

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

Appeal No. 165-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

MARTIN JACINTO, Appellant,

Agency: DEPARTMENT OF PUBLIC WORKS, STREET MAINTENANCE
DIVISION and the CITY AND COUNTY OF DENVER,
a municipal corporation.

Hearing in this matter was held before Michael S. Gallegos, Hearing Officer, on March 9, 2003, in the Career Service Hearings Office, 201 West Colfax, 1st Floor, Denver, Colorado 80202. Appellant, Martin Jacinto, appeared in person and was represented by Cheryl Hutchison, AFSCME. The Agency was represented by Assistant City Attorney Rob Nesor. The Agency's Acting Director of Street Maintenance, Daniel Roberts, was the Agency's advisory witness at hearing.

Within these Findings and Order, the Hearing Officer refers to Martin Jacinto as "Appellant"; to the Department of Public Works, Street Maintenance Division as the "Agency" and the Career Service Rules as "Career Service Rules" or "CSR". The Career Service Rules are cited by section number and are those currently in effect unless otherwise indicated.

For the reasons set for the below, the Agency's written reprimand of Appellant is **AFFIRMED**.

ISSUES FOR HEARING

Whether there is cause to discipline Appellant and whether the degree of discipline imposed is reasonably related to the severity of the offense.

BURDEN OF PROOF

The burden of proof is upon the Agency to show, by a preponderance of the evidence, that there is cause to discipline Appellant and the degree of discipline imposed is reasonably related to the severity of the offense.

PRELIMINARY MATTERS

The parties stipulated to the acceptance into evidence of the Agency's Exhibits 1 through 7. Appellant offered no Exhibits for hearing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Hearing Officer finds the following to be fact:

1. Appellant is an employee in career status who works for the Agency driving and operating a road patcher. He was disciplined for a motor vehicle accident that occurred on July 1, 2003 in the Agency's parking lot. By letter dated September 23, 2003, the Agency's Director of Street Maintenance, Steve Garcia (Director) issued a written reprimand.

2. Appellant drives and operates a road patcher which the Agency identifies as vehicle "CM-14". The CM-14 is an oversized vehicle that functions as an emulsion rock pothole patching machine. On July 1, 2003, Appellant had approximately 9 months experience driving and operating the CM-14.

3. Because the CM-14 is an oversized vehicle, it is parked during non-working hours, with other oversized Agency vehicles, in an area away from offices at the Agency's Roslyn Street location. Appellant arrives at work with sufficient time to park his personal vehicle, start the CM-14, warm the engine and drive the CM-14 to the parking lot adjacent to buildings at the Roslyn Street location. Appellant parks the CM-14, then goes into Agency offices to get his daily assignment.

4. The parking lot at the Roslyn Street location is City-owned property. It accommodates both street vehicles and oversized vehicles. On numerous occasions Appellant has parked in the Roslyn Street parking lot and has maneuvered the CM-14 out of the parking lot without colliding with another vehicle.

5. On July 1, 2003, Appellant drove the CM-14 to the parking lot in front of Building C33 at the Agency's Roslyn Street location. Appellant parked

the CM-14 in a parking space next to Agency vehicle "FL-1", a Jeep Cherokee. Appellant then went into Building C33 to get his assignment for the day.

6. After getting his assignment, Appellant returned to the parking lot, got into the CM-14, started the engine and began to pull forward out of his parked position into a two-way driveway between Building C33 and the parking lot. At that time Appellant saw co-worker, Tom Baca (Baca), walking toward the CM-14. Appellant turned the CM-14 to the right to avoid hitting Baca. Baca began pointing at something but Appellant had no idea what Baca was pointing at. So Appellant stopped the CM-14. At the time Appellant stopped the CM-14, he realized that his back tire had struck FL-1, the Jeep Cherokee.

7. Appellant turned off the engine and went back into Building C33 to report the accident.

8. By pointing at the Jeep Cherokee, Baca intended to remind Appellant that the Jeep was there, so that Appellant could adjust the angle at which he left the parking space.

9. The Agency uses 2 hand signals for "stop". Hand signals are necessary because, due to the noise of machinery, workers cannot always hear verbal directions. One hand signal for "stop" is a raised, closed fist. A second hand signal for "stop" is both arms raised, waving back and forth, crossing in front of the signaler.

10. Baca did not use either hand signal for stop as Appellant attempted to pull out of his parking spot.

11. The Agency's Safety Officer, Marcel Linne', is called out to any motor vehicle accident involving an Agency vehicle. If the accident occurs on a public road way, the Safety Manager determines whether an ambulance or the Police Department should be called. If the accident occurs on City property, the Safety Manager investigates the accident without the Police Department. No matter where the accident occurs, if it involves an Agency vehicle, the Safety Officer is charged with taking pictures of the accident and obtaining statements from those involved in the accident. Following his investigation, the Safety Officer determines whether the accident was preventable.

12. In this case, the Safety Officer did not speak with the employee involved, Appellant. Another Agency employee took photographs of the accident. Appellant provided a written statement and diagram at the scene of the accident and the Safety Officer later spoke with Appellant's supervisor about the accident.

13. The Agency's Accident Review Board includes the Agency's Safety Officer, senior managers and often includes a supervisor. The Board meets as

needed to review accidents involving Agency vehicles. However, due to the schedules of Board members, it may be as much as 8 weeks between Board meetings. The purpose of the Agency's Accident Review Board is to determine if the Agency employee(s) involved in a motor vehicle accident is at fault for the accident. The Board considers accident reports and employee's statements, if any, and considers mitigating circumstances such as road and weather conditions and the employee's driving record. If the Board determines that an employee is at fault, the Board then recommends, to the Director, whether discipline should be imposed.

14. Ordinarily, the employee is neither invited to attend the Accident Review Board meeting nor is the employee invited to provide supplemental information or statements. Although an employee may contact the Safety Officer and request the opportunity to submit a supplemental statement, in this case, the Appellant was unaware that he could request such opportunity. Consequently, Appellant did not submit a supplemental statement to the Board.

15. When the Director receives an Accident Review Board recommendation to impose discipline, the Director then reviews the employee's disciplinary history. If the Director accepts the Board's recommendation and determines that there is cause for discipline, the Director directs Human Resources employees to prepare a pre-disciplinary letter which the Director may modify before it is sent to the employee.

16. In this case, the Agency's Accident Review Board met on August 25, 2003 and determined that the July 1, 2003 accident was preventable. That is, the Board recommended that discipline be imposed.

17. Based on the Accident Review Board's recommendation, Appellant was charged with violations of CSR 16-50 A 2) "...destruction, or gross neglect in the use of City and County property", CSR 16-50 14) "...failure to observe safety regulations which...results in damage or destruction of City and County property, CSR 16-51 A 5) "Failure to observe departmental regulations" including Workplace Safety regulations, CSR 16-51 A 6) "Carelessness in performance of duties and responsibilities" and CSR 16-51 A10) "Failure to comply with the instructions of an authorized supervisor.

18. In determining whether discipline should be imposed, the Director considered the Accident Review Board's recommendation. The Director also considered Appellant's work history including that Appellant worked for the Agency "on-call" for 10 years and as an equipment operator specialist for more than 3 years. During that time Appellant had only one prior accident.

19. In determining the level of discipline to be imposed, the Director considered Appellant's disciplinary history consisting of a verbal warning for a

2002 motor vehicle accident, in a different type vehicle, and a verbal warning for a lost pager.

20. Appellant's testimony at hearing is credible. At hearing, Appellant admitted to the facts of the July 1, 2003 accident but argued that the accident was not his fault.

DISCUSSION

1. **Authority of the Hearing Officer:** The City Charter and Career Service Rules require the Hearing Officer to determine the facts, by *de novo* hearing, in "[a]ny action of an appointing authority resulting in... suspension...which results in alleged violation of the Career Service Charter Provisions or Ordinance relating to the Career Service, or the Personnel Rules." (City Charter C5.25 (4) and CSR 19-10.) A *de novo* hearing is one in which the Hearing Officer makes independent findings of fact, credibility assessments and resolves factual disputes. (See *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. App.1975).)

2. **Cause for discipline:** Career Service Rules provide, in pertinent part: "The purpose of discipline is to correct inappropriate behavior or performance." (See CSR 16-10.) At hearing in this matter, Appellant admitted to the facts of the July 1, 2003 accident but argued that the accident was not his fault and that he should not be disciplined for an accident that was not his fault. The Agency, through its Accident Review Board, determined that the accident was preventable and that Appellant was at fault for the accident. (See Findings of Fact, paragraphs 13 and 16.) Appellant was disciplined for violations of departmental regulations and Career Service Rules including "Failure to comply with the instructions of an authorized supervisor." (CSR 16-51 A 10)

Based on the admitted facts of the accident, the undersigned Hearing Officer agrees with the Agency that the accident was preventable and that Appellant was at fault for the accident. However, insufficient evidence was presented, at hearing, to determine whether Appellant failed to comply with the instructions of an authorized supervisor. Therefore, the Hearing Officer concludes that the Agency has not met its burden to prove, by a preponderance of the evidence, that there is cause for discipline with regard to alleged violations of CSR 16-51 A 10) "Failure to comply with the instructions of an authorized supervisor." Further, the Hearing Officer concludes that the Agency met its burden to prove, by a preponderance of the evidence, that there is cause for discipline for violations of CSR 16-50 A 2) and 14) and CSR 16-51 A 5) and 6).

3. **Level of discipline:** "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." (See CSR 16-10. Emphasis added.) At hearing,

Appellant argued that if cause for discipline was properly found, then the discipline imposed is too severe. Based on the Accident Review Board's recommendation and consideration of Appellant's work and disciplinary history, the Director issued a written reprimand. (See Findings of Fact, paragraphs 16, 18 and 19.)

To be "reasonably related" to the seriousness of the offense, the discipline imposed must be "within the range of reasonable alternatives available to a reasonable, prudent agency administrator." *Adkins v. Div. of Youth Services*, 720 P.2d 626 (Colo. App. 1986). Appellant had received two prior verbal reprimands for carelessness with City property. The next step, under progressive discipline, is a written reprimand. Based on the facts of the accident, which constitute violations of CSR 16-50 A 2) and 14), Appellant could have been dismissed for the July 1, 2003 accident. Therefore, the Hearing Officer concludes that a written reprimand is within the range of reasonable alternatives available to the Director and that the Director's issuance of a written reprimand was reasonable and prudent in this case.

CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction to make and issue Findings, conclusions and Order in this matter.

2. The Agency has met its burden to show that there is cause for discipline for violations of CSR 16-50 A 2) and 14) and CSR 16-51 A 5) and 6).

3. The Agency has not met its burden to prove that there is cause for discipline with regard to alleged violations of CSR 16-51 A 10) "Failure to comply with the instructions of an authorized supervisor." All references to failure to comply with the instruction of a supervisor shall be removed from the written reprimand issued in this matter.

4. The Agency has met its burden to show that the level of discipline imposed is reasonably related to the severity of the offense.

ORDER

Therefore, for the reasons stated above, the undersigned Hearing Officer **AFFIRMS** the Agency's written reprimand of Appellant.

Dated this 14th day of April 2004



Michael S. Gallegos
Hearing Officer for the
Career Service Board.

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the United States Mail, postage prepaid, on the 14th day of April 2004, addressed to:

Martin Jacinto
927 W. 12th Ave.
Denver, CO 80204

Cheryl Hutchison
AFSCME
3401 Quebec St. #7500
Denver, CO 80207

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in interoffice mail, on the 14th day of April 2004, addressed to:

Robert D. Nespor
Assistant City Attorney

Bill Miles
Department of Public Works

Daniel Roberts
Street Maintenance Division

