

DECISION AND ORDER

JOSHUA LOPEZ, Appellant,

v.

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 Nov. 23, 2016 before Hearing Officer Valerie McNaughton. Appellant represented himself. Assistant City Attorney Charles Mitchell appeared for the Agency. Illya Scott served as the Agency's advisory witness and the Agency's sole witness. Appellant testified on his own behalf, and presented the testimony of David Gomez.

I. STATEMENT OF THE APPEAL

Appellant Joshua Lopez challenges his Sept. 1, 2016 dismissal from the position of Motor Vehicle Technician II for the Department of Finance, Motor Vehicle Division, and alleges that his dismissal was based on national origin discrimination. By order dated Sept. 27, 2016, his previously alleged grounds of retaliation and discrimination on the bases of race, color, religion, sex and age were dismissed for failure to assert a prima facie case supporting those claims. The parties stipulated to the admission of Agency Exhibits 1 – 12, and Appellant's Exhibits A – C and E. Exhibit 13 was admitted during the hearing.

II. FINDINGS OF FACT

Appellant was hired on Feb. 28, 2011 as a Motor Vehicle Technician, and progressed to Motor Vehicle Technician II on Dec. 27, 2015. In those capacities, he handled walk-in applications for driver's licenses and car titles to ensure their compliance with applicable motor vehicle laws and regulations. Appellant was terminated for six asserted violations of the attendance rule between May and August, 2016.

Operations Supervisor Illya Scott manages the five customer service neighborhood branch offices. Mr. Scott presented evidence regarding Appellant's attendance history. On Oct. 18, 2013, Appellant's previous supervisor, DMV Southwest Branch Manager Germaine Gibson, counseled Appellant that he had arrived late on all but one day in the previous month, which was adversely affecting the functionality of the office. Appellant agreed his start time was 7:55 am, and stated he would work on his tardies, made worse, he said, because he only lived two blocks from the office. [Exh. 6.] Three months later, Ms. Gibson issued another letter noting five late arrivals in December and January. She informed him that any recurrence in 2014 "could result in further corrective action." [Exh. 7.] A month later, Ms. Gibson met with Appellant

regarding another five tardies. She emphasized, “[i]t is imperative that you report to work at the assigned time of 7:55 am”, and issued a written reprimand. [Exhs. 8, 3.] An additional late arrival on Feb. 26, 2014, six weeks after the written reprimand, led to a two-day suspension. [Exh. 4.]

On Aug. 26, 2014, Appellant met with Mr. Scott and Human Resources Generalist Kimberlee Stiles to discuss four tardy arrivals that month. Appellant agreed that his start time was 7:55 am, and was warned that the next tardy would lead to consideration of further discipline. Appellant arrived late on Aug. 28 and Sept. 2nd, and was suspended for five days on Sept. 12, 2014 by his then-supervisor, Branch Manager Ferguson Lee. [Exh. 5.]

Appellant then accepted a transfer to the Division’s Processing Center at the request of its Branch Manager, Thomas Peace. He succeeded in complying with the attendance standards needed to progress to DMV Technician II during that period. However, on May 12, 2016, Mr. Peace notified him that based on nine tardies in April and two in May, “any recurrence” over the next 12 months could result in discipline under Career Service Rule 16-29 N prohibiting deviations from scheduled start times. [Exh. 2.] Shortly thereafter, Appellant transferred to the supervision of Tremont Branch Manager Kristi Burdett.

Appellant does not dispute that he punched in after his 7:55 am report time on May 24, June 16 and 30, July 18, and Aug. 2 and 4, 2016, during that improvement period. As a result of those tardy arrivals, the Agency began the disciplinary process, which led to issuance of the Sept. 1, 2016 dismissal letter here being appealed.

Operations Supervisor Illya Scott testified that DMV technicians are required to punch in by 7:55 am so they may get to their stations, prepare their cash drawers, perform inventory, and be ready to serve customers at their counters when the doors open at 8 am. Scott explained that while some employees may be capable of arriving after 7:55 am and still be ready for customers at 8 am, the Division set the five-minute rule based on the preparation time needed by most technicians. [Scott, 1:19 pm.] Mr. Scott stated that he has received complaints from customers who have seen empty counters and technicians arriving late, forcing them to take a number to await service. Employees may clock out as early as 4:53 pm and still receive eight hours of pay. The doors are locked at 4:30 pm, but if there are customers in the lobby, they must be served. Technicians receive overtime if they work beyond the eight hours. [Scott, 9:28 am.] Scott noted that failure to enforce the 7:55 am clock-in time for all employees can cause morale problems for technicians who arrive on time and must cover additional work because of late-arriving colleagues.

On the basis of these operational needs, Mr. Scott trains his branch managers to document late arrivals by categorizing tardies as “late-other” if the reason for the delay is unexcused. Tardies may be excused under the concept of “life happens”, which refers to events that could not be reasonably anticipated, or that are understandable in considering the employees as human beings. Mr. Scott gave examples such as things breaking, day care issues, alarms that don’t work: in other words, “something that happens in life that you can relate to.” On the other hand, managers are to require employees to anticipate normal traffic or recurring events, and take steps to arrive on time. Scott permits his managers to exercise their judgment in determining when tardies have reached an excessive level. When a manager brings a tardiness issue to him, Scott personally reviews the time records recorded in the Kronos computer system to ensure managers are being consistent in their enforcement of attendance issues. Generally,

early problems will be handled with a counseling letter, followed by a written reprimand and suspensions, depending on the severity of the issue. The Division does not define excessive tardiness because it has determined that its business needs are better served by managers' ability to exercise judgment in reviewing attendance patterns. [Scott, 10:20 am.]

Mr. Scott recognized Appellant as a self-sufficient, knowledgeable, and highly productive technician with good customer service skills. "As much as we appreciate all he's accomplished for us ... we have to be consistent." The disciplinary panel considered Appellant's attendance and disciplinary history, as well as his continued complaints that his productivity justified an exception to the 7:55 clock-in time. Ultimately, they determined that no lesser amount of discipline would correct his behavior, making dismissal the only alternative. [Scott, 10:16 am.]

III. ANALYSIS

The Agency bears the burden to establish the asserted violation of the Career Service Rule by a preponderance of the evidence, and to show that termination was within the range of discipline that can be imposed under the circumstances. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Appellant has the burden to establish his national origin discrimination claim by a preponderance of the evidence. In re Macieyovski, CSA 55-13 (4/1/14); McDonnell Douglas v. Green, 411 U.S. 792 (1973)

A. VIOLATION OF CSR § 16-29 N

The Agency alleges that Appellant's arrivals after 7:55 am violated the Career Service Rule prohibiting deviations from his scheduled start time. Appellant does not dispute that his start time is and has been 7:55 am during his employment as a DMV Technician, and that he arrived after that time on the six occasions listed in the dismissal letter. He argues however that this should not be considered a violation of the tardiness rule because there was no standard for determining when tardiness becomes excessive.

The rule charged in this action prohibits "[u]nauthorized deviation from scheduled shift including reporting to work after the scheduled start time..." Thus, the rule does not require proof of excessive tardiness, and a single late arrival may establish a violation. The Agency proved that Appellant clocked in one to nine minutes late on six days, after he was placed on a 12-month period for review of his attendance. Even without that review period, Appellant was in violation of CSR 16-29 N by virtue of his late arrivals on those days. The May 12, 2016 gave Appellant unambiguous notice that even one tardy report to work could lead to discipline. The Agency proved that Appellant violated this rule based on his six tardy arrivals from May to August, 2016.

B. PENALTY OF DISMISSAL

Appellant contends that his dismissal is unfair for four reasons: 1) the Agency enforces the rule inconsistently; 2) Appellant was not given adequate time to improve; 3) employees were not paid for the five minutes between their mandatory arrival time and the 8 am beginning of their shift; and 4) the disciplinary letter was served in an untimely manner.

As to the first argument, Appellant states that other employees were given lesser discipline for a similar level of tardiness, demonstrating selective enforcement of the rule.

The Agency submitted as Exhibit 12 a group of disciplinary actions taken against DMV technicians, with no representation that it contains all such actions. Appellant argues that another technician, referred to as EB for privacy purposes, was not disciplined as severely for her attendance problems. EB was placed on a 12-month improvement period in February, 2014 for five tardies; another 12-month period in August, 2014 for ten tardies; and a final 12-month period in May, 2016 for 15 tardies. All told, EB was disciplined three times for a total of 30 tardies over a three-year period. [Exhs. 12-1, 12-4, 12-14.] However, during the four months after the May 11, 2016 action, EB was late a single time, and that by only one minute. [Exh. 12A; E-Bates 0159 – 0189, 0183.]

Appellant also cites to the discipline record of employee JK as less harsh than his dismissal for similarly serious attendance issues. Employee JK was placed on a 12-month improvement period in July, 2014 for 15 tardies; given a seven-month temporary reduction in pay in October, 2014; and given written reprimands in September and December, 2014 for three and one tardy, respectively. On July 27, 2016, JK was placed on another 12-month improvement period for eight late arrivals over a two-month period. [Exhs. 12-2, 12-5 to 12-11.] Thus, JK was disciplined five times for 27 tardies over two years. Since the July 2016 12-month review period, JK was late a single time by three minutes, and on that occasion notified her supervisor by text that she was delayed by traffic. [Exh. E-Bates 1610.] As noted above, Appellant was disciplined six times from 2013 to 2016 for a total of 31 tardies. [Exhs. 2 – 8.]

Appellant argues that these actions show the tardiness policy is interpreted unfairly based on subjective factors leading to inconsistent discipline. The evidence shows that EB, JK and Appellant had very similar attendance histories up to 2016. In mid-2016, EB and JK appeared to have largely corrected their tardiness issues, while Appellant's record clearly shows that he had not. In contrast to the improvements shown by the two employees, Appellant was late another six times in the two months after his May, 2016 12-month review period.¹ The Agency empowered its branch managers to consider such factors in determining whether to seek approval for discipline based on excessive tardiness. Exercise of discretion in enforcing its start time is appropriate, especially where the Operations Supervisor thereafter oversees management consistency and fairness by conducting his own review of the Kronos records. The objective Kronos records reveal a stark contrast between Appellant's continued tardiness on the one hand, and the significant improvements made by EB and JK on the other. [Exh. E.]

Moreover, the Career Service Rules do not require an agency to develop numerical performance standards, but only to "provide clear expectations for their conduct [under] a progressive discipline process that is governed by the principles of due process, personal accountability, reasonableness and sound business practices." CSR Rule 16, Purpose Statement. The different disciplines imposed reflect the Agency's objectively reasonable determination of the employees' ability to achieve future compliance. In Appellant's case, his continued late arrivals and his disagreement with the 7:55 am start time combined to make improvement less likely than that of employees EB and JK. A reasonable supervisor could conclude based on Appellant's attendance history that the pattern of late arrivals had not changed, and that no lesser discipline would correct it. The recent improvements by EB and JK could also give a

¹ Although it was not considered in the discipline, Appellant arrived slightly late on Sept. 1, 2016, the date of his dismissal letter. [Exh. E-Bates 0089.] This final tardy on his last day of work supports the Agency's finding that dismissal was the only appropriate discipline, given Appellant's apparent lack of motivation to correct his conduct.

reasonable supervisor a basis for optimism that the employees had taken steps to correct their previous pattern of tardiness, and thereby withhold corrective action for a single, slightly late arrival. The evidence here demonstrates that the Agency did not discipline Appellant in an inconsistent or unfair manner.

As to Appellant's argument that he was given insufficient time to improve, it is noted that Appellant was first counseled on this issue in 2013. He was thereafter given formal discipline on three occasions, and had one previous unsuccessful 12-month review period. Minimal but increasing discipline was attempted for almost three years. While the most recent tardies total only fifteen minutes, it is not unreasonable for the Agency to conclude that their continuation in the face of significant previous discipline for the same issue demonstrates that Appellant will not comply with a policy the Agency deems important to serve its customers. Appellant presented no evidence to show that continued forbearance was likely to yield a different result.

Appellant's contention that he was not being paid for the five minutes in question was rebutted by Scott's testimony that employees are not being required to work more than their paid eight-hour shifts. Employees may clock out at 4:53 pm, absent the presence of customers. Thus, employees in at 7:55 am and out at 4:53 are paid for seven hours and 58 minutes. Additionally, overtime is paid for any time needed to serve customers in the lobby after 4:53 pm.

Finally, Appellant argues that the dismissal letter was served two days after the 15-day deadline for service of discipline under CSR 16-73 B. That rule was amended on Feb. 12, 2016 to increase the deadline to 21 days. See CSR 16-48 B. The discipline dated and served on Sept. 1, 2016, sixteen days after the contemplation meeting, was therefore served in a timely manner.

C. NATIONAL ORIGIN DISCRIMINATION CLAIM

Appellant's national origin is Hispanic, which establishes his status in a protected group under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2, violation of which is prohibited in CSR § 16-22. He alleges that his dismissal, an adverse action under discrimination laws, was motivated by his national origin. Mr. Scott testified that Appellant did not allege discrimination until it was asserted in his appeal form. [Scott, 1:17 pm.]

Appellant's former co-worker David Gomez testified that he too questioned the Agency's enforcement of its tardiness policy, but was met with only vague answers. Mr. Gomez is also Hispanic. He was disciplined for tardies in August, 2014, and then given a 12-month review period in June, 2016 for nine tardies. He left the Agency in August, 2016, and no further discipline was imposed. [Gomez, 1:38 pm.] That disciplinary record is comparable to that of the other employees shown in Exh. 12, including employee SB who received a 12-month review for seven tardies in two months. [Exhs. 12-3, 12-15.] Appellant also submitted the disciplinary records of EB, a white employee, as proof that non-Hispanic employees are treated more favorably. However, as found above, EB improved significantly after her last 12-month review period in May, 2016. Review of the discipline and Kronos records included in Exhibits 12 and E did not reveal any bias on the basis of national origin in the Agency's imposition of discipline for tardiness.

Appellant's discipline spanned his five years of employment in three separate branches and the Processing Center, under the supervision of four different supervisors. His first supervisor, Germain Gibson, is herself Hispanic. [Scott, 9:57 am.] Ferguson Lee is Native American, and both

Thomas Peace and Mr. Scott are African American. [Scott, 1:17 pm.] Appellant offered no evidence that all or any of his supervisors were motivated by discrimination based on his national origin. I find that Appellant failed to establish his discrimination claim by a preponderance of the evidence.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the dismissal dated Sept. 1, 2016 is affirmed.

DONE December 1, 2016.



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

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Denver, CO 80202
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EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.

I certify that on December 1, 2016, I emailed a correct copy of this Order to the following:

Joshua Lopez, jbonyx@yahoo.com

Charles Mitchell, ACA, charles.mitchell@denvergov.org

City Attorney's Office, dlefilng.litigation@denvergov.org

A handwritten signature in black ink, appearing to be "DHLR", is positioned above a horizontal line.