

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

Appeal No. 372-01

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF;

Appellant: THEODRIC HARRELL

And

DEPARTMENT OF EXCISE AND LICENSES, and the city and County of Denver, a
municipal corporation.

NATURE OF APPEAL

The Appellant Theodric Harrell, (Appellant) is a Career Service Employee and has challenged his dismissal from his position as a Business License Inspector with the Department of Excise and Licenses (Agency). The Agency dismissed Appellant because of conduct that occurred between December 8th, 2000, and October 16th, 2001. The Agency contends Appellant violated Career Service Rule (CSR) §§ 16-50 1), 3), 7), and 13); 16-51 2), 5), 10), and 11).

Appellant contends the Agency violated CSR 9, 13, 15, 16, and 19.

INTRODUCTION

A hearing on this appeal was held before Michael A. Lassota, Hearing Officer for the Career Service Board. Appellant was represented by Thomas J. Kimmel, Esq. The Agency was represented by Assistant City Attorney R. Craig Hess, Esq., with Helen C. Gonzales serving as the advisory witness for the Agency.

The following witnesses were called and testified at the hearing: Theodric Harrell, Jeanette E. Morris, Rich Jankowski, Helen Gonzales, and Noel Deerr.

Exhibits 1-8, 11-20, 22-25, A pages 1-10, B, E, G, H, J, K, M, N, O and U were admitted into evidence and were considered in this decision.

ISSUES ON APPEAL

Whether the Agency proved by a preponderance of the evidence that Appellant violated provisions of the Career Service Rules.

If so, whether Appellant's dismissal was reasonably related to the seriousness of the offense(s), considering all of the circumstances, as required by the Career Service Rules.

Whether the Agency violated Career Service Rules.

JURISDICTION

The alleged conduct that gave rise to the disciplinary action by the Agency occurred between December 8th, 2000, and October 16th, 2001. Appellant was notified of the Agency's contemplation of disciplinary action on October 23rd, 2001. A pre-disciplinary meeting was held on November 1st, 2001. Appellant was advised of the disciplinary action against him by letter dated November 8th, 2001. Appellant filed his appeal with the Career Service Hearing Office on November 19th, 2001. Neither party contested the jurisdiction of the Hearing Officer to hear and decide this appeal.

Based on these facts, I find that this appeal has been timely filed. And, under CSR §§ 19-10 (b) and 19-27, I have authority to affirm reverse or modify the actions of the Agency.¹

RELEVANT FACTS

1. Subsequent to suspicions regarding inaccuracies of mileage recording on Business License Inspectors' daily logs, Jeanette E. Morris (Jenny), an administrator with the Agency, drove an Inspector's daily route to verify the log.

¹ CSR § 19-10 (b) provides:

Actions subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- b) Actions of an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

CSR § 19-27 provides:

The Hearings Officer shall issue a decision in writing affirming, modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.

2. Jenny Morris found this route to be approximately one-half the mileage the Inspector had recorded on their log.
3. Inspectors transfer the mileage from the daily log to a monthly mileage log.
4. Inspectors are paid for the mileage listed on the mileage logs.
5. Appellant signed his mileage logs claiming these miles as official miles driven, and that the log was a true and accurate copy.
6. Jenny Morris brought this mileage discrepancy to the attention of the Agency Director Helen C. Gonzales, who authorized an investigation of all the Business License Inspectors.
7. Between February 8th, 2000, and April 5th, 2001, 8 mileage logs of Appellant were audited by Morris and found to contain discrepancies.
8. Kolb, Stewart and Associates, Inc. were retained to do this investigation.
9. The investigators were only given the basic information needed to enable them to identify the Inspectors, and proceed with their investigation. The video taping was initiated by the investigators
10. Appellant was followed by investigators on September 12th, 2001 to various locations, none of which were work related.
11. The mileage recorded for Appellant by the investigators conflicts with the mileage on Appellant's mileage log.
12. On September 13th, 2001, Appellant turned in a signed daily log claiming to have made work related stops on September 12th and the mileage driven for that day when in fact he made none of those stops.
13. Appellant used a car on September 12th that was not listed on the Official City Business Parking Permit Request/Update Form signed by Appellant on August 2, 2001.
14. On September 25th, 2001, Appellant called his supervisor, Jenny Morris, who authorized a vacation day for Appellant.
15. Appellant was followed by investigators on September 25th, 2001, even though Morris told them Appellant took a vacation day.
16. On October 4th, 2001, Appellant attended an unauthorized meeting at Coors Field with the other 4 inspectors.

17. On October 3rd and 5th, 2001, Appellant arrived at work again using the car that was not listed on the Official City Business Parking Permit Request/Update Form.
18. On October 12th, 2001, Appellant raised concerns about being followed with the Director of Excise & Licenses Helen Gonzales. Appellant stated he made a police report regarding the days he believed he was followed and was questioned by Gonzales about why he felt that way.
19. Appellant's October 12th, 2001, daily log, turned in on October 15th, 2001, indicated the police department stops; however, no leave slip was turned in for the time spent making these reports.
20. On October 16th, 2001, Appellant was questioned by Helen Gonzales regarding a stop Appellant made at a business, (Mustang Classics), on October 15th, 2001, about an expired business license.
21. Appellant was sent a notification that disciplinary action was being contemplated on October 23rd, 2001, with a pre-disciplinary conference scheduled for November 1st, 2001 where Appellant could correct errors in the Agency's information or facts, tell his side of the story, and present mitigating circumstances.
22. Appellant was dismissed on November 8th, 2001 and this appeal filed on November 19th, 2001.

DISCUSSION AND CONCLUSIONS OF LAW

As a 15 year employee of the Agency, Appellant has Career Status as a Career Service Employee and may not be disciplined without just cause.² Appellant is accused of violating the following Career Service Rules:

§ 16-50 Discipline and Termination

A. Causes for dismissal

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

² CSR § 5-62 provides:

Employees in Career Status

An employee in career status

- 1) may be disciplined or dismissed only for cause, in accordance with Rule 16, Discipline.

- 1) Gross negligence or willful neglect of duty.
- 3) Dishonesty, including but not limited to: altering or falsifying official records or examinations; accepting, soliciting, or making a bribe; lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours; using official position or authority for personal profit or advantage, including kickbacks; or any other act of dishonesty not specifically listed in this paragraph.
- 7) Refusing to comply with orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing.
- 13) Unauthorized absence from work, including but not limited to: when the employee has requested permission to be absent and such request has been denied; leaving work before completion of scheduled shift without authorization; or taking unauthorized breaks.

§ 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exhaustive list.

- 2) Failure to meet established standards of performance including either qualitative or quantitative standards.
- 5) Failure to observe department regulations.

The Department of Excise and Licenses Employee Handbook of Policies and procedures regarding work hours states:

“Full time employees are required to work 40 hours per week....”

The Department of Excise and Licenses Employee Handbook of Policies and procedures regarding breaks and lunches states:

“Two breaks of fifteen minutes each are permitted: one in the morning and one in the afternoon.... The two breaks may be

combined with pre-approval from the supervisor. Breaks may not be saved for later use....”

The Department of Excise and Licenses Employee Handbook of Policies and procedures regarding vacation states:

“...An employee must submit a vacation leave request to his or her supervisor at least two days in advance (except in cases of emergency) in order to use vacation leave for leaves of less than five days. Supervisors have the authority to waive the advance notice requirement based on the needs of the office and workload. In instances where employees are required to use their own car from [sic] city business, car trouble may be used as a valid reason for vacation leave....”

- 10) Failure to comply with the instructions of an authorized supervisor.
 - a) On March 24, 1994, your supervisor Helen Gonzales issued a directive to you regarding your not responding to pages made to you. In that directive, Helen Gonzales specifically ordered you to wear your pager at all times while you are on duty at work. That directive also states that failure to do so may result in disciplinary action.
 - b) On March 16th, 1995, your supervisor Helen Gonzales issued a directive to you regarding your workday schedule including lunch breaks and two fifteen minute breaks, one in the morning and one in the afternoon.

The March, 1995 directive also specifically describes how you were to track your workday and advised you that any variation from the procedures outlined in the directive must be pre-approved by your supervisor.
 - c) On January 25th, 2001, Helen Gonzales sent an e-mail to Mr. Patrick Ryan where he shared with you, Don Kelley and Jan Iwasaki directing you that you must obtain pre-approval from your supervisor prior to having any meetings away from the office.
- 11) Conduct not specifically identified herein may also be cause for progressive discipline.

The City Charter, §C5.25 (4) and CSR §2-104 (b)(4) require the Hearing Officer to determine the facts in this matter “de novo”. The Colorado Courts have held that this requires an independent fact-finding hearing considering evidence submitted at the *de*

novo hearing and a resolution of the factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329, 535 P.2d 751 (Colo. App., 1975).

The party advancing a position or claim, in an administrative hearing like this, has the burden of proving that position by a "preponderance of the evidence". To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not (Colorado Civil Jury Instruction, 3:1).³ The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (Colorado Civil Jury Instruction, 3:5).⁴ The ultimate credibility of the witnesses and weight given their testimony are within the province of the Administrative Law Judge or Hearing Officer. *Charnes v. Lobato*, 742 P.2d 27 (Colo. 1987). As the trier of fact, the Hearing Officer determines the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In its dismissal letter, the Agency alleges Appellant violated the numerous Career Service Rules outlined above. Therefore, the Agency has the burden of proving the allegations contained in the letter of dismissal by a preponderance of the evidence.

The first allegation is the Appellant is guilty of "Gross negligence or willful neglect of duty" in violation of CSR §16-50 A (1). Neither Career Service rules nor their definitions define either "willful" or "gross". These two words are interrelated and will be discussed together.

"Negligence" is a failure to use reasonable care or a failure to act in a reasonably prudent manner under the circumstances. *Lavine v. Clear Creek Skiing Corp.*, 557 F.2d 730 (10th Cir. 1977); *Metropolitan Gas Repair Service, Inc. v. Kulik*, 621 P.2d 313 (Colo. 1980); *Rice v. Eriksen*, 476 P.2d 579 (Colo. App. 1970). Gross negligence involves a higher form of culpability than mere negligence. "Gross" in this context means flagrant or beyond all allowance, *Lee v. State Board of Dental Examiners*, 654 P.2d 839 (Colo. 1982), or showing an utter lack of responsibility, *People v. Blewitt*, 192, Colo. 438, 563 P.2d 1 (1977). Willful neglect of duty transcends any form of negligence and involves conscious or deliberate acts. See *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 12541 (1975); *Drake v. Albeke*, 188 Colo. 14, 532 P.2d 335 (1975).

"Gross" has been generally defined as: "Glaringly obvious: egregious."⁵

Black's defines it as:

"Great; culpable. General absolute; not to be excused; flagrant; shameful; as a gross dereliction of duty; a gross

³ The notes on use of Instruction 3:1 state: Generally, in all civil cases, "the burden of proof shall be by a preponderance of the evidence,...: citing C.R.S. § 13-25-127.

⁴ The content of this instruction was approved as an instruction in *Swaim v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (e. Cleary 3 ded, 1984).

⁵ Webster's II New Riverside Dictionary, Office Edition, Berkley Books, New York; copyright 1984.

injustice; gross carelessness.⁶

Black defines "Gross negligence" as:

"The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. "Gross negligence: is substantially higher in magnitude than simple inadvertence, but falls short of intentional wrong." (Cite omitted).⁷

"Willful" is generally defined as: "Said or done deliberately; stubborn."⁸

Black's defines Willful as:

"Proceeding from a conscious motion of the will; voluntary. (Cite omitted). . . . Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently." (Cites omitted).⁹

Appellant's testimony regarding this allegation was that he was distraught and in a state of grief because of the events of 9-11-01 and the anniversary of the death of his son on 9-12-01. Because of this, he was not thinking clearly and just turned in his daily log for 9-12-01 on 9-13-01 signed affirming all information on the log was correct. Further testimony from Appellant revealed that log was not accurate at all, he made no stops that day, this was an isolated incident, this has never happened before, that it would never happen again, and he had never falsified any other logs. There was no attempt to correct this error, no offer to repay the compensation received for 9-12-01, no apology, and no remorse.

At the end of the month of September, Appellant turned in his monthly mileage log for reimbursement purposes listing the inaccurate mileage for 9-12-01. The certification on this log was signed by Appellant affirming the log as true and correct when, in fact, it was not. When questioned about why he never corrected the inaccurate logs his response was he just forgot. The answer to a subsequent question revealed Appellant had filled out the 9-12-01 log at the beginning of the day intending to use it as an outline for what he was going to accomplish that day. That log contains all the details of what was done at each stop, a few times listed when a stop was cleared, when his lunch period was taken, the mileage for the day, and Appellant's signature. There is no way to determine this log was any different than

⁶ Black's Law Dictionary, Fourth Edition; West Publishing Co. copyright 1951.

⁷ Black's Law Dictionary, Fourth Edition; West Publishing Co. copyright 1951.

⁸ Webster's II New Riverside Dictionary, Office Edition, Berkley Books, New York; copyright 1984.

⁹ Black's Law Dictionary, Fourth Edition; West Publishing Co. copyright 1951.

any of the other daily logs turned in by Appellant in all the years he worked as a Business License Inspector. This was a conscious, deliberate act by Appellant that goes beyond gross negligence. It was willful and without justifiable excuse. The only reason this inaccurate log was discovered was because 9-12-01 was a day Appellant was followed by investigators hired by the Agency to randomly follow all the inspectors. The Agency was conducting this investigation because of suspicions all the inspectors were submitting inaccurate log sheets. The Agency allegation Appellant violated this rule is affirmed

The next allegation is Appellant was in violation of CSR § 16-50 A (3): Dishonesty, including but not limited to: altering or falsifying official records.... Affirming this allegation is justified as explained in previous paragraphs.

CSR § 16-50 A (7): Refusing to comply with orders of an authorized supervisor..., was alleged to have been violated by Appellant. Agency Director Helen Gonzales testified Appellant violated this rule by participating in unauthorized meetings, not following up on assigned work, and filing inaccurate log sheets.

The first unauthorized meeting explained by Gonzales was at the Tabor Center with other inspectors to formulate a plan for salary review. E-mail exhibits revealed another inspector assured his co-workers present at the meeting he believed there was at least tacit approval for the meeting. This meeting involved the personal concerns of the inspectors about salary issues and clearly should have had more than tacit approval. Because another employee claims to have taken responsibility for securing authorization for the meeting, Appellant cannot be held responsible for attending an unauthorized meeting. The next meeting was at Coors Field. Gonzales testified neither she, nor supervisor Jenny Morris approved that meeting. Unrefuted testimony from Appellant was the inspectors met with the security people at Coors Field to review video tapes of problem vendors the inspectors needed to be aware of during games at the field. Testimony from Gonzales was Coors Field was an overlapping territory all inspectors were responsible for patrolling and enforcement activity for license violations. This was Appellant's currently assigned territory. Because this meeting was in Appellant's assigned territory, affirming the Agency's allegation Appellant violated this rule, for this reason, is denied.

The allegation Appellant did not follow up on work assignments concerns an incident that occurred when a business owner called Gonzales upset about the lapse of his business license. Gonzales testified Appellant should have known about this because the business name had appeared on several delinquent lists. It was Appellant's responsibility to follow up with the businesses on the list to make sure they renewed licenses. Appellant's testimony was the lists were inaccurate, some businesses appeared on the list only because checks sent for license renewals had not cleared, and it was up to the inspectors discretion how to handle the list. Further testimony provided information that the primary reason this business had not renewed their license is because they never received a renewal notice. Appellant had no control over the sending of renewal notices. Affirming the Agency's allegation Appellant violated the rule, for this reason, is denied.

The allegation Appellant's log sheets were inaccurate, coupled with Appellant's admission they were inaccurate, is affirmed. It is noted; however, Gonzales testified these log sheets have no provision to exclude mileage. She has never seen a log sheet with mileage excluded, taking different routes to stops than investigators took doesn't mean a log was falsified, and there is no written policy to take the most direct route between stops.

CSR § 16-50 A (13): Unauthorized absence from work..., was alleged to have been violated by Appellant. This was because on October 12th, 2001, Appellant raised concerns with Gonzales that he believed he was being followed on October 3rd and October 4th while on the job and was fearful for his safety. Appellant explained to Gonzales he took time during the day to make a police report about the incident. Gonzales testified she was concerned that Appellant waited more than a week to report being followed if he was fearful for his safety. Also, she believed he was only fishing for information from her to see if she knew anything about why he was followed. On his daily log, Appellant claimed the time spent making the police report and mileage to and from the police station as work time, which Gonzales felt violated the rule. Gonzales required Appellant to file a leave slip so this time would be charged against his leave time. She never charged him leave for the time because she never submitted the leave slip to payroll. Had Appellant turned in a leave slip with his log sheet October 12th he may or may not have violated the rule depending on his past history using or abusing leave time. Because Appellant was paid for the time and mileage making the police report regarding his safety on the job, with the knowledge of the Agency, there is no violation of the rule. Affirming the Agency's allegation Appellant violated the rule, for this reason, is denied.

CSR § 16-51 A (2): Failure to meet established standards of performance including either qualitative or quantitative standards is alleged to have been violated by Appellant. Gonzales testified Appellant violated this rule in general by just not doing his job. Because this fact has been explained, previously no further explanation is necessary. The Agency's allegation Appellant violated this rule is affirmed.

CSR § 16-51 A (5): Failure to observe department regulations. The first regulation Appellant is alleged to have violated is failing to work 40 hours per week as required. Appellant did not work a 40 hour week the week of 9-10-2001, as previously determined. The Agency's allegation Appellant violated this rule is affirmed.

Another alleged regulation violation by Appellant regards break and lunch periods. Appellant violated this provision on 9-12-01 because he did not work that day at all and reported a lunch period and afternoon break on the falsified log for that day. The Agency's allegation Appellant violated this rule is affirmed.

Appellant allegedly violated the regulation requiring vacation leave to be approved in advance. Appellant called in and received authorization from his supervisor, Jenny Morris, for a vacation day on 9-25-01. This was a day investigators were going to follow Appellant. The testimony was contradictory as to who, if anybody, authorized investigators to follow Appellant after they were told he had taken an authorized vacation day. Because

Appellant was authorized to take vacation on 9-25-01, and he was followed anyway, every allegation regarding that day by the Agency is denied.

CSR § 16-51 A (10): Failure to comply with the instructions of an authorized supervisor is alleged to have been violated by Appellant. The first example testified to by Gonzales was regarding a 1994 directive to Appellant for not responding to pages. This incident is factually unrelated to this appeal and too remote in time to be considered.

Gonzales' testimony included examples of how Appellant did not comply with a March 16th, 1995, directive explaining how the workday was to be tracked, how breaks and lunches were to be accounted for, and any variation from these procedures require supervisor pre-approval. Gonzales testified she continually referred to this memo during staff meetings; however, nowhere in any of the minutes from these meetings is that directive mentioned or referenced. Appellants un rebutted testimony was this directive was never fully implemented. All the inspectors complained about having to log the locations of their break and lunch periods, so the directive was put on hold. Affirming the Agency's allegation Appellant violated the rule, for this reason, is denied.

A January 25th, 2001, e-mail from Gonzales to another inspector was used as a basis for this disciplinary action under this subsection. The reasons for denying Appellant can be found in violation of this rule, were already explained in the explanation of CSR § 16-50 A (7) above.

JUSTNESS OF DISCIPLINE

Although the Hearing Officer may defer to the discipline imposed by the Agency, he is required to make an independent, *de novo* finding and determination as to the reasonableness of the discipline imposed on the Appellant, consistent with the provisions of CSR 16-10.¹⁰ The reasonable alternatives are always no discipline up to and including termination as discipline. The question then becomes; what is reasonable discipline by the Agency given the facts and circumstances of the appeal being considered by the Hearing Officer?

Appellant, a 15 year employee of the Agency, has no previous disciplinary record. Gonzales testified she took this into account when deciding what level of discipline was appropriate for Appellant. She also testified this was a difficult decision for her based on Appellant's consistently above average work record. It was because of the seriousness of the offense: "He stole from our taxpayers" combined with Appellant's explanation to her, regarding all the allegations of rule violations, which proved to her he lied, that she decided termination was the only reasonable discipline.

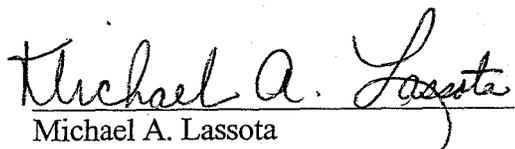
¹⁰ CSR § 16-10 states:

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.

DECISION AND ORDER

Based on the Discussion and Conclusions of Law above, I find termination to be reasonable discipline in this appeal. The decision of the Agency to terminate Appellant is affirmed.

Dated this 11th day of March, 2002.



Michael A. Lassota
Hearing Officer
Career Service Board

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