

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO
Consolidated Appeal Nos. 56-08A., 57-08A., 58-08A., and 59-08A.

FINDINGS AND ORDER

IN THE MATTER OF THE APPEALS OF:

ERNEST COMPOS, DAVID S. HERRERA, GENE SANDLER, and RICHARD J. SENA,

Appellants/Respondents,

vs.

DEPARTMENT OF FACILITES, PLANNING AND MANAGEMENT, and the City and
County of Denver, a municipal corporation,

Agency/Petitioner.

This matter is before the Career Service Board (“Board”) on the Agency’s Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** in part, and **MODIFIES** in part, the Hearing Officer’s Decision dated December 15, 2008, on the grounds outlined below.

FINDINGS

The Appellants are skilled trades workers who have worked for the Agency from seven to thirty years. At the beginning of 2008, the Agency developed a new activity log for employees to keep track of their daily travel and work assignments. Dan Conway, who supervised Appellants Compos, Herrera and Sandler, testified that he permitted his employees to fill out their daily logs at the end of the work day, and he permitted them to round off their time to the quarter hour. For Mr. Conway, the purpose of the logs was to give him “the basic idea of where [his employees] were.” Decision, p. 2.

Shortly after the new activity log was developed, the Agency hired a private investigator to conduct surveillance. Based on certain discrepancies between Appellants’ daily logs and the results of surveillance, all four received 20-day suspensions. The Hearing Officer modified the discipline to 5-day suspensions for Appellants Compos, Herrera and Sena, while Appellant Sandler’s suspension was reversed.

A. Sufficiency of the Evidence.

On appeal to the Board, the Agency challenges the sufficiency of the evidence that supports the Hearing Officer's findings and conclusions. However, under CSR 19-61 D., the Board may reverse on this ground only if the Hearing Officer's decision is not supported by the evidence in the record and is clearly erroneous. While the Agency places great stock in the testimony of Mr. Janowski and Mr. Quiroga, the two investigators who conducted the surveillance, it is the responsibility of the Hearing Officer to judge credibility and weigh conflicting evidence. When the evidence is conflicting, the Board may not substitute its own conclusions for those of the Hearing Officer simply because there may be credible evidence supporting a different result. See, *Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008). A review of the record shows there is factual evidence supporting the Hearing Officer's decision and therefore her decision is not clearly erroneous.

B. Erroneous Rules Interpretation

The Agency also argues that the Hearing Officer erroneously interpreted CSR 16-60 A. (neglect of duty); E. (dishonesty); J. (disobedience to a supervisor's order); K. (failure to meet performance standards); and Z. (conduct prejudicial to the order and effectiveness of the agency). The Board agrees with the Agency as to CSR 16-60 A.

In the context of this case, the Hearing Officer interpreted "neglect of duty" as "negligence." Decision, p. 14. Negligence is the failure to exercise ordinary care in the performance of a duty. *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987). However, in other cases, the Hearing Officer has interpreted CSR 16-60 B. (carelessness in performance of duties) under a negligence standard: "An employee violates this rule when he fails to exercise ordinary care in the performance of a job duty." *In re Sandrowski*, CSA 58-07, p.15 (2/6/08); *In re Richmond*, CSA 18-07, p.5 (8/7/07). While the Board takes no position on whether the Hearing Officer's interpretation of CSR 16-60 B. is correct, as that issue is not before us, the Board recognizes that if both rules are measured under a standard of negligence, then one of these rules becomes superfluous.

The Board finds that CSR 16-60A. (neglect of duty) is violated when an employee neglects to perform a job duty which the employee knows he or she is supposed to perform. The relative importance of the work duty and the degree to which the neglect may result in potential or actual harm are factors that may be relevant in assessing an appropriate level of discipline, if any, for a violation of the rule. Here, a review of the record reveals that all Appellants, including Mr. Sandler, were aware of their duty to complete their daily logs accurately, and in varying degrees, their logs contained inaccurate or missing entries. Therefore, the Hearing Officer incorrectly determined that Appellants did not violate this rule.

C. Degree of Discipline

Based on the totality of the evidence in the record, the Board sees no reason to set aside the Hearing Officer's determination that a 5-day suspension for Appellants Compos, Herrera and

Sena is an appropriate level of discipline. As to Mr. Sandler, only his February 13, 2008, log entries were at issue. With respect to the late afternoon trip to Associated Dealers, the Hearing Officer determined that the Agency had failed to prove any inaccuracy in Sandler's log entry. However, although his log did not reflect his trip to Cableland earlier in the day, the Day Book of Daniel Beck, Cableland Residence Manager, corroborated that Mr. Sandler stopped by that day. This single log inaccuracy is, in the Board's view, a minor infraction, and given Mr. Sandler's "exceptional" PEPR rating, including notations about his high level of trustworthiness and ethical conduct two months after this incident, the Hearing Officer's conclusion that no discipline was warranted is not clearly erroneous.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Decision of December 15, 2008, is **AFFIRMED** as to the level of discipline imposed by the Hearing Officer, and **MODIFIED** as to the interpretation of CSR 16-60 A. (neglect of duty).

SO ORDERED by the Board on May 21, 2009, and documented this 18th day of June, 2009.

BY THE BOARD:



Luis Toro, Co-Chair

Board Members Concurring:

Tom Bonner
Felicity O'Herron
Patti Klinge