears the burden to prove by a preponderance of the evidence that the stated conduct violates the Career Service Rules as alleged in the disciplinary letter. The Agency must also establish that the one-day suspension is within the range of discipline that can be imposed by a reasonable administrator under the circumstances. In re Gustern, CSA 128-02, 20 (12/23/02); Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975).

1. Neglect of duty under §§ 16-60 A

To sustain a violation under CSR 16-60 A, 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). The Agency must make employees aware 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).

The Agency found that Appellant neglected his duty to notify his supervisor of the fence damage as soon as he observed it, contrary to his training and the instructions of his supervisor. Appellant does not dispute that he is obligated to promptly report damage of

the sort he noticed on Apr. 8, 2011. He explained his failure to notify his supervisor by stating that he did not believe he caused the damage.

Appellant's supervisor testified credibly that he regularly reminds his drivers of the need to report accidents or damage right away, and Appellant understood the importance of that requirement. Immediate reporting of accidents allows him to do an on-scene investigation to preserve evidence in pictures and determine fault, often saving the Agency money by exposing false claims and clearing the Agency's drivers of fault. Gutierrez had recently informed Appellant and the other Equipment Operators that they had already gone through their damage budget for the year.

Appellant's assumption that he need not report damage if he did not believe he caused it was not reasonable, given his familiarity with the process based on five previous vehicular accidents over the past nine years. I find that the Agency proved that reporting damage to one's supervisor is an important work duty for Solid Waste drivers, and Appellant was aware of that duty. It also showed that Appellant failed to perform that duty on Apr. 8, 2011, delaying the preservation of evidence through an accident investigation, and causing potential harm to the City's ability to defend the damage claim. The Agency therefore proved that Appellant neglected his duty in violation of § 16-60 A.

2. Carelessness in the performance of duties under § 16-60 B, and Neglect in the use of City property under § 16-60 C.(1)

An employee is careless within the meaning of § 16-60 B when he performs an important work duty poorly, resulting in potential or actual significant harm. In re Mounjim, CSA 87-07, 5 (7/10/08). An employee acts with neglect in the use of city property under § 16-60 C.(1) if he misuses City equipment, causing an accident or property damage. In re Hobley, CSA 61-05, 8 (12/19/05).

The Agency contends that Appellant operated his truck in an improper manner that caused avoidable property damage, and therefore was careless in violation of this rule. The investigation concluded that the truck's grappler arms had not properly hooked onto the dumpster, causing the dumpster to tip into the fence. Appellant admits he was the driver who emptied the dumpster on the day of the accident, and that he saw the hole in the fence after he raised the dumpster. He denies that he caused it, believing instead that it occurred during an earlier collection of recycled material. However, Appellant's theory is inconsistent with the accident investigator's opinion that a recycle bin could not have caused this type of damage, and the claw arm of a recycling truck could not have moved a dumpster or pushed it into the fence. Appellant's argument that a falling dumpster would have caused more extensive damage fails to consider the investigator's reasonable conclusion that the dumpster was not falling, but was hanging by one hook and swung into the fence. The most persuasive facts demonstrate that it was Appellant's failure to properly engage the dumpster hook with his truck's grappler arm that led to the fence damage. That failure to use reasonable care while performing the task of raising the dumpster was careless, in violation of § 16-60 B, and also constituted neglect in the use of Agency property under § 16-60 C.(1).

3. Failure to comply with orders of supervisor or do assigned work, § 16-60 J

Failure to comply with a lawful order in violation of the first clause of this rule is established by evidence that a supervisor communicated a reasonable order, and a subordinate willfully violated that order. In re Owens, CSA 69-08, 4 (2/6/09).

Director Williams concluded that Appellant had been ordered to notify his supervisor and file an accident report, but that he failed and refused to do so. Williams appears to equate Gutierrez' regular training to his drivers to report accidents with a direct order to Appellant to report this accident. This interpretation of § 16-60 J would cause it to merge into a prohibition of the same behavior already covered by § 16-60 A.

A rule must be interpreted consistently with its purpose: in this case, to provide notice of behavior that will subject an employee to discipline. Each subsection of Rule 16-60 was enacted to prohibit a specific subject matter not covered by other rules. See In re D'Ambrosio, CSA 98-09, 7 (5/7/10). The two rules at issue here use very separate words to describe the conduct they prohibit. The first clause of § 16-60 J clearly targets an employee's disobedience to a supervisor's order, an offense very different in nature and seriousness from neglect of duty. See Helvering v. Hammel, 311 U.S. 504, 511 (1941) (in interpreting a statute, courts are not free to reject the literal or usual meaning of its words where they are "consonant with the purposes of the Act.") While conduct may in some circumstances violate more than one rule, I cannot interpret Appellant's failure to perform his duty to report this accident as also a failure to obey an order of a supervisor, in the absence of proof that the Agency communicated a direct order to report it, and Appellant willfully disregarded that order.

The second clause of this rule prohibits failing to do assigned work which the employee is capable of performing. The Agency alleges that Appellant failed to notify his supervisor or file an accident report. While these are duties sometimes arising out of the performance of his work, they are not themselves the work of his position, as assigned by a supervisor or contained in a job description. The evidence therefore does not establish a failure to do assigned work under the second part of § 16-60 J.

4. Failing to meet standards of performance, CSR § 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).

Director Williams found that Appellant had failed to meet his performance standard to ensure a safe working environment by virtue of his noncompliance with the Division's safety procedure; presumably, his failure to report the accident to his supervisor. The disciplinary letter asserted that Appellant was required to "[ensure] a safe working environment [or follow] all Standard Operating Procedures as they related to safety, including PPEs, safe driving practices, servicing and inspection of vehicle, accidents and emergencies." [Exh. 2-2.] However, the Agency did not present any evidence of such procedures, or any standard of performance related to ensuring a safe working environment. The Agency likewise did not prove that Appellant's failure to report the accident itself led to a dangerous working environment. I find that the Agency did not establish this asserted violation.

5. Failure to observe safety regulations, resulting in damage to City property, § 16-60 V

In relevant part, this rule requires proof that Appellant's breach of safety regulations caused damage to City property. Since the only damage proven here was to a private resident's fence, the evidence does not support this allegation.

6. 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).

Director Lars Williams made the decision to impose the one-day suspension based on his findings that Appellant violated seven Career Service Rules. He considered the fact that Appellant had been employed by the City for nine years, and had been given three reprimands for vehicular accidents over the past eight years. He considered Appellant a good employee during that time, but believed that a one-day suspension was necessary and sufficient to correct the behavior, and was consistent with other penalties given under similar circumstances.

The evidence established that Appellant violated three disciplinary rules, §§ 16-60 A, B, and C.(1), based on his carelessness in emptying a dumpster and his failure to report the damage to the fence behind the dumpster. I find that the Director properly considered Appellant's past employment and disciplinary history, and appropriately imposed the minimum suspension consistent with the principles of progressive discipline.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that the Agency's one-day suspension dated June 17, 2011 is AFFIRMED.

Dated this 22nd day of September, 2011.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

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

All petitions for review must be filed with the following:

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

AND

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

AND

Opposing parties or their representatives, if any.

I certify that on Sept. 22, 2011, I delivered a copy of this Decision and Order to the following:

Ryan Lewis, 2970 Krameria St., Denver, CO 80207
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