

DECISION AND ORDER

WILLIAM J. LUCERO, Appellant,

v.

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

The hearing in this appeal was held on March 10, 2016 before Hearing Officer Valerie McNaughton. Appellant appeared and represented himself. Assistant City Attorney Jessica Allen represented the Agency, and Reza Kazemian served as the Agency's advisory witness. Josh Cordova, Ahmad Soufiani, and Reza Kazemian testified during the Agency's case, and Appellant testified on his own behalf.

I. STATEMENT OF THE APPEAL

Appellant William J. Lucero appeals his Nov. 13, 2015 demotion from Operations Supervisor for the Wastewater Management Division to Senior Closed Circuit TV Technician, with an 8% reduction in pay. Agency Exhibits 1 – 8 and 11 – 20 were admitted, as were Appellant's Exhibits E – K.

II. FINDINGS OF FACT

Appellant has been employed by the Agency since 2008. On Oct. 6, 2013, he was promoted to Operations Supervisor in Wastewater's construction section, where his duties were to plan, oversee and report on the work of a manhole crew.

In the summer of 2015, Appellant was assigned by his supervisor, Senior Engineer Ahmad Soufiani, to locate a manhole for a manufacturer's demonstration of an anti-corrosion product. The demonstration would require a manhole suitable for rehabilitation, along with a nearby manhole for drainage in order to dry out the subject manhole. They scheduled the demonstration for Aug. 19, 2015. On July 14th, the contractor emailed Soufiani and Appellant a list of city equipment that was to be brought to the demonstration site. [Exh. 17.] The day before the demonstration, Soufiani reminded Appellant to take the equipment to the worksite first thing in the morning. [Soufiani, 11:18 am.]

On Aug. 19th, Appellant met the manhole crew and manufacturer at the selected site to start the demonstration. When crew supervisor Josh Cordova lifted the cover of the second manhole, they noticed it was plugged with four to five feet of asphalt, and as a result was unusable as a drain. Cordova suggested they use a different manhole and a nearby dead-end manhole for drainage.

Appellant called the engineer to discuss the proposed change. Soufiani told him not to do it, as it would defeat the purpose of the demonstration. He then called Cordova to ask the reason for the change. Cordova told him they could not use the original drain manhole because it had several feet of asphalt in it. He also told him Appellant had not arranged for delivery of the right equipment to the job site. Soufiani said he would be right there. [Soufiani, 11:20 am; Exh. 6-1.]

When Soufiani arrived, he found out that Cordova was right on both counts. Cordova showed him the asphalt in the second manhole. Soufiani pulled Appellant aside and asked him why he had not checked the drain manhole. Appellant replied that he had, but did not see the asphalt. Soufiani later discovered that the asphalt had been accidentally poured into the manhole by a contractor days before Appellant was told to inspect the site. He concluded that Appellant had not inspected the manhole as ordered. Soufiani was more disturbed by Appellant's misrepresentation than by his failure to check the manhole, as he considers trust between supervisor and employee a critical issue in a department that requires independent work to get projects completed. The mismanaged project witnessed by the contractor was embarrassing to Soufiani, who was also troubled that the work took an unexpected two days, one of which was spent using the vacuum truck to remove the asphalt. [Soufiani, 11:28 am.]

When asked about the equipment, Appellant took the blame. He added however that Cordova should have checked Appellant's email while Appellant was out of the office in July, and brought the equipment to the demonstration. Appellant returned from his vacation on Aug. 3, and Cordova had just returned from vacation himself the day before the demonstration. [Appellant, 1:39 pm; Exh. 13.] Later that day, Cordova told Soufiani he is sick of dealing with Appellant because he "has lack of leadership, never shows up to the jobsite, lies to his supervisor and cooks the books when it comes to work order reports." [Soufiani, 1:20 am; Exh. 6-1.]

The next day, the crew continued to prepare the site for the demonstration, including removal of the asphalt from the discharge hole. Appellant called Soufiani to tell him that Cordova had two crew members trying to clean up the hole, despite Appellant's instruction that the crew should be meeting with the contractor instead. Appellant said when he tried to discuss this with Cordova, he hung up on him. Soufiani informed Appellant that he had ordered Cordova to clear out the manhole as soon as possible. After lunch, Cordova called Soufiani and asked him to set up a meeting with Operations Director Reza Kazemian to discuss some concerns about Appellant. Soufiani emailed Kazemian to set up the meeting. [Exh. 6-2.]

On Friday, Aug. 21, Soufiani met with Appellant and Cordova at Appellant's request. Appellant started to complain about Cordova's conduct the day before, but Cordova quickly took over the conversation. He said he was tired of Appellant's failure to do his job, which left him to do all the work planning and coordinating with street maintenance. He told Soufiani that Appellant was falsifying work orders to show the crew was doing fourteen manhole lowerings a day, when in fact they had never done more than eight or nine.¹ He handed Soufiani his street maps with notations of the dates and initials of crew for the manholes done, and asked him to compare them with the numbers reported by Appellant in the work orders. [Exhs. 7, 8.] Cordova continued that Appellant is at the work site for only about 15 minutes a day. Soufiani asked Cordova several times if he would allow him to try to resolve this issue. Cordova refused,

¹ Lowering a manhole to protect it from damage during street paving is generally done by removing the cover and the ring on which it rests, then re-setting the cover further inside the manhole. Lowerings take more time than raising them after the paving is finished. [Cordova, 9:03 am.]

saying, "I'm done with it, I cannot deal with Bill anymore and I need to take this to a higher level to get it resolved." [Exh. 6-3.] Appellant told Cordova, "I wish you wouldn't have brought this up." Cordova asked, "Are you threatening me?" Appellant replied, "No, it's a promise." Soufiani believed the comment was a threat to retaliate against Cordova. [Soufiani, 11:40.] Cordova too believed that Appellant was threatening his job. [Cordova, 10:02 am.]

Soufiani called Kazemian and asked if they could meet with him. When they arrived at the Director's office, Cordova repeated his accusations against Appellant, and added that Appellant had told one of his crew members, Lucas Herrera, that "if you do four [manholes], and I give you ten, that just makes us look better". Kazemian called Herrera into the meeting and asked him, "[w]ere you told to do four and I'll give you credit for ten?" Herrera later told the investigator, "I said no, because of the way the question was phrased." He confirmed that Appellant had actually said, "If you do four, and I give you ten, it just makes us look better." [Exh. 14, 18:23.] Cordova asked Herrera at the meeting if the crew had ever done fourteen manholes in a single day. Herrera said, "No, there's just not enough time in the day to jackhammer fourteen manholes." [Exh. 14, 20:00.]

Cordova also related to Kazemian that Appellant had threatened him during their meeting with Soufiani. Kazemian warned Appellant that he could not talk to his employees like that, and remarked that maybe the position of supervisor was just not a good fit for him. When the employees left, Kazemian instructed Soufiani to check Appellant's work records every day. Cordova reported the matter to Human Resources (HR) Specialist Krista Judd, who began an investigation into the allegations that Appellant falsified work reports and threatened Cordova.

Members of Appellant's crew later told Soufiani that Appellant leaves the work site without telling them where he is going. Soufiani had communicated a performance expectation to Appellant that he was to be at the worksite with his crew 50% of his work day. Soufiani learned that it was Appellant's practice to count all the manholes shown on the daily work map, and to add that number as having been completed. When Soufiani went out to the field, he discovered the number actually completed was much smaller than the number listed by Appellant in the daily work order. Soufiani had stressed during Appellant's training that accurate production numbers are essential to track their costs and staffing levels, since the operation is an enterprise fund paid for by taxpayer service fees, and must justify its function with reliable data in order to avoid the private outsourcing of city jobs. [Soufiani, 11:43.]

The investigatory report issued on Oct. 13, 2015 found that Appellant visits the worksite most days, but stays only 15 to 30 minutes a day. It also found that Appellant had not been verifying the production numbers he entered in his work orders, because Appellant did not create or review the daily work maps. Lastly, the investigation concluded that Appellant did threaten Cordova as alleged. [Exh. 4.] On Oct. 23, 2015, the Agency included these findings in a notice of contemplation of discipline.

Before the investigation was concluded, Kazemian asked all of his direct reports to obtain a volunteer to share ideas for boosting morale one-on-one with him. After there were volunteers for each crew except Appellant's, Soufiani reminded Appellant to ask his crew for a volunteer. Appellant later told Soufiani he had asked his crew on Sept. 15th, but none were interested. On Sept. 16, Soufiani met with the crew and asked them himself, stating he only needed one person. All but one crew member said Appellant had never told them about the team. The one exception had been on the phone when Soufiani made the request to Appellant, and told Appellant at the time that he was not interested. Soufiani asked the crew members to sign

statements to that effect, and they did. [Exh. 18.] One crew member later asked Soufiani if he could get his statement back because he did not want to get in trouble with Appellant. [Soufiani, 11:51.] This allegation was added to the pre-disciplinary notice.

The Agency held a pre-disciplinary meeting on Oct. 10, 2015, and Appellant gave a verbal statement. The Agency thereafter determined Appellant had neglected and been careless in the performance of his duties, falsified work records, and threatened his crew supervisor, along with associated rule violations. As a result, Appellant was demoted from the position of Operations Supervisor to Senior Closed Circuit TV Technician, with the minimum 8% salary reduction under CSR § 9-33 C.2. [Exh. 1.] This appeal followed.

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 demotion 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 RULES²

1. Neglect, carelessness and failure to perform duties, CSR § 16-60 A, B & J.

Neglect under this rule is proven when an employee fails to perform a known duty. In re Gutierrez, CSB 65-11, n1 (4/4/13). The Agency claims that Appellant's failure to prepare the worksite for the demonstration was a neglect of his duty to supervise the manhole crew. Appellant claimed at hearing that Cordova should have signed on to Appellant's email while he was on vacation, read the contractor's equipment list, and transported the right equipment to the worksite. Cordova testified that he was not expected to monitor Appellant's work email in his absence, and that he had just returned to work from vacation the morning of the demonstration.

When Appellant returned from vacation on Aug. 3, he was responsible for checking his own email, and was therefore on notice of the equipment needed for Aug. 19th. In addition, his supervisor reminded him the day before the demonstration to bring the equipment to the worksite. He did not allege that he had ordered Cordova to monitor his email or take over his responsibilities regarding the demonstration. It is not reasonable for Appellant to expect Cordova to have found the contractor's email in Appellant's inbox and arranged for a morning delivery of the equipment when Cordova had just returned to work the very morning of the demonstration. Appellant was on the job at that time and was directly told by his supervisor to handle the logistics. After his vacation, Appellant had eleven full work days and a personal reminder to gather the equipment, and his failure to do so was neglectful.

As to the asphalt found in the drain manhole, Appellant claimed that his eyesight is poor and that he did not see the asphalt when he inspected the manhole. He conceded that he should have had a crew member look or go down the manhole to ensure it was useable as a drain. I find that the Agency proved Appellant neglected his duty to handle the important duty

² Since this appeal was filed, the Career Service Rules have been revised and renumbered. Because the previous version of the rules were in effect at the time discipline was assessed, the earlier version controls here.

of preparing for the demonstration, which his supervisor had directly assigned to him. Based on the same evidence, I find Appellant was careless in the performance of that duty, and failed to perform his assigned duty, in violation of CSR §§ 16-60 A, B, and J.

2. Falsification of records regarding work duties, CSR § 16-60 E.

The Agency claims that Appellant violated this rule by his entry of inaccurate information on the number of manholes lowered and raised in preparation for street paving. During a Peak Performance Rapid Improvement Event held in April, 2014, the construction unit met to explore whether the process could be made more efficient. Cordova developed an innovation that reduced the time for pulling the riser, and the group set a goal of increasing the number of manhole lowerings from seven a day to twelve a day. [Cordova, 10:16 am; Exh. E.]

After that event, the team was reduced from two crews to a single crew, and Cordova told Appellant the goal was no longer feasible. In response, Appellant "gave me a look, like 'what are you doing?'. [so] I stopped." [Exh. 13.] When Cordova took over during one of Appellant's absences, he saw a note from Appellant with a continuous work order that instructed him to fill in "14" as the number of manholes completed per day. Since Cordova knew his crew finished only about eight a day, he believed that Appellant was inflating the performance numbers to look better to management. In order to ensure that he was not accused of false reporting, Cordova began marking the street maps as they completed the work, and had his crew members date and initial it once the work was completed. Cordova testified that Appellant never asked him for the maps, and Cordova never offered them. [Cordova, 10:42 am; Exh. 7.] Appellant told the investigator that the crew can do three manholes an hour, and they average between ten and twelve per day. He denied reporting an inaccurate number, and said his practice is to report the number his crew gives him when they return at the end of the day. [Exh. 12.]

The evidence showed that Appellant counted the number of manholes in the area to be worked that day, and listed them as completed by the work crew, without asking Cordova how many they finished or checking the completed work map. After Cordova's complaint on Aug. 21st, Soufiani went to the field and observed that the number of manholes completed was often six or seven, in contrast to Appellant's recording of 13 or 14 on his work orders. [Soufiani, 11:50 am.]

Appellant's credibility was damaged by his denial of many facts corroborated by others. He asserted that he was on the job site four hours every day. His crew and the investigation confirmed Cordova's statement: Appellant was with his crew only about a half-hour a day, and his whereabouts were often unknown at other times. Appellant claims to have coordinated the daily work with street maintenance and prepared the maps. When confronted with Cordova and Herrera's statements to the contrary, Appellant responded that Cordova should do the coordination with street maintenance, since his father-in-law works there and he lives with Cordova. Both crew members also said Cordova - or Herrera in Cordova's absence - prepares the maps. [Exhs. 13, 14.] Cordova added that he did not give the finished maps to Appellant because Appellant never asked for them. At hearing, Appellant said he did have the completed maps in his desk drawer, but they had been removed during his vacation. In response to the Agency's allegation that Appellant visited a

gym far from the worksite during work hours, Appellant stated that the six-block rule³ did not apply to exempt employees. On rebuttal, Kazemian testified that the rule applies to everybody. [Kazemian, 1:58 pm.] Appellant failed to check the drain manhole or bring the equipment to the demonstration site, then attempted to shift the blame to Cordova, who had just returned from vacation.

The credible evidence demonstrated that Appellant falsified his work records to reflect significantly more manholes completed than were actually done by Cordova's crew, in an effort to appear to achieve the performance improvements developed during the Peak Performance Rapid Improvement Event, in violation of 16-60 E.

The Agency also alleged that Appellant dishonestly told Soufiani that he had asked his crew on Sept. 15th to volunteer for Kazemian's construction enhancement team. While Appellant said his diary note proved he asked the crew, that note was dated Sept. 28th. [Exh. K-2.] The Agency produced five written statements from the crew, four of whom stated that Appellant never asked them to participate in the effort. [Exh. 18.] I find that Appellant was dishonest in his statement to Soufiani that he had informed the crew about the team, also in violation of CSR 16-60 E.

3. Threatening and failing to maintain satisfactory relationships, § 16-60 M, O.

The Agency claims that Appellant threatened to retaliate against Cordova for his Aug. 21st complaints about his performance to Appellant's supervisor. Soufiani testified that he heard the remarks, and believed Appellant was threatening to use his power as Cordova's supervisor to retaliate against him. When Cordova asked him if that was a threat, he said, "[n]o, it's a promise." The obvious promise was that Cordova would be sorry he made the complaints. I find that Appellant made the remarks, and they communicated his intention to retaliate against Cordova.

This rule prohibits communicating an intent to inflict harm or loss on another or his property. In re Harrison, CSA 55-07, 50 (6/17/10), Black's Law Dictionary (8th ed. 2004). A public employee's career is a property right that is protected from deprivation by procedural due process; in this context, by the Career Service Rules. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Where a reasonable person would interpret words as a threat, those words violate this rule. Harrison, supra at 50; In re Katros, CSA 129-04, 8 (3/16/05). Both persons who heard what Appellant said reasonably perceived that they were intended as a threat to Cordova's job. I find that Appellant threatened Cordova, a city employee, in violation of 16-60 M.

At the pre-disciplinary meeting, Appellant admitted he said, "you're going to wish you wouldn't have started this", but added that what he meant was that he could prove his numbers were correct "because of the maps [Cordova] gave me." [Exh. 15.] However, Appellant testified at hearing that there was no proof his numbers were incorrect because the maps were taken from his desk during his vacation in July. If this is factual, then Appellant had no maps on Aug. 21st, the day he made the statement. During his investigatory interview and at hearing, he admitted saying, "I'm sorry you started this." [Appellant, 1:45 pm; Exh. 12.] Appellant also admitted during his interview that he did respond to Cordova's question, "[i]s

³ In order to save gas in city vehicles, Director Kazemian instructed employees that they can go to lunch a maximum of six blocks from their worksite. [Kazemian, 2:02 pm.]

that a threat?", with, "[n]o, that's a promise." [Exh. 12.] Soufiani confirmed both statements, and both Soufiani and Cordova testified that they believed the statements were threats to Cordova's livelihood.

Conduct violates CSR 16-60 O if it would cause another person standing in the employee's place to believe it would be harmful to others or have a significant impact on their working relationship. In re Burghardt, CSB 81-07, 2 (8/28/08); In re Vega, CSA 12-14, 4 (7/3/14). Appellant has supervised Cordova for the past two years, and through Cordova supervises a five-man work crew. The threat to harm Cordova's employment has an obviously adverse effect on Cordova, who is dependent on Appellant for positive performance reviews and good working conditions. Appellant's conduct on Aug. 19th and 21st caused Cordova to conclude he could no longer work with Appellant. As a direct result of these incidents, both Appellant and Cordova left their positions. In addition, Soufiani and Kazemian lost trust in Appellant's word and reports, both crucial to their working relationship and the integrity of the data supporting their enterprise fund. As proven by the evidence of Appellant's actions and their consequences, Appellant violated 16-60 O.

4. Conduct violating other rules, CSR 16-60 Y.

Since I have already found that the Agency established other rule violations, this allegation is moot. In re Perry-Wilborne, CSA 62-13, 8 (5/22/14)

5. Conduct prejudicial, CSR § 16-60 Z.

This violation requires proof that Appellant's misconduct caused actual harm to the Agency or the reputation of the City. In re Jones, CSB 88-09, 2 (9/29/10). The Agency contends that Appellant's poor performance on Aug. 19th caused harm to the Agency's reputation with the contractor. It presented no evidence on that issue. Appellant rebutted that argument by admission of Exh. F, the contractor's statement. Therein, the contractor apologized for his own part in the protracted time needed for the demonstration, and stated "we always see some kind of delays in the initial mobilization and setup. ... This was not a reflection of you or your management, but rather us fumbling around." The Agency failed to prove that Appellant's conduct caused any actual harm to the Agency, or to the reputation of the City.

B. PENALTY DETERMINATION

The Agency's decision-maker was Wastewater Management Director Reza Kazemian. He found that Appellant's false production numbers harmed the all-important data integrity of the enterprise fund. Kazemian considered Appellant's misrepresentations to his supervisor as reflecting on his honesty. Finally, Appellant's inability to defuse the situation with his crew supervisor indicated to Kazemian that Appellant did not have the ability to act as a supervisor. Kazemian noted that less than a year ago Appellant had been disciplined for two of the same type of offenses: inaccurate work records and absenteeism in the field. [Exh. 16.] Kazemian concluded that Appellant and the Agency would be better served if Appellant were to be demoted to his prior position in the Closed Circuit TV unit, where he had performed very well. [Kazemian, 1:27 pm.]

I can find no flaw in the logic or judgment exercised by the Director, who clearly admired Appellant's past work and sought to recognize Appellant's possession of other abilities. Appellant has already been given a ten-month opportunity to correct his past unacceptable practices in report-writing and worksite attendance. By virtue of his most recent actions, Appellant instead repeated those patterns, and added to those misrepresentations about his work and threats to his crew supervisor. Clearly, Kazemian's decision to demote him from the supervisory assignment and give him a fresh opportunity in a position in which he had already performed well was within the range of penalties that may be taken by a reasonable administrator.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the demotion action dated Nov. 13, 2015 is affirmed.

Dated this 12th day of April, 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

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201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
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AND opposing parties or their representatives, if any.