

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 192-03

DECISION

IN THE MATTER OF THE APPEAL OF:

JOHN B. LUCERO, JR.,

Appellant,

v.

Department of Public Works, Solid Waste Management Division, and the City and County of Denver, a municipal corporation,

Agency.

This matter is before the Hearing Officer for decision in the above appeal after the hearing held on April 20, 2004. Appellant was present and represented himself. The Agency was represented by Assistant City Attorney Mindi L. Wright. The Hearing Officer, after reviewing the testimony and documentary evidence presented and the arguments of the parties, makes the following findings of fact and order:

FINDINGS AND ANALYSIS

I. Nature of Appeal

On December 11, 2003, Appellant John B. Lucero Jr. filed this appeal of a three-day suspension imposed on December 4, 2003 based upon an accident resulting in property damage. This is a direct appeal of that action pursuant to Career Service Rule (CSR) 19-10 b). Appellant asserts in this appeal that the discipline violates the Career Service Board's open door policy in CSR 15-120.

II. Background

John L. Lucero Jr. is an Equipment Operator with the Solid Waste Management Division for the City and County of Denver who was assigned to gather residential trash on August 28, 2003. On December 4, 2003, he was suspended for three days for asserted violations of CSR 16-50 and 16-51 on the basis of an accident causing property damage to a garage wall on his route. Mr. Lucero filed this appeal on December 11, 2003.

At the hearing held on April 20, 2004, the Agency presented the testimony of three witnesses in support of its disciplinary action: Charles Brown, Appellant's immediate supervisor, James Oakley, Senior Safety and Loss Analyst, and Gary Price, the Agency's Director and the official who imposed the discipline. The Agency offered exhibits 1, 2 and 4 through 10, all of which were admitted into evidence without objection. Exhibit 1 is a multi-page exhibit consisting of twenty-five photographs of the accident scene. Appellant testified on his own behalf and presented no other witnesses or exhibits.

The Agency's first witness was Operational Supervisor Charles Brown. Mr. Brown testified that Appellant contacted him on August 28, 2003 to report damage to a brick garage wall behind a dumpster in the alley of 915 Monaco Parkway in Denver. Appellant told Mr. Brown that he noticed the damage, and then called him in accordance with policy without emptying the trash. Once at the scene, Mr. Brown observed that one corner of the back lid of the dumpster next to the wall was bent down, indicating to him that the dumpster itself must have been lifted in order to cause the damage. His initial impression was that the damage may have been caused by the previous week's driver.

However, after speaking with the neighbor across the alley and reviewing the investigation completed by Safety Analyst James Oakley, Mr. Brown became convinced that Appellant himself had caused the damage. The neighbor informed Mr. Brown that there had been no damage to the garage wall on the morning of August 28th. Mr. Brown accompanied the safety representative to the alley on September 4th and made further observations. On September 10th, Mr. Brown revised the Vehicle and Property Damage Report, known as the 110 Report, to include the results of the further investigation and to indicate his belief that the damage had been caused by Mr. Lucero.

Appellant asked Mr. Brown on cross examination whether Mr. Brown had been present in February 2003 when another supervisor, Lars Williams, had "cussed at" Appellant "for making him look bad in front of his boss." Mr. Brown testified that he had been present, and that he would have handled the meeting "in a different way."

Senior Safety and Loss Analyst James Oakley next testified that he conducted an on-site investigation into the damage done to the garage at 915 Monaco Parkway on September 4, 2003 with Mr. Brown. He observed that bricks behind the northeast corner of the dumpster had "caved in", causing substantial damage. He also observed brick dust on the back of the dumpster, no damage to the front of the dumpster, and a dented top consistent with the dumpster striking the wall while up in the air. He conducted a re-creation of the accident, using another side loader garbage truck. Mr. Oakley interviewed the property owner and his grandmother, who both confirmed that there had been no damage to the garage wall before the trash pickup that morning. Based upon his observations of the damage, the statements of witnesses, and the results of the accident re-creation, Mr. Oakley concluded that Mr. Lucero had caused

the damage. The City paid \$4,760.10 to repair the damage to the wall, siding, gutters, and adjoining fence gate.

Mr. Oakley stated to questions put by Appellant that the garage was old and poorly constructed, which could have contributed to the extent of the damage to the brick wall. The possibility of "damage by kids never occurred to [him] because of the way the metal was dented down", the apparent point of impact above the top of the dumpster, and the brick dust on the back of the dumpster. Mr. Oakley acknowledged that Mr. Lucero had followed the right procedure in calling his supervisor as soon as the damage was discovered. The physical evidence indicated to him that the damage was done when the dumpster was picked up, hit the wall, then placed back down, Mr. Oakley stated.

Director of Solid Waste Management Gary Price testified that he suspended Appellant for three days on December 4, 2003 after consideration of the facts surrounding the property damage, the information presented at the pre-disciplinary meeting, and Appellant's past disciplinary record. The pre-disciplinary letter sent to Appellant on November 10, 2003 gave him notice that discipline was being contemplated for asserted violations of CSR 16-50 A. 1), 2), 14) and 20), CSR 16-51 A. 5) and Public Works handbook § 4.A and C, and § 5 6), 8) and 11). The stated factual basis for the asserted misconduct was that Mr. Lucero caused significant property damage to the brick wall by gross negligence and failure to observe proper safety procedures.

In imposing a three-day suspension, Mr. Price considered Mr. Lucero's reiterated denial that he caused the damage, as well as his past disciplinary record and work record. He did not specifically consider Mr. Lucero's past driving record in either mitigation or aggravation of the penalty. Appellant had received a one-day suspension on February 27, 2003, and a two-day suspension on May 8, 2003, both for unauthorized leave. Based thereon, and in keeping with a policy that is said to interpret progressive discipline as "encouraging" one-step increments over the last level of discipline, Mr. Price imposed what he thought was a lenient penalty of a three-day suspension.

On cross examination, Mr. Price stated that he was the final decision-maker as to the discipline, even though Mr. Williams signed both the pre-disciplinary letter and the notice of suspension for him in his absence.

Appellant testified that he considered the suspension unfair in view of the lack of discipline given other employees who have three to four accidents a year, the lack of eyewitness testimony that he caused the accident, and his six years of good driving record with the city. Mr. Lucero further testified that he believed the discipline was imposed because of Field Superintendent Lars Williams' personal dislike of him, as shown by Mr. Williams' response to Appellant's February 2003 transfer request that "[y]ou'll be stuck here til you change your attitude. Don't blame me for your shitty [attendance] record."

Appellant expressed a belief that he could have won appeals of his past suspensions, since he had a doctor's note for the first absence charged as unauthorized, although the note was undated. The second absence was caused by his supervisor's requirement that Appellant return to the doctor's office to get the note dated. Appellant did not file an appeal as to either previous suspension.

Mr. Lucero stated that Mr. Williams' dislike of him was further illustrated by pressure Mr. Williams brought to bear on Appellant's supervisor in an ultimately unsuccessful attempt to have Appellant's performance rated as below expectations.

Lastly, Appellant argued that, as a back-up driver forced to accept occasional driving assignments which paid a minimal amount of differential pay, he should not be held to the same standard as a regular driver.

In response to questions by the Hearing Officer, Appellant described the procedure for dumping trash into the side loader. He stated that the technique is basic, requiring use of three mirrors to confirm that the two hooks have connected with the dumpster and that the dumpster has been pulled the required six inches away from any wall. He testified that he is still assigned to drive when needed, and that he believes he does a good job and completes routes faster than some more experienced drivers.

The Agency argued in closing that the suspension was consistent with the evidence and with the purpose of progressive discipline to correct inappropriate behavior. The discipline stemmed from a neutral investigation done by a safety officer with no reporting relationship with Lars Williams, argued the Agency. Further, the confrontation between Appellant and Mr. Williams was in February 2003, too remote in time to be considered as a cause for retaliation, according to the Assistant City Attorney. The physical evidence and pictures indicate that the damage occurred during a trash collection, and the witness statements confirm that it must have been caused on August 28th, the date on which Appellant reported the accident. The investigator ruled out other causes, such as damage from a car or truck driving the narrow alley. The Agency further disputed Appellant's contention that he should not have been charged with causing significant damage based on the poor condition of the wall. The city is obligated to pay for the actual damage done, regardless of the condition of the property, stated the Assistant City Attorney.

Appellant asserted that the physical evidence indicates that the point of impact was lower than that testified to by Mr. Oakley, the Agency's safety officer, and that fact was consistent with damage done when the dumpster was pushed back, not picked up by a side loader. Appellant urged the Hearing Officer to order the discipline removed from his employment record.

III. Issues on Appeal

This appeal presents the issue of whether the Agency established by a preponderance of the evidence that its three-day suspension of Appellant was taken in

conformity with the Career Service Rules, including its open door policy. Appellant also raised as an issue whether unrelated past discipline can be used to increase the severity of progressive discipline.

IV. Analysis

Although this discipline arose from a charge that Appellant violated a number of different safety and disciplinary rules, the asserted misconduct is based upon one event: that Appellant caused significant damage to private property on August 28, 2003 in the course of performing his duties. If the discipline is supported by proof by a preponderance of the evidence that Appellant violated one or more of those rules, the discipline will be affirmed if the penalty itself is reasonably related to the seriousness of the offense and takes into consideration the employee's past record.

The facts which support the Agency's discipline are largely undisputed. On August 28, 2003, movement of a dumpster caused substantial damage to the brick wall of the garage in the alley behind 915 Monaco Parkway. A thorough investigation revealed brick dust on the back of the dumpster, and no damage or debris on the front of the dumpster. The corner of the dumpster closest to the damaged wall was bent down. The point of impact on the wall was determined to be above the top of the dumpster. The investigator and Appellant's supervisor Charles Brown obtained statements from three witnesses, who stated that the damage to the wall had not been present the morning of August 28th. A re-creation of the accident demonstrated to the investigator's satisfaction that the damage occurred when the dumpster was lifted. Witnesses Charles Brown and James Oakley confirmed that the pictures submitted as Agency's Exhibit 1 illustrate the condition of the dumpster and wall on August 28th. The Agency argues by implication that Appellant is the only one who could have caused the damage, since he was the driver of the only vehicle that could lift the dumpster on the date the damage first appeared.

Appellant asserts that the damage was present at the time of his arrival on August 28th to empty the dumpsters. He testified that the point of impact indicates that the dumpster could have been pushed against the wall by others. This theory would rebut the Agency's claim that Appellant was the only one with an opportunity to have committed the property damage.

However, the physical evidence is inconsistent with Appellant's alternative theory. A close review of Exhibit 1-13 shows that the back corner edge of the dumpster top is bent decisively downward, not crumpled or jammed, as would have occurred if the dumpster had been pushed vertically against the wall. Thus, it appears only a vehicle such as the Appellant's side-loading truck could have caused such damage on August 28th.

A. Application of Career Service Rules

The Agency has proven by a preponderance of the evidence that Appellant's act in neglecting the required step of moving the dumpster away from the wall prior to

raising it caused damage to property. The resulting damage to private property cost the City \$4,760.10. [Agency's Exhibits 9 and 10.] Appellant's action constituted carelessness in the performance of his duties and responsibilities, as proscribed by CSR 16-51 A. 6), and neglect in the use of City and County property, in violation of CSR 16-51 A. 8.

In addition, Appellant's action violated two sections of the Public Works Handbook, as follows: 1) Appellant failed to perform his job carefully and safely as prohibited by § 4. A.; and 2) Appellant failed to operate a motor vehicle safely, in violation of § 5; 3). Appellant thereby violated CSR 16-51 A. 5) by his failure to observe departmental regulations.

Mr. Lucero's action did not constitute a violation of CSR 16-50 A. 1), since there is no evidence that his neglect to move the dumpster away from the wall was "more than ordinary inadvertence or inattention." Prosser and Keeton on the Law of Torts, § 34, at 212 (5th. Ed. 1984).

The evidence also does not support a finding that Appellant violated CSR 16-50 A. 2), since the Agency relied solely upon the damage to private property in its imposition of discipline. Similarly, the accident giving rise to the discipline did not violate CSR 16-50 14), since the evidence contained no proof of injury, jeopardy to the safety of any person, or damage to City and County property. The minimal damage to the City dumpster was not considered in support of the discipline of in the evidence presented at hearing.

CSR 16-50 A. 20) and 16-51 A. 11) are catch-all provisions intended for use when conduct which may be cause for discipline is not specifically described in the disciplinary rules. Here, the misconduct falls within several more specific rules, and thus there is no necessity to rely upon either general subsection.

B. Appropriateness of Discipline Imposed

The Agency official who determined the penalty to be imposed for the above violations did so in accordance with a practice to set discipline at the next level of progressive discipline, regardless of his expressed opinion that a three-day suspension was "lenient" based upon the amount of property damage caused. Here, that practice did not harm Appellant by the imposition of an unreasonable penalty, since a three-day suspension was reasonable under the circumstances, including the need to correct the behavior, Appellant's past disciplinary record, and the substantial property damage caused thereby. CSR 16-10.

Appellant urges the Hearing Officer to find that past discipline must be of the same type in order support imposition of the next step in progressive discipline.

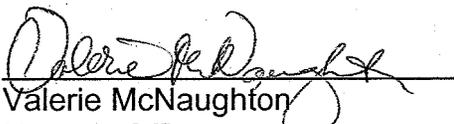
The purpose of discipline under Rule 16 of the Career Service Rules is the correction of inappropriate behavior. Supervisors measure the type and severity of the

discipline to be imposed by evaluating the gravity of the offense, the employee's past record, and what is believed to be needed in order to achieve future compliance. CSR 16-10. "Whenever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate." CSR 16-20 2). Thus, Rule 16 does not impose any requirement that a supervisor must "start over" at the level of a verbal reprimand for every type of inappropriate conduct. "Past conduct" does not imply past conduct of the same type that is charged in the current disciplinary action. Such an interpretation would be inconsistent with the purposes, standards and flexibility set forth in the Rule.

DECISION

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer hereby AFFIRMS the Agency's imposition of a three-day suspension on Appellant dated December 4, 2003.

Dated this 4rd day of June, 2004.


Valerie McNaughton
Hearing Officer
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing DECISION by depositing same in the U.S. mail, postage prepaid, this 4th day of June, 2004, addressed to:

resent 8th

John B. Lucero, Jr.
3109 S. Lowell Blvd.
Denver CO 80236

I further certify that I have forwarded a true and correct copy of the foregoing ORDER by depositing same in the interoffice mail, this 4th day of June, 2004, addressed to:

resent 8th

City Attorney's Office
Litigation Section
201 W. Colfax Ave. Dept 1108
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Bill Miles
Dept. of Public Works

Gary Price
Solid Waste Management