CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. 02-07

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

JOHN ENCINIAS,

Appellant/Respondent,

vs.

DEPARTMENT OF PUBLIC WORKS, WASTEWATER MANAGEMENT DIVISION, and the City and County of Denver, a municipal corporation,

Agency/Petitioner.

This matter is before the Career Service Board ("Board") on the Agency's Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Hearing Officer's Decision dated May 15, 2007, on the grounds outlined below.

I. FINDINGS

A. Erroneous Rules Interpretation

The Agency terminated Appellant's employment based on alleged violations of Career Service Rules 16-60 A., B., D., E., J., L, and S. On appeal, the Agency contends that the Hearing Officer erroneously interpreted these rules as requiring the Agency to prove that an employee has been provided with detailed and specific written procedures for each and every work assignment. The Board disagrees.

The Hearing Officer determined that in order to prove Appellant violated these rules, the Agency needed to demonstrate that it had made him aware of his work assignments and the manner in which those assignments were to be carried out. While the Agency is free to determine the method by which it communicates its policies and procedures to its employees, in this case, the Hearing Officer simply found that the Agency failed to prove adequate communication of its policies and procedures to Appellant. In so finding, the Hearing Officer did not erroneously interpret any of these Career Service Rules.

As an additional argument, the Agency contends that the Hearing Officer erroneously interpreted CSR 16-50 as requiring city agencies to use a strictly linear progressive discipline policy. Again, the Board disagrees. When an Agency head testifies that he considered an employee's disciplinary history as part of his decision to terminate employment, and that disciplinary history appears illogical (here, the penalties for unauthorized leave progressed from verbal to written to suspension in 2003 and 2004, but then regressed back to a verbal warning in 2005), the Hearing Officer noted that such history "begs for some explanation" and none was forthcoming. Left unexplained, the Hearing Officer reasoned, the principles of personal accountability, reasonableness and sound business practice invite doubt about the choice of discipline. The Board finds this is not an erroneous rules interpretation; rather, it was the Hearing Officer's weighing of the evidence and deciding whether the Agency's decision to terminate Appellant's employment adequately took into account his past record.

B. Policy Setting Precedent

The Agency next contends that the Hearing Officer's Decision will have a precedential effect beyond the case at hand in three different ways: 1) the Decision, by abrogating the "plain meaning" doctrine, will require city agencies "to write hundreds of pages to describe each agency work procedure"; 2) the Hearing Officer is interjecting himself into how city agencies run their business, and 3) the Decision requires city agencies to use a strictly progressive discipline policy in considering an employee's disciplinary history.[1]

Under the "plain meaning" doctrine, words and phrases should be given their plain and commonly understood meaning. The Agency contends that as a result of this Decision, words like "immediate" and "clean" no longer have a plain meaning. But the Agency's argument misses its mark; the issue here is not whether these words have a plain meaning, but whether the Agency's expectations that equipment operators must report all mechanical problems immediately, or must report only catch basins actually cleaned, were adequately communicated to its employees.

For purposes of a policy setting precedent, the Board is not persuaded by the Agency's "hundreds of pages" argument. All city agencies are free to choose the methods by which they communicate employees' work assignments and the manner in which those assignments are to be carried out. Those communication methods might include written policies and procedures, PEP Plans, periodic training sessions, as well as verbal instructions from supervisors, but whatever method is used, the agency still bears the burden of showing that it made the employee aware of his job responsibilities. Based on the evidence, the Hearing Officer found that the Agency failed to adequately communicate its policies and procedures and the Board does not find a policy setting precedent beyond the unique facts presented here.

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[1] As to the third argument, the Board has already addressed the Hearing Officer's findings regarding Appellant's prior disciplinary history and finds it unnecessary to address it again.

Nor does the Board believe the Hearing Officer improperly interjected himself into the Agency's business. In a career service hearing, the Hearing Officer's responsibility is to determine, based on a *de novo* review of the evidence, whether the discipline imposed is fair, appropriate and reasonable under the circumstances, which is exactly what the Hearing Officer did here.

C. Sufficiency of the Evidence

Pursuant to CSR 19-61 D., the Board may only reverse on the grounds of insufficient evidence if the Hearing Officer's Decision is clearly erroneous. Although the Agency correctly recognized that findings are clearly erroneous only when there is no support for them in the record, on appeal it focuses only on the evidence presented by Agency witnesses and ignores the conflicting evidence presented by Appellant's witnesses.

The most serious allegation against Appellant was that he falsified his December 6, 2006 daily report by indicating "23" next to the space marked "CB". (Exhibit 8). All three Agency supervisors testified that a CB (catch basin) may be counted on the daily report only after cleaning around and inside it, even if there is little or no debris. However, there is no written policy or procedure on this reporting requirement and on the issue of how this directive is communicated to employees, the Hearing Officer found the Agency's testimony vague. In essence, the Agency relied upon "common knowledge."

But the reliance on "common knowledge" was contradicted by Appellant and two other Agency employees who testified with certainty that there is no set procedure for counting CBs on the daily report, either by written or verbal instruction. All three testified that equipment operator specialists (EOS) routinely count CBs that are already clean, that are frozen, or are located within construction zones covered with tarpaulins, even though the CBs are not actually cleaned by the worker. The Agency did not challenge the credibility of Appellant's witnesses Cruz Vigil and Mario Abeyta and it is certainly within the Hearing Officer's province to find those witnesses as credible as the Agency witnesses and determine that the Agency failed to meet its burden of proof.

The Agency also contends that a series of photographs taken on December 7, 2006, are self-evident proof that Appellant failed to clean most of the CBs he counted on his daily report. However, the Board agrees with the Hearing Officer that the photos are inconclusive. Some (## 4, 5, 20) show CBs in construction zones which the Agency acknowledged Appellant did not have to clean, but the testimony was disputed as to whether they could be counted on the daily report. Other photos (## 11, 12, 15, 16, 25, 29, 30, 34, 39) show snow or ice on the CBs, but again, the testimony was disputed as to whether EOSs were required to break up the ice and clean them. Abeyta and Cruz Vigil testified they were never so instructed. Still other photos reasonably could be interpreted as either clean or not clean (##2, 3, 6, 7, 13, 14, 17, 18, 19, 25, 26, 27, 32, 35, 38).

Appellant was also disciplined for a 1 hour and 24 minute stop at a vacant lot on Quincy St. between 7:37 and 9:01 a.m. on December 6, 2006. The Agency apparently

believed Appellant was not working during this time period, but Appellant explained he was servicing the auxiliary motor and Abeyta and Cruz Vigil backed up his explanation. The Agency then claimed that Appellant failed to call in this repair. Tyson Vigil, Appellant's supervisor, testified that an EOS must notify him or the fleet coordinator "immediately" if there is any problem with a truck, and that an EOS is not supposed to fix any problem himself. The Hearing Officer found the testimony of all three Agency witnesses vague as to how this directive was communicated to the EOSs. Once again the Agency relied on "common knowledge", and once again, that common knowledge was contradicted by Appellant's witnesses.

Appellant and Cruz Vigil testified that there is no directive about calling base for every truck problem; both stated it is common practice for drivers to make minor repairs on their own trucks in the field. Mr. Vigil also testified that mechanics become upset when EOSs call for repairs they can fix themselves and the Hearing Officer found this specific detail made Vigil's testimony ring true.

In addition to the conflicting testimony, the Hearing Officer found that this case was complicated by the Agency's failure to tie together all factual allegations to specific rule violations. For example, the Agency provided no proof to support violations of CSR 16-60 D. (unauthorized operation or use of City vehicle) or CSR 16-60 S. (unauthorized absence from work). Similarly, Appellant's dismissal letter (Exhibit 2) refers to an allegation that on December 5, Appellant stopped for 1 hour and 29 minutes at the same Quincy St. location where he stopped twice on December 6, (one stop for 1 hour and 24 minutes and another for 41 minutes). The December 5 incident may have been significant, but as the Hearing Officer noted, the Agency offered no evidence regarding this allegation and it was not clear if this incident entered into the Agency's decision to terminate Appellant's employment. It is not the Hearing Officer's role to speculate about allegations that may have played a part in a disciplinary action when no evidence of that allegation is presented at the career service hearing.

For these reasons, the Board finds there is sufficient evidence in the in the record to support the Hearing Officer's findings and therefore his Decision is not clearly erroneous.

II. ORDER

IT IS THERFORE ORDERED that the Agency's Petition for Review is **DENIED,** and the Hearing Officer's Decision of May 15, 2007 is **AFFIRMED.**

SO ORDERED by the Board on October 4, 2007, and documented this 18th day of October, 2007.

BY THE BOARD:

Acting Co-Chair

Board Members Concurring:

Luis Toro
Tom Bonner

CERTIFICATE OF MAILING

I certify that I have mailed a true and correct copy of the foregoing **FINDINGS AND ORDER,** postage prepaid, this 18th day of October, 2007 to:

Michael O'Malley, Esq.
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And **VIA INTEROFFICE MAIL** this 18th day of October, 2007:

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Reza Kazemian, P.E.
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