

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

DOUGLAS HOWARD, Appellant,

vs.

DEPARTMENT OF AVIATION,

and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Feb. 6, 2012 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and represented by Eric James, Esq. The Agency was represented by Assistant City Attorney Andrea Kerschner. Having considered the evidence and arguments, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order.

I. STATEMENT OF THE APPEAL

Appellant Douglas Howard is a Staff Information Technology (IT) Developer at the Denver Department of Aviation (Agency). He appeals a 4% pay reduction for 13 pay periods that was imposed on Aug. 18, 2011 for asserted violations of nine Career Service Rules, and also claims that the discipline was imposed in retaliation for the filing of a grievance. On Sept. 28, 2011, his claim of discrimination or harassment was withdrawn at Appellant's request.

Agency Exhibits 1 – 6 were admitted by stipulation. Agency Exhibits 7 and 11, and Appellant Exhibits A - C, F, G-9 and I-16 to I-26 were also admitted. Exhibit E was admitted for the limited purpose of explaining the Kronos punch rounding rule.

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 (CSR),

2) Did the Agency establish that the reduction in pay was within the range of penalties that could be imposed by a reasonable administrator for the proven misconduct, and

3) Did Appellant establish that the discipline was imposed in retaliation for his filing of a grievance on May 3, 2011?

III. FINDINGS OF FACT

Appellant Douglas Howard has been employed with the City and County of Denver since July 2000, and had incurred no discipline prior to this reduction in pay. His duties include systems analysis and programming for software, operating systems and databases for the Department of Aviation located at the Denver International Airport. [Exh. A.] Appellant is a non-exempt employee under the federal Fair Labor Standards Act, 29 USC § 201 et. seq. (FLSA), who is paid on an hourly basis.

On Aug. 18, 2011, the Agency issued a disciplinary letter to Appellant for time management and performance issues from January to July. The letter imposed a 4% reduction in pay for 13 pay periods, changed Appellant's work schedule, and extended his June 27, 2011 90-day Performance Improvement Plan (PIP) by another 90 days. Appellant challenges that action under the Career Service Rules, and also asserts it was taken in retaliation for his filing of a grievance in May 2011 regarding his Performance Enhancement Program Report (PEPR).

Senior IT Developer Kristina McGinnis has been Appellant's supervisor for the past three years. In 2010, she noticed that Appellant's performance was declining. On March 10, 2010, they met to discuss several issues, including excessive time spent in the Wellness Center and Appellant's failure to complete work assignments on time. Ms. McGinnis instructed Appellant to punch in by his start time of 6 am, then go to his desk and start his work. Appellant agreed to work on those issues.

In the months that followed, Ms. McGinnis did not see improvement in either performance area. She observed that Appellant was sometimes not at his work location, and was still not finishing assignments in a timely manner. On August 28, 2011, Appellant was not at the office when Ms. McGinnis arrived at 8:40 am, although his time records showed he had punched in at 6 am. Ms. McGinnis met with Appellant later that day, and changed his shift to 8 am to 4:30 pm to align his hours with that of the rest of the staff so she could monitor his attendance and performance. She also removed him from a flex schedule under which Appellant took every other Monday off. An hour later, Appellant returned to ask if his start time could be changed to 7 am because of his bus schedule. Ms. McGinnis agreed. [McGinnis, 9:33 am.]

That December, Appellant asked for a change back to flex time. Ms. McGinnis forwarded the request to Deputy Manager Sally Covington, who denied the request based on Appellant's continued failure to keep to his work schedule. Ms. McGinnis, Ms. Covington, and Deputy Manager of Communications and Marketing Jeff Green held a meeting with Appellant on January 5, 2011 to communicate that decision. The next day, Mr. Green sent Appellant an email memorializing that conversation. [Exh. 4.] The email confirmed that the request had been denied, and that Appellant's schedule would therefore continue to be 7 am to 3:30 pm, Monday through Friday. Mr. Green instructed Appellant to take his 30-minute lunch break between 11 am to 2 pm, and to clock in using the Kronos unit located in the break room on Level 9 of the Airport Office Building near his work location.

Please stick to your 7 – 3:30 schedule. As we discussed in the meeting yesterday, we are willing to work with you to temporarily flex a schedule or make time up here and there if you must attend appointments that cannot be made outside your regular hours. This will need to be discussed and agreed upon with as much advance notice. If you require a full day out of the office, please plan to use sick, vacation (only if you request it in advance) or other time that you have available.

[Exh. 4.]

Appellant received and read the email, but inadvertently deleted it. [Exh. 6-1.] Between that meeting and his April performance review, Appellant sometimes complied with the order to punch in on Level 9, but more often clocked in on Level 4. He continued to arrive late and alter his schedule. [Exh. 5-1 to 5-6.]

On April 19, 2011, Appellant was given a below expectations performance rating based in part on his continued attendance issues. [Exh. A-3.] In his response to the PEPR, Appellant stated that he was consistently arriving early, with the exception of one isolated incident in August 2010. [Exh. B-5.] Appellant filed a grievance of this PEPR on May 3, 2011. At the grievance meeting with Ms. McGinnis, Mr. Green, Ms. Covington and Human Resources personnel, Appellant stated that he had been blindsided by the rating. Ms. McGinnis was surprised by that statement, since they had been discussing his time management and performance issues for the past year, and she had changed his schedule in order to assist him. [McGinnis, 9:26 am.] The Agency's written grievance response noted that his supervisors had communicated attendance and performance expectations to Appellant in March, August, and December of 2010 and again in January 2011. In answer to the concerns raised in the grievance, the Agency agreed to have a team meeting facilitated by Human Resources to provide him clarity about his performance standards, and assist with the development of a Performance Improvement Plan (PIP) "to help and support you with future and sustainable success in your performance." [Exh. C-1.] The rating was not changed as a result of the grievance, and Appellant did not pursue the matter further under Career Service Rule 18.

The Agency audited Appellant's time records for the period January 1 to June 8, 2011. The audit found he had left the Wellness Center on Level 4 a few minutes after his 7 am start time on 49 occasions, and left a minute or two before 7 am six other times, indicating according to the Agency that he could not have arrived at his desk several floors away by his 7 am start time on those days. The audit also showed that Appellant took long lunch breaks on six days, and punched in at the loading dock 40 times.

On March 23, 2011, Mr. Green observed appellant arriving at the office at 7:40 am after having punched in at the loading dock shortly after 7 am. On April 11th, Mr. Green noted Appellant's arrival at 7:30 am, although his Kronos showed he had clocked in at 7:03 am at the loading dock. [Exh. 5-5, 5-6.] On June 17th, Appellant clocked in at 5:53 am, left his work location at 6:42, and returned at 7:14 am. [Exh. 5-11.] Badge history information for that day indicates that Appellant was at his work location on Level 9 from 5:51 to 6:42, went to Level 4 from 6:43 to 7:14 am, and returned to Level 9. [Exh. 5-30.] In response to Mr. Green's inquiry the following Monday about how he had spent the first 90 minutes on June

17th, Appellant told him he was on the phone and working on emails with the door closed. [Green, 12:00 pm.] A videotape of the Level Four elevator door shows that Appellant entered the elevator in a checked shirt at 5:50 am, emerged from the elevator at 6:44 am in workout clothes carrying a backpack, and reentered the elevator in the checked shirt with wet hair at 7:14 am. [Exh. 7.] Mr. Green concluded that Appellant had not been complying with his supervisors' instructions to abide by his scheduled work hours.

On June 23, 2011, the Agency implemented a 90-day PIP directed at improving Appellant's time management and communications in several concrete areas. The PIP prohibited Appellant from changing his work hours without prior approval, spending work hours in the Wellness Center, and punching in at the 4th floor rather than at his 9th floor work location. Appellant was also ordered to respond to emails and meeting invitations in a timely manner, and advised that he must set up an out-of-office response when absent for more than one day. [Exh. 3.] As a result of the below expectations performance review, Appellant was removed from the Snow Team and the opportunity to overtime pay that duty provided during airport snow emergencies.

Ms. McGinnis met with Appellant every 30 days during the PIP period. Appellant continued to adjust his schedule without advance notice to his supervisor. [McGinnis, 9:50 am.] During 11 days in July, Appellant was late by between one and six minutes, for a total of 37 minutes. [Exhs. 5-10, 5-12, 5-35, 5-38.] On July 7th, Appellant replied to a client's inquiry about a project by stating that he did not have proper access to their programs, and that his supervisor had not allowed him enough time to do the work. He also inquired about the availability of a full-time position with the client to do the programming functions. [Exh. 11.] The Agency countered that Appellant was given four months to perform the work, and that the message to the client "appears to be insubordination toward your supervisor." [Exh. 1-5.]

On July 25, 2011, the Agency served a pre-disciplinary letter on Appellant based on the above allegations. Appellant responded that he had mistakenly deleted the January 6th email, and did not recall the details of the cited time infractions. He added that his punch-ins at the loading dock were the result of habit based on Ms. McGinnis' prior permission to do so, but that he has corrected the situation. He stated that his inaccurate time reporting on June 20th may have been the result of a toothache. "I was in my office the first 50 minutes and wasn't logging my time. I must have went to my locker to get something then went to the bathroom to freshen up a bit." Appellant stated that he believed the Kronos rounding rule gave him seven minutes in either direction within which to punch in and still be considered on time. [Exhs. 6, E.]

On August 18, 2011, the Agency issued the disciplinary letter imposing the pay reduction, changing his schedule and extending his PIP for 90 days. [Exh. 1.]

At the hearing in this appeal, the parties stipulated that the 11 late incidents in July stated in the disciplinary letter did occur, and that all late arrivals were within the 7-minute punch margin. [Exhs. 1-4; E.] Appellant did not deny the specific allegations of time and attendance violations, but testified that they were inadvertent or minor, and that other employees were allowed to come and go at will. The Agency responded that Appellant was treated differently on time and attendance issues because he is the only hourly employee in

the unit, and was thus required to record and work 40 hours to avoid the payment of overtime under the FLSA. [Green, 2:50 pm.]

Appellant argued in mitigation that his PEPR was delayed and that the Agency held no monthly meetings to review his performance under the PIP. Both Mr. Green and Ms. McGinnis testified that the PEPR process was delayed for all employees that year due to a CSA-wide change in PEPR procedures, and that they met with him at least three times to review his compliance with the terms of the PIP. [McGinnis, 9:50 am; Green, 12:23 pm.]

IV. ANALYSIS

In appeals of discipline brought before the Career Service Hearing Office under CSR § 19-10, an agency bears the burden to prove by a preponderance of the evidence that the conduct violated the Career Service Rules as alleged in the disciplinary letter. An agency must also establish that the penalty is within the range of discipline that can be imposed by a reasonable administrator under the circumstances. See Adkins v. Division of Youth Services, Dept. of Institutions, 720 P.2d 626, 628 (Colo.App. 1986). Appellant has the burden of proof as to his claim of retaliation. In re Gallo, CSA 63-09, 3 (CSB 3/17/11).

1. Neglect of duty under § 16-60 A.

An employee violates this rule when he fails to perform a job duty he knows he is supposed to perform. In re Compos et al, CSA 56-08, 2 (CSB 5/21/09). The Agency claims that Appellant was negligent in failing to punch in at his Level 9 work location on 40 occasions, despite written instructions to do so. Appellant's supervisors ordered him in January 2011 to clock in on Level 9 to ensure that he was at his workplace at his scheduled start time, and repeated that order in his June PIP. [Exh. 4.] This order was reasonable given Appellant's pattern of clocking in on Level 4 and spending time in the Wellness Center during his work hours before reporting to his work location.

The Agency proved by contemporaneous computer-generated records that Appellant clocked in at the loading dock on 55 occasions from January 6 to June 16, 2011. [Exhs. 5-1 to 5-9.] Appellant conceded that he continued to clock in at the loading dock out of habit. The Agency therefore established that Appellant neglected his job duty to comply with Agency time and attendance requirements by virtue of his failure to clock in at his work locations. See e.g. In re Abbey, CSA 99-09, 6 (8/9/10).

2. Carelessness in the performance of duties under § 16-60 B.

An employee performs his duties carelessly in violation of this rule when he is heedless of an important work duty, resulting in potential or actual significant harm. In re Mounjim, CSA 87-07, 5 (7/10/08). The Agency here alleges that Appellant carelessly performed his duties because he was late on numerous occasions, clocked in at the loading dock instead of his work location, and altered his work schedule eight times between January 7 and June 20, 2011. While this conduct may violate other rules, it does not establish poor performance of a work duty.

3. Dishonesty, including lying to supervisors regarding official duties, CSR § 16-60 E.3.

An employee violates this rule by making a knowing misrepresentation within the employment context. In re Mounjim, CSA 87-07, 5-6 (CSB 1/8/09). The Agency claims that Appellant lied by telling his client, Mike Carlson at Airfield Operations Group, that his supervisor had not given him enough time to work on its computer-based training project. There is no dispute that Ms. McGinnis had made the AOG project a part of Appellant's job duties. [Exh. 11.] Appellant adequately explained his email statement at the pre-disciplinary meeting: "Kristina did give me time to work on the project in June and I completed changes. However, there is much more work to do on this program than initially thought [based on] shockwave issues and the need for a 32bit machine to do the testing on." [Exh. 6-2.] The Agency did not present any evidence that Appellant's detailed explanation was inconsistent with the facts. Therefore, I find that Appellant did not make a knowing misrepresentation to the client, in violation of this rule.

The Agency also claims Appellant was dishonest to his supervisor on June 20, 2011 when he emailed Mr. Green that he was working in his office the first 90 minutes of his work day on June 17th. [Exh. 1-3; Green, 11:39 am.] The badge records partially support Appellant's statement to his supervisor, as it appears Appellant was on Level 9 (Door AOB9) from 5:51 to 6:42 am. [Exh. 5-30.] However, the video showing Appellant in workout clothes and wet hair supports a finding that Appellant spent the next 30 minutes in the Wellness Center on Level 4. [Exh. 7.] Appellant's testimony and response to the pre-disciplinary letter that he only retrieved something from his locker and washed his face are inconsistent with his change in appearance and the amount of time he spent on Level 4, as confirmed by the video and his badge records. [Exhs. 7; 5-30.] Thus, I find that Appellant made a knowing misrepresentation in violation of this rule when on the following Monday he told his supervisor he had been working during that time.

4. Failure to comply with lawful orders in violation of § 16-60 J.

An employee violates this rule by willfully failing to obey a reasonable order. In re Sawyer and Sproul, CSA 33-08, 9 (1/27/09). The Agency's proof under this rule is based on Appellant's noncompliance with the January 6th email and his June PIP. The email ordered him to clock in at Level 9, restrict his lunches to 30 minutes, use the Wellness Center off the clock, and "stick to your 7 – 3:30 schedule." [Exh. 4.] The June PIP repeated the orders to clock in on Level 9 and get permission before changing his work hours. [Exh. 3.]

The Agency asserts that Appellant disobeyed these orders by continuing to clock in at the loading dock, repeatedly arriving late for work, taking long lunches on seven occasions, absenting himself from his duty station on June 17, and adjusting his schedule without permission eight times from January to June 2011.

Appellant admits he understood the instructions given at the January 5th meeting, and received the follow-up email the next day that summarized this discussion. [Appellant, 11:58 am.] The fact that he inadvertently deleted the email does not alter the fact that the orders were communicated and that he understood them. Appellant testified that he was making an effort to comply and adapt to his new schedule.

Appellant was on notice of his supervisors' concerns about his time and attendance practices since March 2010, ten months before he was first ordered to clock in on Level 9. His testimony that his noncompliance was the result of habit rather than intent is belied by the fact that he often complied for days, then went back to using Level 4 to clock in. Between January 6 and June 16, 2011, Appellant punched in at the loading dock 55 times, almost as often as he punched in at Level 9. [Exh. 5-1 to 5-12.] In January, Appellant complied on all but six days. From early February to mid-May, Appellant used Level 4 twice as much as he used Level 9, then reversed this pattern of usage from late May to July. [Exh. 5-3 to 5-12.] These facts support a conclusion that Appellant was acting out of choice rather than habit. I find that Appellant willfully failed to comply with his supervisors' January 2011 order to clock in on Level 9, in violation of CSR § 16-60 J.

The remaining allegations relate to other time and attendance issues. The Agency proved that Appellant violated its January 2011 order to comply with his established work schedule by taking long lunches on seven separate days, spending 30 minutes at the Wellness Center during his work hours on June 17, and adjusting his schedule without permission eight times from January to June 2011, and Appellant did not dispute that proof. [Exh. 5.] The sheer number of attendance violations over the six-month period indicates that Appellant violated this rule by intentionally ignoring the January order prohibiting long lunches, unauthorized schedule changes, and work time spent at the Wellness Center. However, I do not find that Appellant's 11 late arrivals in July by a few minutes prove an intentional disobedience to the order, since such small delays may just as easily be caused by inadvertence or factors beyond Appellant's control.

5. Failing to meet established standards of performance under § 16-60 K.

An employee violates this rule when an agency clearly communicates a specific standard of performance, and the employee fails to meet that standard. In re Bernal, CSA 54-10, 11 (3/11/11); In re Mestas et al., CSA 64-07, 19 (5/30/08).

The Agency relies on the June 23, 2011 PIP expectations of time management, communication, and work performance as the established standards at issue here. However, only two incidents in that letter occurred after the date of the PIP: the July 7th email to Mr. Carlson, and the 11 incidents of tardiness from July 6 to 21, 2011.

The communication standard requires Appellant to actively manage his emails to ensure work flow, and requires him to keep clients advised of his progress and anticipated completion times. Appellant argues that the July 7th email did not violate this communication standard because he was appropriately responding to a client's inquiry by explaining his time and access limitations. [Exh. 11.] The email did advise the client of factors affecting his ability to complete the project, and therefore does not breach the communication standards set forth in his PIP. For that same reason, it also does not violate the work performance standard.

Appellant does not deny that he was late on the eleven July days listed in the disciplinary letter. This frequent tardiness violates the clear terms of his PIP to "begin working at your desk at 7 am." [Exh. 3-2.] In that respect, Appellant violated this rule by failing to adhere to his time management performance standard.

6. Failure to maintain satisfactory work relationship under § 16-60 O.

This rule is violated by conduct an employee knows or reasonably should know will harm or significantly impact a working relationship. In re Burghardt, CSA 81-07, 2 (CSB 8/28/08). Mr. Green testified that the discipline was based on Appellant's failure to adhere to orders, which impacted the team. The Agency presented no evidence that Appellant's attendance issues affected his ability to maintain satisfactory working relationships with co-workers, other City employees or the public, and therefore failed to establish a violation of this rule.

7. Unauthorized absence from work, CSR § 16-60 S.

This rule is violated by an absence that is unauthorized under a departmental or career service rule. In re Dessureau, CSA 59-08, 8 (1/16/08). The Agency contends that Appellant was absent without authorization in contravention of this rule when he clocked in at the wrong Kronos location, contrary to his supervisor's order. This rule must prohibit different conduct than simple tardiness, or it would be duplicative of § 16-60 T. The Agency presented no testimony or evidence as to his payroll or attendance that shows an unauthorized absence in violation of this rule.

8. Reporting to work after the scheduled start time, § 16-60 T.

The Agency claims that Appellant violated this rule when he clocked in on Level 4 after the start of his shift on 49 occasions from January 1 to June 8, 2011, and six times when he left the Wellness Center one or two minutes before the start of his shift. As to the latter, Mr. Green conceded that the elevator ride from Level 4 to Level 9 could take as little as one minute. [Green, 1:20 pm.] Based on this evidence, I do not find the allegation of tardiness was proven based on the six incidents when Appellant left the Wellness Center at 6:58 or 6:59 am. However, the 49 incidents of clocking in after 7 am five floors below his work location clearly establish that Appellant violated this rule on those occasions.

The Agency also claimed Appellant was late 11 times in July, as shown by his time records. [Exh. 5-10, 5-12.] Appellant does not deny that these records are accurate and that he punched in after 7 am on those dates, but counters that most of them were within the seven-minute rounding rule, and therefore he was not late. The rule permits an employee to be paid for a full shift even if the punch occurred seven minutes before or after the shift start and end times. However, "[r]ounding has no bearing on the employee's regularly scheduled work times nor does it have bearing on early or late indicators in the employee's timecard." [Exh. E.] "Reporting to work after the scheduled start time of the shift" is a violation of CSR § 16-60 T. The Agency proved that Appellant violated this rule by 49 late punch-ins from January to June, and 11 late arrivals in July.

9. Unauthorized performance of overtime, § 16-60 U.

The Agency claims that Appellant performed unauthorized overtime on four occasions: January 7 (25 minutes), February 3 (30 minutes), June 13 (24 minutes), and June 17, 2011 (67 minutes). Appellant did not respond directly to this allegation, but testified that he had previously been allowed to make up any time he missed as long as it did not

exceed 40 hours. The Kronos punch records confirm that Appellant was not simply making up time on these four days, but that he worked more than eight hours in the amounts indicated, without permission from the Agency. [Exhs. 5-1, 5-3, 5-11.] Therefore, the evidence showed that Appellant violated this rule on the above dates.

10. Appropriateness of Disciplinary Action

In evaluating the appropriate degree of discipline, an agency must consider the severity of the misconduct, an employee's past employment and disciplinary history, and the penalty most likely to achieve compliance with the rules. CSR § 16-20. An agency's determination of penalty must not be disturbed unless it is clearly excessive, or based substantially on considerations not supported by the evidence. In re Owens, CSA 69-08, 8 (2/6/09); Adkins v. Div. of Youth Services, 720 P.2d 626 (Colo.App. 1986).

The evidence established that Appellant violated six disciplinary rules because of his failure to adhere to his supervisors' orders and dishonesty relating to time and attendance issues over a lengthy period of time, despite clear notice of the issues and numerous warnings. Mr. Green testified that his decision was strongly influenced by the persistence of Appellant's attendance issues over time despite the Agency's many efforts to assist Appellant in correcting this pattern of behavior. Mr. Green was persuaded that only serious discipline would achieve the desired result despite the lack of prior discipline because of Appellant's dishonesty in concealing his absence from the workplace on June 17th, and his observed absence from his work location after clocking on other occasions, causing Mr. Green to lose trust in his ability to report to his supervisors with honesty. Mr. Green decided that a temporary reduction of pay was more appropriate than a suspension because the former would allow Appellant to continue to work on projects needed by the Agency. I find that the Agency reasonably considered the seriousness of the misconduct in light of the Agency's business needs and the employment relationship, including Appellant's past employment and disciplinary history, consistent with the principles of progressive discipline.

V. RETALIATION CLAIM

Finally, Appellant argues that the discipline and his removal from the Snow Team were imposed in retaliation for his May 2011 grievance. Mr. Green testified that an employee who receives a below expectations performance review was ineligible to participate in snow removal based on Agency policy. [Green, 2:51 pm.] Appellant did not dispute this evidence.

As to the allegation that the grievance led to the discipline, Appellant presented only his testimony that "[i]t sure seems like it." [Appellant, 2:16 pm.] However, the chronology indicates that the discipline arose from Appellant's continued failure to abide by time and attendance orders and policies for almost 18 months after his first warning. The pre-disciplinary letter was not issued until three months after Appellant's grievance was filed, and was preceded by Appellant's failure to comply with his June 23rd PIP. The discipline was not punitive in degree, but was tailored to the misconduct: it reduced his salary rather than forcing even further absences by a suspension, changed his work schedule to assist him in complying with the rules, and extended his PIP to give further reinforcement to the attendance standards.

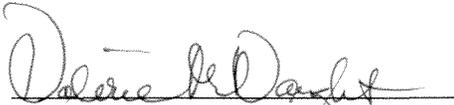
Thus, the evidence as a whole does not establish that the discipline and his removal from the Snow Team were motivated by Appellant's May 2011 grievance.

VI. ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered that

1. The Agency's disciplinary action dated August 18, 2011 is AFFIRMED, and
2. Appellant retaliation claim is DISMISSED.

Dated this 21st day of March, 2012.


Valerie McNaughton
Career Service Hearing Officer