HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 49-14

DECISION AND ORDER

THE MATTER OF THE APPEAL OF:

KRISTIE BURDETT, Appellant,

vs.

DEPARTMENT OF FINANCE, MOTOR VEHICLE DIVISION,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Dec. 3 and 4, 2014 before Hearing Officer Valerie McNaughton. Appellant was present and was represented by Louis Undebakke, Esq. Assistant City Attorney John Sauer represented the Agency in the appeal. The Agency called Kristi Burdett, Illya Scott, Paula Gomez-McIntosh and Crystal Cordova. Appellant testified on her own behalf and presented the testimony of Jennifer Lynn Kelley-Sweet, Phillip Lewis, Katherine Marie Lopez, Yohannes Adenew, and Tonya Torres.

I. STATEMENT OF THE APPEAL

Appellant Kristi Burdett appealed her five-day suspension dated Sept. 3, 2014. The parties stipulated to Agency Exhibits 1 - 10. At hearing, Agency Exhibits 11 - 13 and Appellant's Exhibits A - I, K, M - EE, and GG were admitted.

II. FINDINGS OF FACT

Appellant was hired by the Department of Finance in 1994, and was promoted to Branch Manager of the Northeast Motor Vehicle Division in August, 2011. Her duties are the general management and administration of all branch office functions, including supervision of a staff of nine Motor Vehicle Technicians. On Sept. 3, 2014, Appellant was suspended for failing to monitor late arrivals by one of her direct reports, and for two violations of the refund policy. (Exh. 1.)

A. Monitoring employee late arrivals

The disciplinary letter states that Appellant failed to document instances of late arrivals in the city's Kronos electronic attendance software, and failed to "move through the progressive discipline process as necessary to mitigate this department-wide problem." (Exh. 1-2.) At the DMV manager's meeting held on Feb. 21, 2014, Appellant's supervisor Illya Scott reported that there were serious attendance issues, including absences and late arrivals. "We need to be sure to take swift action on addressing these issues ... If your employee arrives late be sure to add a comment to Kronos. ACTION: Managers be sure to watch for tardies in Kronos." (Exh. 4-1.)
meeting, Scott stated that "as a team we need to be consistent on the documentation of personnel issues." In April, Scott reminded the managers to use the comment function in Kronos to note tardies, and proceed through discipline if the behavior does not change. (Exh. CC.) Scott later spot-checked Kronos and concluded that all managers, including Appellant, were thereafter in compliance with this part of his order.

One of Appellant's employees, Jennifer Kelley-Sweet, arrived late by a few minutes on five days in April. Appellant documented all but one (Apr. 2nd) of those tardies in Kronos, and prepared a written counseling session on Apr. 15, 2014. Appellant updated that form to document all but one (May 12th) of the employee's tardy arrivals from April to July. (Exh. H-5.)

During their one-on-one July monthly meeting, Appellant informed Scott about the employee's late arrivals. Scott responded that Appellant needs to "address it, and document anything that needs to be documented." (Scott, 12/3/14, 11:06 am, 1:12 pm.) Scott testified that he did not define what he meant by documenting the issue, but that he expected a manager at Appellant's level to know the action that was expected. He testified that the action required of a branch manager depends on what is shown by the documentation. "It may mean having a counseling session with an employee or drafting a counseling letter." (Scott, 11:08 am.) Scott explained at hearing that "(d)ocumenting means not only looking at Kronos, but it also means that if you come to the conclusion that if there is excessive tardies, that you should then draft up a memo or a counseling session, then she (Appellant) should also contact me and let me know what her results were." (Scott, 11:09 am.)

Scott testified that one example of excessive tardies is two late arrivals within a pay period. (Scott, 11:08 am.) There is no evidence that this standard was communicated to Appellant or the other branch managers. When measured by that standard, Appellant's employee had three excessive tardies in April and May. (Exhs. 13, H-1 to H-3.)

The only written policy defining excessive tardies was dated Aug. 13, 2014, but was removed two weeks later. (Exhs. H-8, H-9.) That policy defined excessive tardies as four unexcused tardies within a month. Under that standard, the employee had excessive tardies in both April and May. In any event, the August policy was not in effect during the period in question. After the July 10th meeting, the employee had no excessive tardies under either standard.

On the Monday following her discussion with Scott, Appellant ran a Kronos report on Kelley-Sweet's attendance. (Appellant, 12/3/14, 9:37 am.) The employee was not tardy again until July 21st. Two days after that late arrival, Appellant drafted a counseling letter and submitted it to Scott. It was approved and served on the employee on July 24, 2014. (Exhs. 10, H-4, H-6.) Prior to that time, Appellant had counseling sessions with the employee on April 23, 29, and May 5th. In addition, Appellant delivered and updated a written counseling session form which documented all but one of the employee's late arrivals. (Exhs. 1-2, H-5, 10.)

At hearing, Scott stated that Appellant's discipline was not based on her failure to document the April to June tardies. He testified that she was suspended for failing to address and document excessive tardies that occurred after their July 10th meeting.
It is undisputed that the employee had no excessive tardies after May, and that Appellant delivered a counseling letter to the employee for her only late arrival after July 10th. (Exh. 10.)

Scott testified that he held all branch managers to the same standard in enforcing the tardy policy. (Scott, 1:36 pm.) Kronos records of eight employees from the Southwest Branch show 358 instances of excessive late arrivals1 between October 2013 and October 2014. Over that same period, the records of two employees from the Tremont Branch and four from the Northwest Branch show a total of 67 and 103 excessive tardies, respectively. (Exhs. M - Z, 12.) In the ten two-week pay periods before Scott's February instruction to watch for tardies, there were 329 excessive tardies within those three branches. In the ten two-week pay periods following his order, there were 152 excessive tardies in the same branches. While the tardy rate was cut in half, excessive tardies continued. (Exhs. M - Z.) The Agency confirmed during discovery that Scott did not discipline any other branch manager for failing to monitor late arrivals. (Exh. AA.)

B. Compliance with refund policy

The disciplinary letter contends that Appellant failed to follow the refund policy implemented in October, 2013 with regard to two refund requests. First, it alleges that Appellant improperly processed the two requests, since both were untimely under the Agency's two-month rule. (Exh. I-2, I-9, I-10.) Second, the Agency states that Appellant failed to process the requests within 24 hours of the request. (Exh. 7.)

On July 11, 2014, Appellant processed a refund request for customer William Morris, who had donated his vehicle on May 10, 2014. (Exh. 6.) On July 29, 2014, Appellant processed a July 9th refund request for another customer, Herman Stockton, based on his statement that he had paid the registration in error, having sold the vehicle the previous year. (Exh. 8.) Both were rejected as untimely by Staff Assistant Crystal Cordova.

Scott testified that the relevant refund policy is Exhibit 7, which was issued in October, 2013. This policy superseded the previous policy which had been in effect since Oct. 15, 2004. The 2004 policy specified that in order to grant a refund, "transaction must have taken place by the end of the month following the original business date." However, it added, "refunds will be allowed from previous years if they meet the criteria." (Exh. I-10 to I-18.) Scott referred to this rule as the two-month rule, and stated that he intended to include that part of the 2004 policy in the 2013 policy.

The October 2013 policy required a motor vehicle technician to perform the first five steps, and then place the documents with the daily balancing at the end of the day. The manager was then to audit the documents, and document the refund on the summary report the following day. Scott referred to this as the 24-hour rule, requiring a manager to process a refund within 24 hours.

Scott stated at hearing that the Agency is obligated by Colorado statute to process refunds within two months. (Scott, 11:57 am.) The Agency did not identify that

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1 Under the Agency's evidence, excessive late arrivals or tardies means two tardies within one pay period. (Scott, 11:08 am.)

The operation of the new policy was immediately questioned by staff during a morning huddle on Nov. 7, 2013. Based on the "issues and edits that came up" during that huddle, Scott "announced to put things on hold." (Exh. I-5.)

On Feb. 11, 2014, Scott sent an email marked "high importance" to some of his staff and managers, informing them that he had previously placed the refund policy on hold based on "issues and edits" raised in the November huddle. In response to that email, Deputy Director P.J. Taylor apologized to Appellant for her "abrupt phone call" the previous day. Taylor told Appellant that she had not realized the refund policy had been suspended "to allow the clerks to do the refunds on the spot with the document initiated by management." Taylor stated that she had learned that "none of the branches were doing what the memo sent a while ago directed." She told Appellant she would investigate "and bring it to Illya (Scott) to see if we can get to a resolution." (Exh. I-5.)

Scott testified that his action did not suspend the entire refund policy. "What was on hold is the actual text producing the refund not the managers." (Scott, 11:59 am.) When asked whether he ever put the "issues and edits" in writing, Scott testified that he had not. (Scott, 12:01 pm.) Thus, Deputy Director Taylor believed in February that the policy was suspended to permit clerks to process refunds after initialed by the manager, whereas Scott's intention was to restrict clerks from processing refunds at all. On March 25, 2014, a draft Operations Policy Manual, including a refund policy, was printed but never put into effect. (Scott, 1:01 pm; Exh. BB.)

The evidence as a whole indicates that there was confusion about which policy was in effect after two previous policies had been suspended in whole or in part and a new draft proposed but not adopted. In a July 31st email to branch management, Scott acknowledged the confusion, and itemized seven reminders for processing refunds. (Exh. I-22.)

In July, 2014, when the two refunds in question were processed, Appellant believed that the refund policy was in flux. As a result, she relied on the 2004 refund policy on which she has been trained in order to process refunds while the policy was being reconsidered. (Appellant, 10:25 am.) That reliance was not unreasonable, given Scott's testimony that he intended parts of previous policies to continue in effect until the entire policy could be redrafted. The 2004 policy, in Appellant's view, permitted refunds from previous years. (Exh. I-10.)

Agency Staff Assistant Crystal Cordova administers the refund function for the Agency. She was hired on June 16, 2014, and was trained on the refund policy a month later by Deputy Director Taylor. (Cordova, 12/4/14, 12:36 pm.) Based upon her training by Deputy Director Taylor and her past experience performing the same
function for Adams County, Cordova was clear that a refund request could only be granted if it was made in the month following the payment. However, the Agency newsletter issued July 16, 2014 only added to the confusion. "Remember, the refund request must be done during the month of application or the month following the month of application." The word "application" apparently refers to the application for refund, not the customer's payment of registration or renewal fees. The next day at the manager's meeting, a somewhat similar and equally confusing formula was employed: "reminder to follow refund policy of approving only if requested in month of application or month following month of application. (ex. Business date of 6/17/14, can apply for refund through end of July.)" (Exh. DD-2.)

Cordova testified that she frequently fields questions about whether the time starts from the renew date or the sell date. There are issues presented in every group of refund requests submitted by branch managers. Cordova's practice is to email the manager when she notices inconsistencies with the policy on which she was trained. She testified that the type of refund request made in Exhibit 8 "happens all the time." (Cordova, 12:25 pm.) Cordova was unaware that the refund policy had been changed since October, 2013. (Cordova, 12:35 pm.) Cordova confirmed that managers can grant exceptions even if requests for refunds are untimely. In this instance, Cordova emailed Scott to ask if he wanted to grant an exception to the deadline for one of Appellant's refund requests. His response was that he did not. (Exh. I-19.)

The Agency also asserts that Appellant violated the rule requiring that refund request shall be processed within 24 hours. The policy used to support this rule does not set forth a 24-hour deadline for processing refunds. (Exh. 7; Scott, 12/3/14, 11:34 am.) The Agency's disciplinary letter describes the policy in the following terms: "We do our best to turn in the refund request within the 24 hour time frame not only because it is policy, but it is good customer service." (Exh. 1-3.) The policy is also silent as to whether processing a refund request can be postponed to allow an applicant to provide any missing information. (Exh. 7.)

Illya Scott imposed a five-day suspension based on his finding that Appellant, as Branch Manager, should have performed those job duties better. He imposed progressive discipline which he felt was appropriate because Appellant already had both a verbal and written reprimand for other violations prior to July, 2014.

III. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and to show that a five-day suspension was within the range of discipline that can be imposed under the circumstances. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).
A. VIOLATION OF DISCIPLINARY RULES

1. Neglect of duty under CSR § 16-60 A.

In order to prove a violation of this rule, an agency must prove an employee failed to perform a job duty she knew she was obligated to perform. In re Serna, CSB 39-12, 3-4 (2/28/14); In re Campos, CSB 56-08 (6/18/09).

The disciplinary letter alleges that Appellant neglected her duty to address, document and move forward on counseling or discipline of eight late arrivals by one of her staff members. At hearing, Scott testified that the discipline was actually imposed for Appellant's failure to address and document excessive tardies after he ordered her to do so on July 10, 2014.

It is undisputed that a branch manager has a duty to manage her staff's compliance with agency policies, including attendance. The evidence shows that Appellant documented all but four of her employee's 17 late arrivals in Kronos. She also adequately addressed and documented the tardy arrivals of her employee by means of three in-person meetings and two written counseling letters between April and July. As a result, the employee's tardy arrivals were significantly reduced starting in mid-May, and there were no excessive tardies after May 15, 2014. Appellant's lack of action on the issue from July 10 to July 24th is readily explained by the undisputed evidence that the employee had no excessive tardies after May, and therefore no further corrective action was needed. The Agency therefore failed to establish that Appellant neglected her duty to manage the attendance of her direct report.

As to the refund policy, the Agency does not claim that Appellant failed to perform her duty to process refunds, but rather that she did so in a manner that was out of compliance with its policies. The Agency therefore did not establish that Appellant neglected her duty to process refunds.

2. Careless performance of duties, CSR § 16-60 B.

This rule prohibits the performance of duties in a heedless or substandard manner. The Agency did not present any proof in support of this allegation, and therefore I find that it has not been established.

3. Failure to comply with lawful orders, CSR § 16-60 J.

An employee violates this rule by failing to comply with a supervisor's reasonable order under circumstances demonstrating willfulness. In re Dineen, CSB 56-11, 3 (12/20/12.)

On July 10, 2014, Appellant's supervisor Illya Scott ordered her to address, document and follow up on her employee's tardy issues as necessary. Scott testified that excessive tardies were two tardies within one pay period. Before July 10th, Appellant had monitored and counseled her employee regarding this issue. After July 10th, the employee was late only once, and had no excessive tardies. Three days after the July 21st tardy, Appellant counseled the employee in writing in a document that listed all but
one of her tardy arrivals from April to July. I find that Appellant adequately complied with
her supervisor's order to address, document and move forward with appropriate
discipline on the tardy issue. Therefore, the Agency failed to prove Appellant did not
comply with her supervisor's order.

The Agency presented no evidence that Appellant had been ordered to take
any specific action regarding the refund policy. Thus, this violation was not proven at
hearing as to either the tardy or refund issues.

4. Failure to meet established standards of performance, CSR § 16-60 K.

An employee is in violation of this rule when the agency established and clearly
communicated a performance standard, and the employee failed to meet that
standard. In re Rodriguez, CSA 12-10, 9, 10 (10/22/10). Performance standards may be
found in a performance evaluation, classification description, or in agency policies and
procedures. However, broad policy statements that give no notice of the measures
used to enforce compliance are not enforceable under this rule. In re Leslie, CSA 10-
11, 11 (12/5/11.)

Here, Appellant is charged with failing to meet two standards. The first standard
is operational: a branch manager "resolves operational and procedural problems;
informs staff of relevant business issues and their impact on operations." The second
relates to compliance standards: a branch manager "ensures compliance with rules,
regulations, state and federal laws, and City ordinances." (Exh. 1-1.)

As found above, the evidence on the tardy issue did not establish that Appellant
failed to resolve an operational or procedural issue. In fact, it showed that Appellant's
oral and written counseling had the effect of significantly reducing the employee's
tardy arrivals, as well as eliminating excessive tardies for the period at issue.

The Agency argued that Appellant failed to take immediate action to discipline
the employee after the July 10th meeting between Scott and Appellant. I find that the
Agency failed to prove that Scott clearly communicated a performance standard in
that conversation. The evidence revealed no clear standard for either excessive
tardies or documentation of attendance issue. Scott testified that one example of
excessive tardies was two tardies in one pay period, and that he expected branch
managers to move forward with discipline when necessary. That statement invites
supervisors to exercise their judgment in correcting this operational problem. A later
written performance standard on tardies was eliminated from the shift policy within two
weeks of its issuance. (Exhs. H-8, H-9.) In fact, the employee had no excessive tardies
after July 10th, and thus required no discipline. Most persuasively, the time records of
fourteen other employees in three other branches indicate strongly that Scott did not
enforce this as a performance standard. (Exhs. M - Z.) The Agency failed to prove
Scott's July 10th statement established a clear performance standard.

Finally, the Agency argues that Appellant failed to resolve operational and
procedural problems and ensure compliance with laws and regulations related to the
refund issue. The evidence showed that the operational and procedural problems
regarding refunds have been caused by the lack of a clear written refund policy from
November, 2013 to the present. Appellant's only role in the refund process was to
prepare the necessary documents and submit them to Cordova for payment. In the absence of a clear policy, Appellant was required to process refund requests for her branch to the best of her ability based on her training. Appellant's actions did not violate any quantitative or qualitative performance standard governing refund requests. As a result, the Agency failed to establish a violation of CSR § 16-60 K.

B. PENALTY

Since the Agency failed to establish a violation of any of the disciplinary rules cited in the disciplinary letter, the Agency's penalty determination is moot.

Order

Based on the foregoing findings of fact and conclusions of law, the five-day suspension imposed on September 3, 2014 is REVERSED.

Dated this 14th day of January, 2015.

Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 et seq., within fifteen calendar days after the date of mailing of the Hearing Officer’s decision, as stated in the decision’s certificate of delivery. See Career Service Rules at www.denvergov.org/csa. All petitions for review must be filed with the:

Career Service Board
c/o OHR Executive Director’s Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.