CIVIL SERVICE COMMISSION, CITY AND COUNTY OF DENVER, COLORADO

Case No. 12 CSC 02

In re the matter of:

ANDREW NUANES (92011)
Officer in the Classified Service of the Denver Police Department,
Petitioner.

FINDINGS, CONCLUSIONS, DECISION AND ORDER

This matter comes before the Civil Service Commission hearing officer, Carolyn J. Lievers, on the briefs from the parties in lieu of a hearing. The Petitioner, Andrew Nuanes, ("Petitioner") was represented by Eric M. James, Esq. The Respondent, Hon. Alex J. Martinez, Manager of Safety ("the Manager") was represented by Robert D. Nespor, Assistant City Attorney.

At the case management meeting on April 16, 2012 the following stipulated exhibits were admitted into evidence as the record in this case: Exhibit 1, State of Colorado Traffic Accident report in Case #11-504952; Exhibit 2, color photos of the accident scene and vehicles involved; Exhibit 3, Denver Police Department Statement of Natasha D. Williams dated November 17, 2011; Exhibit 4, Denver Police Department Statement of Andrew Nuanes dated November 17, 2011; Exhibit 5, Contemplation of Discipline Letter dated December 27, 2011; Exhibit 6, Findings by the Chief of Police/or designee- Pre disciplinary Conference dated January 6, 2012; Exhibit 7, Departmental Order of Disciplinary Action dated January 13, 2012; Exhibit 8, Denver Police Department Officer Driving History for Nuanes, Andrew dated November 20, 2011; and Exhibit 9, Police Vehicle Accident Data Sheet (Denver Police Department) Accident report # 11-504952 P# 213.

THE APPEAL

The Manager issued a Departmental Order of Disciplinary Action, P2011 11 057, fining the Petitioner “the loss of eight (8) hours for violation of RR-809 of the Operations Manual” ("OMS") on January 13, 2012. The Manager found that Petitioner was appropriately assessed four points for being the primary cause of this accident. The Manager noted that Petitioner had three points for a prior relevant accident. See Exhibit 8, p. 2.

The Manager concluded that this was a preventable accident. The manager explained that “[W]hile damage is extensive and there is an injury, the vehicles were not a total loss and the injury was not serious. Thus, 2 points less than the maximum of 5 is
appropriate.” The Manager’s analysis led him to assess three points for this preventable accident, a violation of RR-809. See Exhibit 7.

Petitioner appealed the Departmental Order of Disciplinary Action on January 26, 2012. Petitioner claims that the Manager should have assessed two points instead of three points for this preventable accident consistent with the recommendations of Lt. Block, Captain Padilla and Division Chief Klee. See Exhibit 9. Petitioner asserts his penalty should have been a written reprimand under the circumstances of this accident. Alternatively Petitioner claims that he did not receive an impartial review from the Chief that would have resulted in a lesser consequence such as a written reprimand.

**ISSUES**

1. Whether Petitioner violated RR-809, Rough or Careless handling of City or Departmental Property.

2. Whether the Chief’s review was impartial.

3. Whether the Manager’s decision to assess three points instead of two points for a preventable accident was arbitrary.

**FINDINGS OF FACT**

The accident between vehicles driven by Petitioner and Natasha D. Williams in this appeal occurred on November 17, 2011. The time and place of the accident was approximately 7:40 A.M. on west bound 8th Avenue at Zuni Street in Denver, Colorado. Both parties to the accident gave a written statement at the scene. There was significant damage to both vehicles causing both vehicles to be towed. Photos were taken of the accident scene and vehicles as part of the police report. Ms. Williams was transported to DHMC with a “possible injury” that turned out to be minor. See Exhibit 9.

Ms. Williams was driving west on 8th Avenue. She stopped for the traffic light at Zuni Street. When she tried to proceed when the light permitted, her vehicle had stopped running. She had some sought of mechanical failure. She tried to start her car several times without success. The light “changed from green to red a few times while I tried to start my car.” Ms. Williams had hazard lights on when her vehicle was struck by Petitioner’s vehicle.

Petitioner was driving west bound on 8th Avenue at approximately 30 miles per hour as he approached the intersection of 8th Avenue and Zuni street. He noticed that the car ahead (Ms. Williams’ car) was stopped. He tried to avoid the stopped car by swerving to the left and applying the brakes. “I was unable to avoid the stopped car and struck the left rear with my right front.” Exhibits 1, 2, and 4.

Petitioner’s driving history reveals that he was assessed three points for hitting a fire hydrant while backing his vehicle on March 16, 2010 in Accident Number P-52. Exhibit 8.

The parties stipulated that Petitioner completed remedial drivers training, both class room and instructional, on January 20, 2012.
CONCLUSIONS OF LAW

1. Pre-disciplinary review

Petitioner’s alleges that he did not receive an impartial pre-disciplinary review before the decision of the Chief of Police because Deputy Chief Battista simply affirmed his own prior recommendation.

The Denver Municipal Code, section 9.4.14(A), Disciplinary procedures, permits the Chief or his or her designee to hold the pre-disciplinary meeting and make the departmental recommendation to the Manager. Deputy Chief Battista was the Chief’s designee, a proper delegation. The Chief had authority to designate Deputy Chief Battista to hold the pre-disciplinary meeting and make the departmental decision. The Chief or his or her designee is obligated to follow the same rules: conduct a thorough review of the accident, taking in consideration severity of the accident and Petitioner past driving points assessed. If the Chief or his or her designee concludes that the accident was a preventable accident, the Chief or his or her designee is authorized to assess points within the ranges for scheduled discipline. After considering the officer’s driving history, if any, the Chief or his designee decides an appropriate consequence within the range, based on total points the officer has under the Departmental Accident Point Classification. OMS 203.09 (2) (d) (5).

No evidence was presented that Deputy Chief Battista failed to undertake an independent review of the accident or gave a consequence that was not authorized by OMS 203.09 in making the Chief’s decision.

Neither the Chief’s (nor his designee’s) decision can supplant the independent review of and disciplinary action decision made by the Manager. The evidence is that Manager made an independent decision after reviewing the facts (the exhibits) in this case.

The claim that somehow the pre-disciplinary process was defective because the Petitioner “was not afforded an impartial audience with the Chief as contemplated by the rules” and that Deputy Chief Battista was involved earlier in the recommendation process in this case is unfounded. This is so because the rules do not guarantee personal review by the Chief; the Chief is permitted to designee another to make the department’s final decision. The Municipal Code provides a mechanism to correct any error made at the Chief’s level of decision making by providing for an independent review of the allegations and determination of the discipline to be given by the Manager. Denver Municipal Code section 9.4.14 (B).

Moreover, tribunals should consider, on a case by case basis, whether the alleged action was prejudicial to the party making the claim of harm. In this case the Manager’s decision was more favorable to the Petitioner (a one day fine instead of the Chief’s two day fine). Thus there was no harm to Petitioner, if it was an error to designate Chief Battista. This is so because no substantial right of the Petitioner [a thorough review of the accident and consequences authorized by the scheduled discipline rule] was harmed. OMS 203.09 (2) (a) (5) (d).
2. RR-809, Rough or Careless Handling of City and Department Property
   (Scheduled Discipline as it relates to Preventable Accidents)
   In the Police Department Disciplinary Handbook (“Handbook”) RR-809 conduct shall be construed as a rule violation of the Operations Manual. RR-809 violations expressly are subject to Scheduled Discipline, rather than penalties under the Disciplinary Matrix. Handbook, Appendix G, p.6 Preamble. Specifically OMS 203.09(2) (a) (5) (d) sets forth the scheduled consequences for violations of RR-809 involving preventable accidents. The level of consequence is based on a point system. The severity of the accident controls the number of points and ultimate consequences to be given for a preventable accident within the set ranges. OMS 203.09(2) (d) (2) and (3), and 203.09 (2) (d) (5) (d). See also Handbook section 12.4.7.

   The Petitioner’s Commander (or his/her designee) makes the initial determination of whether the accident under consideration was preventable. The definition of preventable is: the “accident was principally caused by the driving actions in violation of traffic laws and/or department policy or contributed to by poor defensive driving practices.” OMS 203.09(2) (d) (1) (a). RR-809 simply requires that Police Department equipment and property be handled with care. Thus if a police vehicle is involved in a preventable accident this rule is violated.

   The conclusion that the accident in this case was preventable is unchallenged by Petitioner. Also Petitioner does not challenge the assessment of four points for careless driving, the cause of this preventable accident. Petitioner had three points on his record for an accident in the previous 24 months. Exhibit 8, p. 2.

   Petitioner complains that the Chief’s designee failed to follow recommendations from his Commander and those of the Division Chief, officers in the chain of command, to assess two points for this preventable accident. The Chief or his designee is not bound by any prior recommendations. The Chief’s (or his designee’s) duty was to make an independent determination and issue his written decision. Exhibit 9, Decision: Chief of Police.

   Similarly the Manager is not bound by the Chief’s or his designee’s decision. The Manager’s duty is to conduct a thorough independent review of the entire investigative file and decide whether a RR 809 violation should be sustained and, if sustained, what sanction to impose based on the Scheduled Discipline ranges. The Manager must follow and apply the rules in the Operations Manual.

   In his disciplinary action letter the Manager explained that he considered that “the vehicles were not a total loss and the injury was not serious” in reaching his decision to give three points instead of the maximum of five points for this preventable accident.

   The rules impose no duty to explain why the Manager does not adopt a particular recommendation or adopt the Chief’s decision. The Manager conducts his independent review of whether RR 809 was violated, and if he finds a violation, he decides what scheduled discipline is appropriate under the circumstances. Denver Municipal Code section 9.4.14(B) [The Manager … shall … approve, modify or disapprove the written order of disciplinary action.].

   The Manager’s conclusion that this was a preventable accident is consistent with the definition of a preventable accident in the rules. The Manager’s decision to give three points out of a possible five points for this preventable accident is authorized by the schedule of points for a preventable accident.
Petitioner’s previous two year driving record points (three points) added to the four points for careless driving, and the three points for preventable accident total 10 points. At ten points the Manager is directed by the Departmental Accident Point classification to impose a fine of between one and five days. OMS 203.09 (2) (d) (5) (d). Choosing the minimum fine of one day (8 hours) is reasonable under scheduled discipline in the Operations Manual. OMS 203.09(2) (d) (5) (d) [“10-15 points: A fine of one to five days”]. The decision to impose an eight hour fine is reasonable and within the authority of the Manager.

DECISION
The Petitioner violated RR-809, Rough or Careless Handling of City or Departmental Property (Scheduled Discipline as it relates to preventable accidents) by engaging in careless driving. The Manager properly applied OMS 203.09 in assessing points and arriving at the eight hour fine under scheduled discipline.

ORDER

NOTICE OF APPEAL RIGHTS
Pursuant to Charter § 9.4.15(E), and Rule 12 § 11 (A)(1 and 2), the decision of the Hearing Officer may be appealed to either the Civil Service Commission, or directly to District Court. Any appeal to the Commission shall be initiated by filing a Notice of Appeal with the Commission, within fifteen (15) calendar days of the date noted on the certificate of service of the Hearing Officer’s decision by the Commission. Any appeal to District Court shall be initiated in accordance with the Colorado Rules of Civil Procedure currently in effect.

Dated this 20th day of June 2012.

/s/ Carolyn Lievers
Hearing Officer