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

Appeal No. 05-05

DECISION

IN THE MATTER OF THE APPEAL OF:

LAWRENCE DANIEL MITCHELL,
Appellant,

vs.

DENVER DEPARTMENT OF HUMAN SERVICES,
Agency, and the City and County of Denver, a municipal corporation.

The hearing in this appeal was held on May 9, 2005 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Nora Nye, Esq. The Agency was represented by Assistant City Attorney Dianne Briscoe. Having considered the evidence and arguments of the parties, the Hearings Officer makes the following findings of fact, conclusions of law and enters the following decision:

FINDINGS AND ANALYSIS

This is an appeal of a written reprimand of Appellant Lawrence Daniel Mitchell, Child Support Enforcement Technician for the Department of Human Services (Agency). The action dated December 20, 2004 was imposed based upon Appellant's failure to disclose criminal convictions on the 2004 annual background check. Appellant grieved the resulting reprimand in accordance with Career Service Rule (CSR) § 18-12. This timely appeal asserts that the Agency action violated Career Service Rules 16-10 and 16-54.

The Agency's Exhibits 1 – 4 and 6 - 9 and Appellant's Exhibits A – D and F - N were admitted without objection. Exhibits E and P were admitted over the Agency's objection.

I. NATURE OF DISCIPLINE

Appellant was given a written reprimand based upon the appointing authority's conclusion that on November 4, 2004 he gave false information in answer to a question on a required annual consent to a background check. The Agency charged Appellant

with dishonesty, refusing to comply with the orders of a supervisor, conviction of a crime impacting his ability to perform his duties, violation of departmental rules, carelessness, and failure to comply with supervisor's instructions, all in violation of the Career Service Rules.

The written reprimand recited as cause for the discipline that Appellant did not reveal the following convictions on his 2004 annual background profile:

1. A 1986 conviction for driving under the influence of alcohol, 2nd offense,

2. A 1991 conviction for driving while privileges were suspended, denied or revoked,

3. A 1992 conviction for careless driving, and

4. A July 2003 conviction for driving under the influence.

II. ISSUES

The following issues were presented for appeal:

1. whether the Agency proved that the Appellant's failure to reveal misdeameanor convictions violated the stated Career Service Rules by a preponderance of the evidence; and

2. if so, whether the written reprimand imposed was reasonably related to the seriousness of the offense in conformity with CSR § 16-10.

III. FINDINGS OF FACT

Appellant has been employed in the position of Child Support Enforcement Technician for his 5 ½ years with the Agency. In that capacity, he performs office work in order to enforce child support orders. The parties agree that his position does not require him to drive.

At the time of Appellant's hire in 1999, the Agency required applicants to consent to a background investigation "for the purpose of employment evaluation." Appellant was asked the question, "Have you ever been convicted of a crime, excluding minor traffic violations? If yes, please provide details including date, location and nature of crime(s)." Appellant answered, "No. All traffic violations were misdemeanors." [Exh. E.] Appellant concedes that at the time he had a 1992 conviction for careless driving, a 1991 conviction for driving under suspension, and a 1986 conviction for driving under the influence-2nd offense.

In 1999, the Agency searched motor vehicle and judicial databases for metropolitan Colorado counties for all new hires. [Exh. P.] If the search reveals a "detrimental police

record", the human resources director must then determine whether the police record was "inconsistent with the duties to be performed" by the applicant. [Exh. P.] The Agency's pre-hire search of Appellant's Colorado court records was performed by a private company, Investigative & Background Solutions, Inc. (IBS), and revealed no convictions. [Exh. F.] Appellant testified that he recalled submitting other forms consenting to the background check in later years, that he always answered "no" to the above question, and that the Agency never questioned that answer. He therefore believed that his misdemeanor convictions arising from traffic offenses were of no interest to the Agency, since he was not required to drive as a part of his job.

In April 2003, the Agency developed a policy which required annual "agency specific background checks" for current employees using "the leas[t] intrusive method possible." The checks were designed to reveal employees' "unreported incident[s] on their record that could affect their ability to perform the essential functions of their job" in order "to ensure the safety of the work environment and the clients we serve. The yearly background checks are not the same level of detail as the initial check that is done . . ." The memo explaining this policy was distributed to all users. [Exh. 9.] Appellant admits that he received a copy of this memo.

On November 13, 2003, Appellant filled out the same IBS questionnaire as that used during the hiring process. Again, he answered "no" to the question "have you ever been convicted of a crime, excluding minor traffic offenses?" [Exh. G.] Appellant concedes that in 2003 he was again convicted of driving under the influence of alcohol. The evidence does not reveal the nature of the background check done in 2003, or whether it uncovered Appellant's four convictions between 1986 and 2003. In any event, Appellant was not disciplined for his reply to the question.

In September 2004, the Agency changed the method by which employee background searches were performed. Agency Director Roxanne White approved a background check procedure which defined a "conviction, warrant, felony or misdemeanor" as a "positive report" requiring review of the information by the personnel officer. [Exh. 6.] Deb Arter was the human resources employee assigned to perform the annual background checks by searching three public databases: the statewide ICON system, the District Court database, and denvergov.org for county court convictions. Ms. Arter used the old IBS form to obtain the necessary information from the employees. [Testimony of Deb Arter; Exh. 8.]

Shortly before these changes were implemented, Agency Manager Valerie Brooks informed her direct reports that "an employee who has been convicted of a crime that is more than a minor traffic violation [who has] not revealed it on their background check" should be given a written warning. If the conviction is determined to affect the employee's ability to do his or her job, more severe discipline may be taken. In addition, direct reports were informed that "all future background checks should reveal arrests." [Exh. 7.] The evidence is silent as to whether the 2004 changes to the procedure and its disciplinary consequences were communicated to employees.

On November 4, 2004, Appellant again answered "no" when asked if he had "ever been convicted of a crime, excluding minor traffic violations?" [Exh. 8.] However, Ms. Arter's search of the three public databases revealed his four convictions between 1986 and 2003. [Exh. 5.] Pursuant to the policy then in effect, Appellant was issued a written reprimand for failure to reveal the convictions. [Exh. 4.] Ms. Arter estimated that 100 to 140 employees have received written reprimands since the inception of the most recent changes to the system.

Ms. Arter testified that she determines whether an offense is a minor traffic violation on a case-by-case basis. Ms. Arter stated she was not privy to how the policy had been interpreted in the past. She testified the phrase "minor traffic violations" was not formally defined in Agency policies, but that she considers its meaning clear. When she is in doubt, she consults the City Attorney's Office and the Colorado Revised Statutes to determine the nature of some convictions revealed by the background checks. Ms. Arter testified that she considers any offense involving alcohol to be major because of legislative changes to those statutes and the media attention given to drunk driving. She believes that any reasonable person would know that a conviction for driving under the influence is not a minor traffic offense. When employees ask her for clarification of the phrase, she refers them to the court in which they were convicted for the classification of the offense.

Appellant testified that he interpreted the question to require only the disclosure of felonies, since he believes the word "crime" connotes a felony. When he first applied for his position, he revealed that "all traffic violations were misdemeanors." [Exh. E.] Since he was not thereafter asked to reveal those traffic violations, he assumed that he was correct in his conclusion that he was not required to disclose his misdemeanor motor vehicle offenses. He did not report his 2003 conviction for driving under the influence because he believed that, since it was the same type of offense as his 1986 conviction, and the Agency had not questioned his 1999 response or the identical response in the intervening years, it was likewise not a "crime" as that term was used in the form. He testified that, in addition, he did not believe driving offenses were the target of the inquiry because his duties have never included driving.

IV. ANALYSIS

The Career Service Rules require a de novo hearing of disciplinary appeals. The Agency bears the burden to establish that discipline is proper by a preponderance of the evidence. CRS § 13-25-27.

1. CSR § 16-50 A. 3) Dishonesty, including but not limited to: altering or falsifying official records or examination; 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.

Based upon Appellant's failure to reveal four convictions in his 2004 background profile, Appellant was charged with violation of the above rule prohibiting dishonesty in the context of job performance.

In order to sustain a charge of dishonesty under the above rule, the Agency must prove by a preponderance of the evidence that Appellant knowingly supplied false information with the intention of misleading the Agency. See Naekel v. Dept. of Transportation, 782 F.2d 975 (Fed. Cir. 1986.) If an employee reasonably believed the statement was correct when made, the element of intent is missing. Id. at 979.

The evidence indicates that the Agency communicated no official definition of the phrase "crime, excluding minor traffic violations" to its employees. In 1999, when Appellant first answered the question as a part of the hiring process, his convictions were between eight and thirteen years old. Thereafter, Appellant reasonably relied upon the Agency's silence to determine that his past convictions were of a kind excluded from the question based upon the lack of relevance to his job duties. In 2003, Appellant answered "no" to the same question, despite his 2003 conviction for driving under the influence. The Agency did not discipline Appellant for that answer, or otherwise question it.

In 2004, the Agency changed the method used for background searches. The form still asked for criminal convictions "excluding minor traffic violations", and "details, including date, location and nature of crime(s)." [Exh. 8.] In reliance upon his past experience with this question, and his conclusion that the word "crime" referred to serious crimes such as felonies, Appellant again answered "no".

In view of the totality of the circumstances, I cannot conclude that the Agency has proven the charge by a preponderance of the evidence. The evidence is not clear that the Agency provided Appellant notice of its definition of what crimes were required to be revealed, or of the new policy changing the standards governing background checks. Appellant credibly testified that he believed his offenses were minor traffic violations because they were classified as misdemeanors, and that he acted in reliance on the Agency's response to his signed forms for the past five years. Appellant was given a copy of only one policy memo related to background checks. Therein, Appellant was informed that "detrimental police records" must be "inconsistent with the duties to be performed" in order to affect a job offer. [Exh. P.] Appellant reasonably relied on that memo to conclude that convictions must bear some relation to employment in order to subject the employee to discipline.

The Agency submitted no evidence addressed to the reasonableness of Appellant's interpretation of the phrase in question, arguing only that he should have known he was incorrect. Absent notice of a change in policy, it was reasonable for Appellant to conclude that the Agency maintained the same definition of "minor traffic offense" as it had applied in the past. Therefore, I find the Agency did not prove Appellant violated the rule prohibiting dishonesty by a preponderance of the evidence.

2. 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

In order to establish a violation of this subsection, the Agency must prove that Appellant was ordered to perform an action. The evidence here is that Appellant was instructed to complete the Applicant Profile form, and did so based upon his reasonable understanding of its terms. As found above, the Agency did not prove that Appellant violated its implied order to answer the question honestly. Therefore, the charge of refusing to comply with an order cannot be sustained.

3. CSR § 16-50 A. 9) Conviction of a crime which impacts the individual's ability to perform the duties and responsibilities of the job

The Agency conceded at hearing that driving has never been a part of Appellant's employment. The Agency submitted no proof that the convictions impacted Appellant's position in any other respect, and therefore it is determined that the Agency did not establish a violation of this section.

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

An agency establishes an employee's failure to observe regulations by proving 1) an oral or written departmental regulation, 2) notice to the employee of that regulation, and 3) the employee's failure to comply with the regulation. E.g., In re Casteneda, CSA 79-03 (1/14/04).

The Agency supported this charge by proof that the department maintained a policy requiring each employee to consent to an annual background check and provide accurate information in aid of that check. The Agency contends that Appellant failed to provide accurate information on the form submitted in 2004.

Appellant argues that he was never given notice of the Agency's interpretation of the word "crimes" which must be reported on the background check consent form. He supports his decision to exclude them because 1) his job did not include driving duties, 2) the only Agency policy he saw indicated it was concerned with convictions that affected employees' ability to do their jobs, 3) for five years the Agency appeared to accept his 1999 statement that "all traffic violations were misdemeanors", and 4) in his opinion, the question's language referred to felonies. [Exhs. E, K, 9.]

Here, Appellant relied upon his assumptions that the Agency would have contacted him in 1999 if it disagreed with his statement that "misdemeanors" in a traffic context were excludable, and that the words used in the 1999 question kept the same meaning in the 2004 question. I find that the passage of five years without Agency action or notice of change in policy rendered both assumptions reasonable. It is axiomatic that a public employer must provide reasonable notice to its employees of the type of conduct for which discipline may arise. A review of traffic and criminal laws reveals that the phrase "crime, excluding minor traffic violations" does not give an

employee reasonable notice of the type of conviction to which the phrase refers. Indeed, the Agency employee who determined that phrase "on a case-by-case basis" was at times required to consult with the City Attorney's Office and the Colorado Revised Statutes to resolve the issue.

The Agency has the burden to prove the existence of the regulation and Appellant's notice thereof. I find that the Agency established a regulation requiring employees to provide accurate information for the annual background check. However, this regulation gave employees little guidance as to what meaning would be assigned to the relevant phrase, and was thus ambiguous in that respect. That ambiguity allows consideration of extrinsic evidence. Moland v. Industrial Claim Appeals Office, 111 P.3d 507 (Colo. App. 2004). The evidence revealed that Appellant had never driven as a part of his job, and had given the same answer for five years. Under these circumstances, I find Appellant not unreasonably excluded his misdemeanor driving offenses from his 2004 background check form. I must conclude that the Agency has not established a violation of the rule by a preponderance of the evidence.

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

Carelessness is the absence of that degree of care an ordinarily prudent person would exercise under similar circumstances. Black's Law Dictionary 193 (6th ed. 1979). The charge of carelessness in the performance of duties is thus established by evidence that an employee failed to exercise ordinary care in performing a job duty.

The Agency contends that Appellant had a duty to exercise ordinary care in answering the questions on the background check form. Completion of the consent form was a peripheral duty of each Agency employee, including Appellant. Thus, Appellant had a duty to complete the form in a careful manner.

The Agency contends that Appellant carelessly disregarded both common knowledge and his own experience of the seriousness of his alcohol-related convictions. The Agency supported this contention by referring to the media attention given Mothers Against Drunk Drivers (MADD), and several legislative increases to the punishment accorded such convictions. Appellant countered that testimony by the more specific evidence of the Agency's lack of action and its failure to provide notice of the type of conviction which must be revealed. On the evidence presented, I do not find that the Agency proved Appellant's interpretation of the word "crime" was careless by a preponderance of the evidence.

The Agency further argues that Appellant acted carelessly in not requesting clarification of the word "crime" if he did not understand it. Appellant testified that he believed he understood the word to exclude misdemeanors, and that his understanding was confirmed when the Agency took no action to correct his 1999 form. Appellant further relied on the fact that his convictions arose from traffic offenses, and his position does not require him to drive. I find that Appellant was not careless in failing to request clarification of a word he believed he understood.

6. CSR § 16-50 A. 10) Failure to comply with the instructions of an authorized supervisor

This charge is proven when an employer communicates an instruction to an employee that is capable of performance, and the employee fails to comply with that instruction.

The evidence presented by the Agency indicates that Appellant was instructed to complete the background check form accurately. Appellant testified that he did so, to the best of his understanding of the terms used therein. The Agency counters that Appellant's explanations are implausible, and indicate an intention to conceal his convictions. I find that the Agency did not give Appellant notice of the kinds of convictions he needed to disclose, and therefore Appellant's failure to list his misdemeanor convictions did not constitute disobedience to an instruction within the meaning of the above rule.

7. CSR §§ 16-50 A. 20) and 16-51 A. 11) Conduct not specifically identified herein may also be cause for dismissal or progressive discipline

The above rules provide that discipline may be imposed even if the misconduct is not specifically defined in any subsection of CSR §§ 16-50 or 16-51. The Agency did not argue that discipline was justified for any reason other than those alleged, and no such reason appears of record. Therefore, I find discipline is not appropriate under these rules.

Finally, Appellant argues in his closing brief that the Agency's policy of requiring the disclosure of all criminal convictions and arrests regardless of age or relevance to an employee's position is unlawful under state and federal law. Since Appellant answered the questions contained in the form without objection, and did not assert a discrimination claim as a part of this appeal, this question is not properly presented herein.

ORDER

Based on the foregoing findings of fact and conclusions of law, the written reprimand issued on December 20, 2004 is hereby REVERSED.

Dated this 27th day of June, 2005.

Valerie McNaughton
Hearings Officer for the
Career Service Board