

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

Appeal No. 92-06

DECISION

IN THE MATTER OF THE APPEAL OF:

CHRISTINE WARREN - WESLEY,
Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS, STREET MAINTENANCE DIVISION
Agency.

The hearing in this appeal was held on Dec. 27, 2006 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Karen Larson, Esq. The Agency was represented by Assistant City Attorney Robert Nespor. Having considered the evidence and arguments of the parties, the following findings of fact and conclusions of law are entered herein.

I. INTRODUCTION

Appellant was a Senior Utility Worker for the Department of Public Works, Street Maintenance Division, until her termination on Oct. 13, 2006. The appeal included claims of race and disability discrimination, which were dismissed before hearing based upon Appellant's failure to file an internal complaint of discrimination under CSR § 15-103. Agency's Exhibits 1 - 20 and Appellant's Exhibit D were admitted into evidence without objection.

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, and
- 2) Did the Agency establish that termination was within the range of penalties that could be imposed by a reasonable administrator in compliance with the Career Service disciplinary rules?

III. FINDINGS OF FACT

Appellant is the holder of a commercial driver's license (CDL), and is assigned to drive a sign truck for the Street Maintenance Division. The Department of Transportation (DOT) regulates CDL licensees with regard to the use of alcohol while driving commercial vehicles. Agency employees annually receive a copy of Executive Order (EO) 94, the City and County of Denver's drug and alcohol policy, and the Agency's policy on drug and alcohol testing. [Exhs. 13, 15, 16.] As a driver holding a CDL, Appellant acknowledged in writing that she was subject to random drug tests. [Exh. 14.] DOT regulations require that a driver who has tested positive for alcohol may not return to work in a safety sensitive position until the employee has tested negative in a return-to-work alcohol test. [Exh. 2, p. 3.]

On Oct. 28, 2005, the Agency administered a breath test on Appellant based on her supervisor's observations which indicated Appellant was under the influence of alcohol during work hours. The breath and confirmation tests were both positive for alcohol. [Exh. 20.] On Nov. 21, 2005, the Agency and Appellant signed a Stipulation and Agreement under which Appellant was given a 30-day suspension and obligated to participate in a substance abuse treatment/education plan as a condition of continued employment. The Stipulation and Agreement required Appellant to submit to 18 breath, urine or blood screening tests in 2006, and a decreasing number of tests for three years thereafter. In the event of discipline arising from an alleged violation of the agreement, Appellant waived her right to appeal all issues except whether she complied with the Stipulation and Agreement. [Exhs. 2, 7.]

Appellant was scheduled to return to work after her suspension on Dec. 22, 2005. A week before that date, Michael Cugini, the substance abuse professional assigned to Appellant, notified the Agency that Appellant had not taken the steps needed to obtain a treatment plan and drug/alcohol testing as required by the Stipulation and Agreement. Appellant was placed on another 30 days of leave for the purpose of allowing her to comply. [Exhs. 6, 8.] Appellant forgot her first scheduled meeting with Mr. Cugini, returned to work on Jan. 19, 2006, and successfully completed treatment on Feb. 6, 2006. On Feb. 9th and April 13th, Appellant's tests were considered low positives, which required retesting. [Exh. 5.] All other tests until the incident in question were negative for both drugs and alcohol.

On Sept. 20, 2006, the results of Appellant's breath and confirmation tests were .078 blood alcohol content (BAC), which is the percentage of alcohol in the blood. [Exhs. 3, 4.] As a result, Appellant was placed on investigatory leave and driven home. [Exh. 9.] On Sept. 29th, Appellant was notified that discipline was being contemplated. [Exh. 17.] At the pre-disciplinary meeting attended by Appellant and her attorney, Appellant admitted drinking alcohol on Sept. 19th, but denied being under the influence the day of the test. Appellant stated that she believed the test was improperly administered or the equipment was faulty. The Agency found that Appellant "persistently disregarded" Agency rules, her supervisors' directives, and the Stipulation,

that she had lied to management, and that she was under the influence of alcohol on Sept. 20th. As a result, Appellant was terminated on Oct. 13, 2006. [Exh. 10.] This appeal followed.

At the hearing, Appellant's supervisor Elroi Ortega testified that Appellant was crying when she arrived at work on Sept. 20, 2006. Appellant told Mr. Ortega that this was the anniversary of her mother's death, and she didn't want to drive that day. He observed that she was talking a little louder than normal. Shortly thereafter, he was instructed to bring Appellant to the clinic for a drug and alcohol test pursuant to the stipulation. In doing so, he followed the annual training he received under Executive Order 94, which required him to keep her in sight, restrict her water intake, and observe her behavior. Appellant stipulated that the Agency followed all the necessary steps in performing the breathalyzer test on Sept. 20, 2006. After both the test and confirmation test showed a .078 BAC level, Mr. Ortega was told to take Appellant home. En route, Appellant told Mr. Ortega to "tell Oscar and the boys that their wish has been fulfilled", and that he "would have a peaceful life now." Appellant testified she said that because she believed a co-worker named Oscar had been trying to get her fired.

Richard Jones has been the Program Administrator for Drug and Alcohol Testing for the Denver Health Medical Center for the past 17 years. Mr. Jones helped develop the random testing program mandated by DOT since 1994, and runs that program. He is a Breath and Alcohol Technician certified to operate the Drayger breathalyzer, and to train others on that machine.

Mr. Jones testified that he performed a random breath test on Appellant on Sept. 20th with the Drayger breathalyzer pursuant to the substance abuse plan developed as a part of Appellant's Stipulation and Agreement. The breath and confirmation tests both indicated a .078 BAC. Under the DOT regulations applicable to CDL holders, "under the influence" is defined as having an alcohol concentration of 0.04 or higher. Employees not holding a CDL are governed by the Colorado statutes, which sets that rate at .08 BAC. EO 94, p. 15.

Identical breath and confirmation test results are unusual, since the later test is expected to show a lower breath alcohol level because of the passage of time. Mr. Jones confirmed that he had never seen this result, but that breath tests can be influenced by body weight, liver function, ingested food and liquids, and other factors. He explained that the tests may have captured the BAC level at the same point as it went up and down as the alcohol was metabolized and then left Appellant's system. Alcohol is metabolized at an average rate of one glass per hour. Mr. Jones was confident in the accuracy of the test results because the calibration test showed a .038 rate, indicated on the test results as "accuracy units." [Exh. 3.] That result is within the manufacturer's standard for acceptable calibration, which is set at within .005 of .04. Mr. Jones observed that the machine was operating normally that day. Appellant stipulated that the breath and confirmation tests were administered properly.

Director of Street Maintenance Division Daniel Roberts terminated Appellant based on all the facts recited in the disciplinary letter, and in reliance on the city's alcohol and drug policy mandating dismissal for a second offense of being under the influence of alcohol while on duty. EO 94, p. 13. EO 94 also mandates dismissal for a violation of a Stipulation and Agreement. EO 94, p. 12.

Appellant testified that she had two cocktails the night before the breath test, and used a Nasonex inhaler that night and the next morning before the test. Appellant does not know whether use of the inhaler would have affected the test results. Appellant believes the results were inaccurate because the breath and confirmation tests were identical. Appellant testified that the calibration test always showed .00 in her past tests, and so she believes the .038 result on Sept. 20th further demonstrates the inaccuracy of the test. The calibration test on Oct. 5, 2005 was .032. [Exh. 20.] Appellant also believes she was tested more frequently than others who were on a Stipulation and Agreement. Appellant was tested 12 times over the nine months during which she was covered by the Stipulation and Agreement. Her treatment plan required 18 tests during 2006. [Exh. 5, p. 2.] Appellant argued that two other employees were not fired after violations of the alcohol policy. Under cross-examination by Appellant, Mr. Roberts explained that the first employee was covered by different standards because he did not hold a CDL, and another employee had a single violation of the alcohol policy.

Appellant believes her low positive results on Feb. 9 and April 13th were caused by cough syrup she used to treat bronchitis. Appellant did not feel intoxicated on either Oct. 5, 2005 or Sept. 20, 2006, the days of her positive alcohol tests.

IV. ANALYSIS

1. Career Service Rules

Jurisdiction is proper under CSR § 19-10 A. 1. I. In this de novo hearing on the appropriateness of the discipline, Agency bears the burden of proof to show by a preponderance of the evidence both that Appellant violated the disciplinary rules as alleged, and that termination was within the range of discipline that can be imposed under the circumstances. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.); In re Gustern, CSA 128-02, 20 (12/23/02).

A. CSR § 16-60 G: Being under the influence of alcohol while on duty

On Sept. 20, 2006, Appellant had a BAC of .078 while on duty. Appellant challenges that result because the confirmation test was identical to the breath test. It is undisputed that this is an unusual result. However, that of itself does not cast either test result into doubt. The machine was properly calibrated that day, and the parties agree that numerous circumstances can affect test results, including ingestion of food and drink, liver functioning, and body weight. The BAC level revealed by the test was almost twice the defined rate for under the influence for CDL employees. Appellant

admits having two drinks the night before the test. It is highly unlikely that any error would cause two identical overstatements of alcohol concentration of this magnitude.

Moreover, other evidence indicates that Appellant was not being truthful about the amount and timing of her alcohol use. After the first violation, Appellant said she had one drink the night before the test showing a .125 BAC, which is over three times the applicable level for under the influence. However, Appellant subsequently admitted that she was under the influence of alcohol while on duty, and that the results of that test were accurate based on her use of alcohol. [Exh. 2, p. 4.] Thereafter, Appellant did not abstain from alcohol, but testified she drank on weekends, and drank two or three glasses of water to extend the "buzz" of alcohol. Appellant also testified she did not drink between Mondays and Fridays, but she admitted she had two cocktails on Tuesday evening Sept. 19th. Appellant acknowledged that she "had a relapse" before the test, but said she got herself together thereafter. I conclude that it is more likely than not that the test was accurate, and that Appellant was under the influence of alcohol at work on Sept. 20, 2006, in violation of § 16-60 G.1. Appellant did not demonstrate that the Agency enforced its policy in an inconsistent manner.

B. CSR § 16-60 J: Failing to comply with lawful orders of supervisor

As a condition of employment as a CDL driver, Appellant was obligated to acknowledge that she was prohibited from being under the influence of alcohol while performing city business under EO 94, and that such use or testing positive for alcohol could result in her termination, even for a first offense. [Exh. 14.] Appellant was also counseled and given written instruction to comply with the rules on use of alcohol. [Exh. 10, p. 6.] Strict enforcement of these rules against a city CDL driver is mandated by DOT regulations, and required for reasons of public safety and the accomplishment of the Agency's mission.

As a holder of a CDL and driver for the city, Appellant was given annual notice of the DOT regulations, city and Agency policies governing her use of alcohol. That was reinforced in a powerful way after Appellant's first violation, when Appellant agreed to a 30-day suspension, substance abuse treatment and education, and submission to random tests for at least three years. Appellant's actions on Sept. 20, 2006 in presenting herself to work while under the influence of alcohol violated the orders of her supervisors under § 16-60 J.

C. CSR § 16-60 K: Failing to meet standards of performance

Appellant was required by her Performance Evaluation Program (PEP) to complete assignments as safely as possible, and to maintain a safe working environment. [Exh. 12.] The Agency proved only that Appellant was under the influence of alcohol while at work. There is no evidence from which I could find that Appellant failed to complete an assignment in a safe manner, and failed to maintain a safe working environment. As indicated in this decision, the Agency did establish that

Appellant failed to follow the identified Career Service Rules and Agency regulations, in violation of § 16-60 K.

D. CSR § 16-60 L: Failure to observe departmental or agency regulations

The Agency alleges that Appellant violated Public Works Rules and Regulations § 1. B. 2) prohibiting an employee from being under the influence of alcohol when at work. By virtue of the facts establishing misconduct under CSR § 16-60 G., the Agency also proved a violation of this rule. The Agency failed to prove that Appellant failed to review safety procedures frequently, as required by § 4 of the Agency regulations.

E. CSR § 16-60 V: Failure to use safety devices

The Agency presented no evidence that Appellant failed to observe safety regulations or use safety devices as required by this rule. Therefore, the Agency has not proven a violation of § 16-60 V.

F. CSR § 16-60 Y: Conduct violating Executive Order 94

Executive Order 94 applies to Appellant as a city employee and an operator of city vehicles under a CDL regulated by DOT. The order prohibits an employee from being under the influence of alcohol while performing city business, driving a city vehicle or being on city property. The breath test confirmed that Appellant was under the influence of alcohol on Sept. 20th at almost double the level prohibited by the order. Thus, the Agency proved that Appellant's conduct on that date violated EO 94.

Z. CSR § 16-60 Z: Conduct prejudicial to the good order and effectiveness of department or agency

This rule requires employees to avoid conduct that hinders the agency's mission, brings the agency into disrepute, or compromises the integrity of the City. See Thomas v. Denver, 487 P.2d 591 (Colo.App. 1971). The evidence here showed that Appellant submitted to a random breath test, and was driven home after the test showed positive for alcohol. There is no evidence that Appellant's absence negatively affected the reputation, integrity, or mission of the Agency or City, or even that the Agency was required to change any work assignments as a result of Appellant's conduct. Therefore, I conclude that Appellant's actions were not prejudicial to the good order and effectiveness of the City or Agency.

2. Penalty

The purpose of discipline is to correct inappropriate behavior, if that is deemed possible. Appointing authorities are directed by the rules to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20. Since this requires the decision-maker to analyze both

the misconduct and the employee's motivation to change that behavior, automatic penalties and no-tolerance offenses are not favored by the Career Service Rules.

Here, Mr. Roberts considered Appellant's use of alcohol as very serious, given the Agency's numerous attempts to modify her behavior, including the 2005 Stipulation and Agreement. Mr. Roberts determined that Appellant's conduct was a second violation of EO 94 as well as a violation of the Stipulation and Agreement, and thus that it mandated termination under EO 94, § IV, ¶¶ 8 and 9.

Appellant's job for the Street Maintenance Division of the Department of Public Works requires the operation of machinery to maintain city streets in a safe and efficient manner. The City is required by DOT to strictly enforce the rules prohibiting use of alcohol by CDL operators, and Appellant was given annual notice of that policy. Appellant was aware of the consequences of a second violation, as shown by her signature on the Stipulation and Agreement, as well as her statement on Sept. 20th which indicated she knew she would be terminated after the positive breath test. EO 94 states,

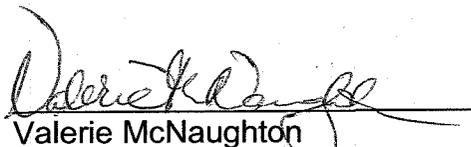
If it is determined after the appropriate predisciplinary meeting that any of the following situations apply, the employee *shall be dismissed* even for the first offense for the following conduct:

8. The employee has violated the Stipulation and Agreement;
9. The employee violates Executive Order 94 for the second time in the employee's career with the City and County of Denver and/or its agencies.

Executive Order 94, pp. 12 – 13.

Where, as here, an agency has a compelling need for strict enforcement of a stated penalty in order to accomplish its mission and an employee has notice of that policy, imposition of a set penalty for well-defined conduct is appropriate under the progressive discipline rules. I find that Appellant had notice of both the policy and the penalty to be imposed, and that termination was appropriate under these circumstances.

Dated this 9th day of February, 2007.


Valerie McNaughton
Career Service Hearing Officer