

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

CRUZ VIGIL, Appellant,

vs.

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

The hearing in this appeal was held on Sept. 14, 2009 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Robert Nesper, and Agency Director of Operations Reza Kazemian served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE CASE

On July 6, 2009, Appellant Cruz Vigil was suspended for five days from his position as Equipment Operator Specialist with the Department of Public Works Wastewater Management Division ("Agency" or "Department"). Appellant filed this timely appeal challenging that suspension on July 15, 2009. The parties stipulated to the admissibility of Agency Exhibits 1 – 7 and Appellant's Exhibit A. Exhibits 8, B-2 and B-8 were admitted during the hearing.

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 five-day suspension was within the range of penalties that could be imposed upon Appellant by a reasonable administrator for the violations proven under the rules?

III. FINDINGS OF FACT

Appellant Cruz Vigil is an Equipment Operator Specialist in the Wastewater Management Division, System Maintenance Unit in the Department of Public Works (Agency or Department). This five -day suspension was imposed based on the Agency's conclusion that Appellant had been careless and neglectful of his duties on June 9, 2009 by failing to perform the pre-trip inspection of his vehicle and complete the inspection report.

The following facts are not disputed by either party. Appellant's job is to operate a water jet vehicle to power wash sanitary sewer lines from manhole to manhole in assigned areas within Wastewater District 3 in southeast Denver. As equipment operator, he is the holder of a commercial driver's license (CDL), and is the lead worker to his laborer helper. Before leaving the shop every day, Appellant is required by the U.S. Department of Transportation (D.O.T.) and Agency procedures to perform pre-trip inspections of their vehicle. [Exh. 6.] Any defects discovered during the pre-trip inspection are to be noted by check marks on the Department's multi-copy Vehicle Inspection Report. [Exh. A.] The driver is to sign the form as "pre-operator." "Hazardous conditions", i.e., defects affecting the safe operation of the vehicle, must be corrected before the vehicle leaves the yard. [Testimony of Appellant; Exhs. 6, A.] The pink copy is to be kept with the driver in the vehicle and made available to police officers if requested. Drivers who do not have the signed report in the vehicle may be issued a traffic citation. [Testimony of System Maintenance Manager Lupe Martinez.] At the end of the day, the driver must sign the inspection form as "post-operator" to indicate that the "condition of the above vehicle is satisfactory." The driver then turns over to his supervisor the white copy of the completed Vehicle Inspection Report.

After Appellant left the shop on June 9, 2009, he called his supervisor from his vehicle, known as #DF5. Appellant informed Operations Supervisor Tyson Vigil that the arrow board mounted on the back of the water jet was not working, and he was coming back to get it repaired. The arrow board is a long electrical panel operating the flashing directional arrows, which alerts drivers approaching from the rear that the lane is closed and directs them to the right or left around the water jet. At the time, Appellant was at his work location at Harrison and Iliff Streets, about twenty minutes away from the shop. When Appellant arrived back at the shop, Mr. Vigil asked him why he had not fixed it before he left that morning. Appellant told him that the board was working when he left. Mr. Vigil's supervisor, Mr. Martinez, asked Mr. Vigil to look in Appellant's vehicle for the Vehicle Inspection Report for that day. Mr. Vigil searched but could not find it. Mr. Martinez instructed Appellant to get a broom and do some sweeping while he waited for his vehicle to be repaired. [Exhs. 4, 5-1.] Appellant was later assigned to another vehicle, #DF1, and did not complete the inspection report for #DF5. [Testimony of Appellant; Exh. 7.]

Evidence diverges on only a few factual issues, one of which is whether Appellant inspected #DF5 before he left for his work assignment at 8 am. After Mr. Vigil

searched but could not locate the report, he asked Appellant where it was. Mr. Vigil testified that Appellant told him he had forgotten to do the pre-trip inspection. In contrast, Appellant testified that he told Mr. Vigil he had not filled in the paperwork – the inspection report – and did not mean he forgot to do the physical inspection itself. In his written statement submitted at the pre-disciplinary meeting, Appellant said,

[Mr. Vigil] did not find the pretrip sheet in the vehicle and when he inquired where it was, you stated that you didn't complete the pretrip inspection [quoting from the pre-disciplinary letter]. This is an incorrect sentence; as I have already stated in point 1 of my statement on June 9, 2009, I completed the required pretrip inspection per D.O.T. regulation as part of the procedure to maintain my vehicles readiness before I left the shop.

[Exh. 4.]

Mr. Vigil's summary of the incident contains no reference to this issue. [Exh. 5-1.] I find that Appellant intended to communicate to Mr. Vigil that he had not completed the report itself, but that Mr. Vigil understood him to mean he had not inspected his vehicle. Appellant's statement is consistent with his testimony that he did not believe he was required to fill out the pre-trip portion of the report until the end of the day, when he turned it into his supervisor.

At the hearing, Appellant explained in detail the reasons he did not fill out the pre-trip report. He stated that his shift starts at 6:30 am, and that he is given an hour every Tuesday morning to perform his daily inspection and all other equipment maintenance, including cleaning, fueling, and restocking supplies. On June 9, a Tuesday, he did his daily vehicle inspection, washed the vehicle, and filled it with gas for the week. By the time he was done, it was 7:50 am. Since his supervisor is strict about requiring all vehicles to leave the yard no later than 8:00 am, he got in the water jet and called Mr. Vigil to advise him he was running late. Appellant testified that in the rush to leave by 8 am, he forgot to fill out the pre-trip report.

Appellant said he could not recall being told he needed to have the pre-trip report filled out before he left the shop in the morning. Appellant stated that he usually completes the pre-trip portion in the morning before he leaves, but always has both the pre-trip and post-trip sections done by the end of the day so he can give it to his supervisor. He believes many equipment operators do not fill out the pre-trip portion of the form until after they leave the yard in the morning.

Charles Pletcher is the Heavy Equipment Mechanic who performed the inspection and repair work on the vehicle's arrow board on June 9th when Appellant returned to the shop. Mr. Pletcher testified that the arrow board's wire was not connected to the power source: a solenoid box with four posts for various electrical accessories, including a 2-way radio, strobe lights, dashboard lights, and GPS. [Exh. 8.] Mr. Pletcher observed that the arrow board's wire should have been connected to a

solenoid post by threading a nut over the ring terminal at the end of the wire. He noted that the vehicle service records showed that the vehicle's radio had been replaced or repaired the previous day. Based on his knowledge and experience as a mechanic, Mr. Pletcher testified he believed that the machinist working on the radio the day before did not re-connect the arrow board's wire to its post. He believes that the arrow board may have worked for a short time if the ring terminal had been looped over the post without the nut, or the nut was only loosely tightened. However, he testified that it would not have maintained the circuit connection long enough to travel the five miles from the transmitter shop to the Wastewater shop where Appellant begins his day. Therefore, he concluded that the arrow board could not have been working at any time on June 9th until Mr. Pletcher reconnected the wire to the solenoid.

On or shortly after June 11, 2009, Mr. Vigil wrote a memo entitled, "SUBJECT: Written Reprimand Cruz Vigil". Mr. Vigil thereafter hand-wrote the words "(became Pre-Disc)" on the subject line. [Exh. 5.] Mr. Vigil testified that he gave the memo to his supervisor Mr. Martinez, but not to Appellant. Appellant testified that Mr. Vigil gave him the memo a few days after June 9th. Appellant did not mention the written reprimand in the statement he delivered at the pre-disciplinary meeting. Operations Director Reza Kazemian testified that he never saw Mr. Vigil's memo. He stated that Public Works has a practice of producing written reprimands in a form similar to other disciplinary actions, such as this suspension. [Exh. 3.]

Appellant attended the pre-disciplinary meeting with his union representative, Mr. Ed Bagwell, and presented his signed statement, Exh. 4. On July 6, 2009, Agency Operations Director Reza Kazemian imposed a five-day suspension. Mr. Kazemian found that Appellant neglected his duty to do a pre-trip inspection, as shown by the absence of a Vehicle Inspection Report and his admission to Mr. Vigil that he forgot to do it. He found Appellant was careless in performing his job based on the same evidence. Mr. Kazemian testified that the Agency lost two to three hours of work for both Appellant and his helper, as well as significant maintenance cost during the unnecessary trip to and from his assignment in southeast Denver.¹ Finally, Mr. Kazemian determined that Appellant violated § 16-60 Y by virtue of his failure to "fulfill the duties and responsibilities" of his position under CSR § 15-5. He concluded that a five-day suspension was appropriate as progressive discipline because Appellant had two previous reprimands and a one-day suspension for a verbal argument with his supervisor.

IV. ANALYSIS

The City Charter requires that appeals from employment actions must be decided based on a de novo determination of the facts. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975); In re Luna, CSB 42-07, 4 (1/30/09). The Agency bears the burden to prove that the imposition of discipline was appropriate under the Career

¹ Mr. Kazemian testified that the Agency pays the city's Fleet Maintenance Department a specific amount per mile for each type of vehicle it uses. The water jet vehicle costs \$5.71 per mile to operate. Therefore, the 40-mile round trip in the water jet cost the Agency \$228.40.

Service Rules, and that the level imposed was within the range that could be issued by a reasonable administrator.

1. 16-60 A: Neglect of duty

This rule is violated “when an employee neglects to perform a job duty which the employee knows he or she is supposed to perform.” In re Compos et al, CSB 56-08, 2 (5/21/09). Neglect of duty is distinguished from carelessness in the performance of a duty in that the former is proven by an act of omission, and the latter is proven by performing a duty poorly. See In re Hill, CSA 14-07, 6 (6/8/07); In re Ortega, CSA 81-06, 8 (4/11/07).

Appellant concedes that he must perform a pre-trip inspection, a duty which has three elements: a physical inspection of the vehicle before setting out for the day, completion of the pre-trip inspection report, and documenting any visible problems encountered during the inspection. [Exh. 6.] He acknowledges that the duty is an important part of his compliance with safety standards and D.O.T. regulations, a requirement of his CDL license. [Exh. 4, ¶ 5.]

On June 9, Appellant ran through his routine vehicle inspection tasks. He spent from 6:30 to 7:50 am checking the functioning of the items listed in the inspection report. In addition, he washed the vehicle, gathered supplies and filled the gas tank. He stated he ran out of time to fill out the report. I find that Appellant did perform some parts of his pre-trip inspection duty, but not others. Therefore, the Agency failed to prove Appellant neglected to perform this duty under CSR § 16-60 A.

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

To establish carelessness, the Agency must prove Appellant was heedless in his performance of an important work duty, resulting in potential or actual significant harm. In re Mounjim, CSA 87-07, 5 (7/10/08). Here, the Agency must prove that Appellant was heedless while performing his duty to complete the pre-trip inspection and document any safety problems by filling out the inspection report.

As found above, the pre-trip inspection duty requires that an equipment operator conduct a physical inspection of the vehicle, fill out the pre-trip portion of the inspection report, and record any visible problems. Appellant describes this duty in strong words: “I am the sole responsible party for the safe and proper working order of the vehicle . . . , so it is imperative that hazardous conditions . . . be addressed immediately.” [Exh. 4, quoting Exh. 6, job description for Equipment Operator Specialist.] I find that this duty is an important part of his job, and that Appellant understood that importance.

The next issue is whether Appellant performed this duty. He admits he did not fill out the inspection form, but testified that he checked the operation of the arrow board that morning by pushing the turn signal button on the dashboard and walking behind the vehicle to make sure the arrows were flashing. However, he added that he did not believe checking the arrow board was required by the inspection report. Appellant

explained that he performed a number of additional maintenance tasks that morning, and was running late. He concedes that he usually signs the pre-trip portion of the form before he leaves the shop in the morning, and that D.O.T. regulations require that the report be available in the vehicle while operating. While the parties agree that the job description does not specify when the pre-trip report must be completed, it does state "it is imperative that hazardous conditions of the vehicle be addressed *immediately*". [Exh. 6, emphasis added.] The duties in the job description are stated in their order of performance for the day once the EOS goes to the assigned vehicle: first, "do a vehicle pre-trip", next, immediately address any hazardous conditions by notifying the supervisor and radio # 207. The next phrase, "[o]nce you have arrived at your work site", indicates in this context, and in common sense, that the inspection and discovery of hazardous conditions must precede actual operation of the vehicle.

The Agency presented the convincing evidence of mechanic Charles Pletcher, who testified that the wire was not just loose but completely unconnected to the power source. He noted that there had been work done on the solenoid the day before, and the mechanic probably forgot to reconnect the arrow board's wire to the solenoid post after finishing the radio work.

Based on all the evidence, I find that Appellant forgot to perform a physical check of the arrow board on June 9th, did not complete the pre-trip inspection report, and failed to document and correct a readily visible problem that Appellant admits interfered with the safe operation of the vehicle.²

As a result, Appellant and his helper wasted at least two hours of travel and work time, and unnecessarily added to the number of miles driven by the water jet vehicle, resulting in increased maintenance cost. The Agency established that Appellant violated § 16-60 B as a result of his carelessness in performing this important duty.

3. Violation of Code of Conduct

The Agency determined Appellant had violated CSR § 15-5, the Employee Code of Conduct, by failing to "conscientiously fulfill the duties and responsibilities of his . . . position." This rule has been interpreted as a statement of broad policy rather than a disciplinary rule. In re Dessureau, CSA 59-07, 9 (1/16/08); *citing* In re Stockton, CSA 159-02, 14 (12/03/02). Moreover, a single incident of careless performance of one duty cannot establish a broad failure to fulfill all of Appellant's duties. The Career Service Rules clearly provide both performance improvement and disciplinary tools for addressing such issues. Rule 13, § 16-60 K. Therefore, Appellant's June 9th carelessness in performing his pre-trip inspection duties did not establish a violation of CSR § 16-60 Y.

² "From my route I called my supervisor . . . to inform him that my directional safety arrow board was not working and that I was returning to the shop to have it fixed. I am the sole responsible party for the safe and proper working order of the vehicle in which I am assigned, so it is imperative that hazardous conditions of this vehicle be addressed immediately." [Appellant's statement at pre-disciplinary meeting, Exh. 4.]

4. Appropriateness of level of discipline

“The purpose of discipline is to correct inappropriate behavior or performance, if possible.” An agency must consider the gravity of the offense and the employee’s past disciplinary record. CSR § 16-20.

The evidence raises the issue of whether the suspension was a second punishment for the same offense. Appellant testified that Mr. Vigil handed him a memo dated June 11th entitled “Written Reprimand” a few days after the incident. [Exh. 5.] The evidence supports a conclusion that the memo was the recommendation of Appellant’s direct supervisor, which was not accepted by the disciplinary decision-maker, Mr. Kazemian. [Testimony of Appellant; Exh. B-2.] Moreover, the document was not recorded or treated as a written reprimand in the disciplinary letter itself. [Exh. 3-2.] Therefore, Appellant has not suffered a second penalty based on the same allegations.

Mr. Kazemian imposed the five-day suspension based on his view of the seriousness of the misconduct, which affected the Agency’s compliance with safety standards and federal regulations. He considered the loss of employee time and the cost of the unnecessary vehicle trips as adding to its seriousness. Finally, Mr. Kazemian imposed the longer suspension based on Appellant’s accumulation of two verbal reprimands and a one-day suspension over the past eight years.

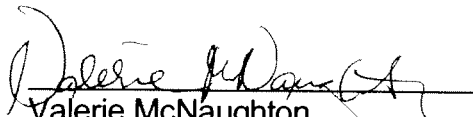
Appellant testified in mitigation that he was not told the pre-trip report needed to be completed before leaving the yard in the morning. Appellant argued but did not prove that others in the Agency did not complete their reports until later in the day. He stated he almost always did complete it once he was done with his physical inspection of the vehicle, but that morning he was running behind. As found above, I have concluded that a reasonable person would conclude from the job description that the pre-trip report must be filled out before leaving in order to document visible problems and address hazardous conditions. In fact, Appellant acted in accordance with that understanding on most days, and only failed to complete it on that day because of time constraints.

Based on the totality of the evidence, I conclude that a five-day suspension was within the range of penalties that could be imposed by a reasonable administrator.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency action dated July 6, 2009 is AFFIRMED.

DATED this 9th day of October, 2009.


Valerie McNaughton
Career Service Hearing Officer