HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 28-14

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

VINCENT MACIEYOVSKI, Appellant,

vs.

DEPARTMENT OF GENERAL SERVICES, FACILITIES MANAGEMENT,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Aug. 11 and 28, 2014 before Hearing Officer Valerie McNaughton. Appellant was present and represented himself. Assistant City Attorney John Sauer represented the Agency in these proceedings. James Williamson served as the Agency’s advisory witness. The Agency called as witnesses Appellant, Gary Martinez, Suzi Latona, James Williamson and Adrienne Benavidez. Appellant testified on his own behalf.

I. STATEMENT OF THE APPEAL

Appellant Vincent Macieyovski appeals his dismissal from his position as Master Trades Worker with General Services' Facilities Management Division. Appellant also alleges that his dismissal was in retaliation for his whistleblower complaints. The parties stipulated to Agency Exhibits 1 - 6, and to Appellant's Exhibits A - G. Agency Exhibit 7 and Appellant's Exhibits H - N were admitted during the hearing.

II. ISSUES FOR HEARING

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 dismissal was within the range of penalties that could be imposed by a reasonable administrator for the violations established by the evidence?

3) Did Appellant prove by a preponderance of the evidence that the Agency’s action violated the Whistleblower Protection Ordinance?

III. FINDINGS OF FACT

Appellant Vincent Macieyovski has been a Master Trades Worker with the Department of General Services since 2003. His main duty was performing preventive maintenance of HVAC
equipment in city facilities, including care of tools and equipment used on the job and cleaning up his work sites. [Appellant, 8/11/14, 9:16 am; Exh. 6-7.] Eighty-six percent of the Agency's budget is devoted to the preventive maintenance program directed by its Enterprise Asset Management System, which tracks all equipment for emergencies, repairs, and regular maintenance under manufacturers' warranties. [Benavidez, 8/28/14, 11:20 am; Williamson, 9:30 am.] Preventive measures like changing HVAC filters on the manufacturer's recommended schedule avoids heat buildup in the motor and damage to the fan coil unit, thus increasing the life of the equipment. [Martinez, 8/11/14, 10:51 am.] As a policy, the Agency has embraced prevention over replacement in older buildings in order to prevent system degradation and maximize its limited equipment budget. [Williamson, 8/11/14, 4:42 pm; 8/28/14, 9:28 am.]

One year before Appellant was terminated, the Agency suspended him for careless operation of a city truck and other performance issues. [Exh. 4.] In May, 2013, Appellant was placed on a three-month Performance Improvement Plan (PIP), which was later extended to November due to ongoing concerns about his performance. [Exhs. 2-3, 5; Williamson testimony, 8/11/14, 4:10 pm.] Mr. Martinez closely supervised Appellant's work during the six-month PIP, and met with Appellant twice a week. [Appellant, 8/11/14, 9:10 am; Exh. 5.] On Oct. 28, 2013, Appellant received an eight-day suspension for violations of the uniform policy. At the end of the PIP on Nov. 25, 2013, Appellant was ordered to comply with all aspects of his job, and informed that he would be subject to random performance audits. [Exh. 2-4.]

On or about Feb. 12, 2014, Williamson instructed Facilities Superintendent Suzi Latona to conduct an audit of Appellant's work orders. Latona selected ten orders at random out of 35 completed by Appellant. On Feb. 19th, Appellant's supervisor Gary Martinez inspected the work done on the work orders. [Latona, 8/11/14, 2:50 pm.] After concluding that the work on six of the orders had not been completed and that Appellant reported excessive work times on several others, the Agency began the disciplinary process. [Exh. 1.] On Apr. 22, 2014, the Agency terminated Appellant for failing to adequately perform his duties on eight of the ten work orders examined during the audit, and failing to do preventive maintenance on another two orders discovered shortly after the random audit. [Exh. 2; Exhs. 1-10 to 1-28.]

1. Audit of work orders

The work orders at issue were created and worked on five different days in January and February, 2014. In the first, Appellant is alleged to have worked 1.25 hours to correct a vibrating fan coil in an air conditioner located in a County Judge's chambers. He left without fixing it, reporting that "Judge Gonzales stated that is OK she never uses other than low speed." [Exh. 1-10.] Appellant's supervisor returned another day, and found the filter unchanged and very dirty. "This was definitely a 10 on a scale of 10 for dirt." [Martinez, 8/11/14, 10:34 am; Exh. 11.] He changed the filter and fixed the vibrations in ten minutes.

Five of the work orders instructed the technician to change the filters. A few weeks later, the inspection found that all of the filters were still dirty. [Exhs. 1-12 to 1-20.] Some of the work areas had not been cleaned of debris or used parts. [Exhs. 1-12, 1-14.] One work site had a large hole in the wall that had not been noted on the work order or fixed, as required by work rules. [Benavidez, 8/28/14, 11:06 am; Exh. 1-13.] In another, the filters were changed but not dated, and the work consumed an hour instead of the expected 30 minutes. [Exh. 1-23.] Appellant noted on two work orders that the work was not done because "no access, furniture". The next day, another employee was able to change the filters by getting to his knees. [Exhs. 1-26 - 1-28, 2-7.]
The last work order in the audit recorded Appellant's routine equipment checks, which must be performed three times a week. [Martinez testimony, 8/11/14, 11:03 am.] Appellant's records for three weeks in January indicate that he performed the equipment checks twice during the first two weeks, and not at all during the third week. [Exh. 1-21, 1-22.]

Around the time of the audit, Latona received a report that a courtroom clerk had complained that Appellant refused to change filters in the clerk's office and Courtroom 105 because it was blocked by furniture. Maintenance Technician Daniel Garcia went to the courtroom the next day, and found only a chalkboard on rollers. He shifted the board and changed the filters. [Latona, 8/11/14.] These two work orders were also included in the disciplinary letter. [Exh. 2-6, 2-7; 1-26 to 1-28.]

Appellant testified that he was hired in 2003 as a Site Engineer to perform energy management and preventive maintenance. He presented as proof his job description, which contains both titles. [Exh. M.] He claims that Williamson assigned him additional duties in 2010 to report shortcomings that he saw and to develop project ideas. [Appellant, 8/11/14, 8:56 am.] Appellant testified that other technicians just put a "band-aid" on HVAC units while doing preventive maintenance, but he had been told to "do it how it should be [done]." [Appellant, 8/11/14, 9:04 am.]

Williamson testified that Appellant's job title was never changed from Master Trades Worker, and his job duty was always the performance of preventive maintenance on HVAC equipment. Appellant's supervisor also testified that Appellant's job title has been and is Master Trades Worker. [Martinez, 8/11/14, 10:23 am.]

In 2012, in response to Appellant's memo to Director Benavidez about energy conservation, Williamson invited Appellant to spend some time with the energy efficiency team after his preventive maintenance work was done. [Williamson, 8/28/14, 10:36 am.] The team's purpose was to implement the energy audit by developing sustainability projects. Appellant did not attend meetings because he believed it had finished making the decisions in which he had an interest.

Appellant presented testimony through cross-examination that the equipment numbers on the work orders did not always match the numbers on the HVAC units, making it hard for him to find the units listed on the work orders. [Martinez, 8/11/14, 11:42 am.] However, he did not recall whether that occurred in any of the ten work orders covered by the audit. Appellant did not report any discrepancies in equipment numbers to his supervisor, and his notes on all twelve work orders indicate that he found the equipment in question. [Exh. 1-10 to 1-28.] Williamson testified that the Agency had reached 95% accuracy in its equipment numbers by the time of Appellant's audit in February, 2014. [Williamson, 8/28/14, 10:32 am.]

After the inspections, supervisor Martinez accompanied Appellant to the HVAC unit at the Office of Energy Management, which had a large hole stuffed with insulation in the wall where the pipe emerged. [Exh. 1-13.] Appellant told him that he did not work on that unit, but could not recall the location of the one he had serviced. [Martinez, 8/11/14, 11:44 am.]

2. Evidence related to whistleblower claim

On Feb. 19, 2014, Appellant emailed Director Benavidez to report that a long-broken HVAC in the Police Administration Building (PAB) was costing taxpayers substantial amounts of money, "as we're most likely utilizing full cooling in winter months to compensate for this out of
control (heating) there." He reported that despite this waste, he was being instructed not to fix it. [Exh. D.] Less than a month later, he emailed Chief Financial Officer (CFO) Cary Kennedy to complain of waste and mismanagement at Facilities Management. Specifically, Appellant stated that PAB's broken HVAC unit caused $6,000 worth of flood damage in Dec., 2013, and another $12,000 a month to run both heat and air conditioning during the winter. Appellant alleged that the Agency's failure to spend $6,000 to control the chilled water loop violated the Fiscal Accountability Rules, the Building Code, and the energy-saving guidelines in Executive Orders 72 and 123. [Exh. L.]

The very day of Appellant's email, Martinez conducted audits of Appellant's work orders. Appellant argues that the timing indicates the Agency was motivated by a desire to retaliate against him for his report of waste and mismanagement. He testified that the CFO must have talked to Superintendant Latona about his whistleblower report. However, Williamson ordered the audits, and did so a month before his communication to the CFO. [Williamson, 8/11/14, 4:12 pm.]

The Agency Manager and decision-maker, Ms. Benavidez, admitted she was aware of Appellant's previous complaints about management bullying and failure to implement energy conservation measures. She denied however that she knew of Appellant's letter to the CFO until August 2014, a few weeks prior to the hearing in this appeal. [Benavidez, 8/28/14, 10:33 am.] Williamson too testified that he did not learn of Appellant's letter to Ms. Kennedy until just before this hearing. [Williamson, 8/28/14, 10:33 am.]

3. Penalty determination

Director Benavidez delegates most disciplinary decisions to Williamson, but reserves for herself the decision of whether an employee is to be terminated. She considers that the end of a city career has such serious consequences for an employee that it deserves a separate determination by the head of the Agency before that penalty is imposed. Thus, in this case, Williamson conducted the pre-disciplinary meeting and submitted his recommended findings to Benavidez for the final decisions on rule violations and penalty.

Benavidez independently found that the Agency had failed to prove several allegations. The rejected charges included misuse of his computer and alteration of equipment settings at the PAB, as alleged in the pre-disciplinary letter. [Exh. 1-6.] She did find that Appellant violated the above six disciplinary rules based on her review of the facts surrounding the work orders. Benavidez concluded that Appellant had either not done the work at all, did the minimum and left inadequate notes for EAM tracking, or misrepresented his time and work. She considered the length of Appellant's work experience and his recent receipt of intensive coaching, counseling, and discipline on similar issues. [Exhs. 3-5.] She also took into account Appellant's demonstrated disinterest in preventive maintenance after having been told repeatedly that the latter was his job. Most importantly, Benavidez considered Appellant's statements showing that he would not obey orders that he disagrees with. When Superintendant Latona instructed him to remove programming that was shutting a controller down, he told his supervisor that he didn't care what Latona said. Williamson and Martinez recommended termination based on their observation that Appellant could do the job, as shown by his compliance when he was being closely supervised. However, as soon as that supervision ceased, they noticed that performance problems recurred. Benavidez concluded that Appellant's performance could not be corrected by further progressive discipline because Appellant did not desire to perform the job assigned by the Agency. [Benavidez, 8/28/14, 11:26 am.]
IV. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and that dismissal was within the range of discipline that can be imposed under the circumstances. In re Roberts, 40-10, 9 (11/15/2010); see also Department of Institutions v. Kinchen, 886 P.2d 700, 707 (1994). As “the proponent of an order” in his whistleblower claim, Appellant has the burden to prove that claim by a preponderance of the evidence. Velasquez v. Dept. of Higher Education, 93 P.3d 540, 542 (Colo.App. 2003), citing C.R.S. § 24-4-105(7).

A. VIOLATION OF DISCIPLINARY RULES

1. Neglect of duty under CSR § 16-60 A.

Neglect of duty is proven by substantial evidence that an employee failed to perform a job duty he knew he was obligated to perform. In re Serna, CSB 39-12, 3-4 (2/28/14), citing In re Campos, CSB 56-08 {6/18/09).

The Agency claims that Appellant neglected his duty when he did not change the HVAC filters in six of the audited assignments, failed to include notes of anything unusual at the OEM work site, and failed to perform his regular rounds. Based on her review of the facts and work orders, Benavidez believed Appellant was well aware of what was expected of him. [Benavidez, 8/28/14, 11:04 am.] In one work order, Appellant noted “no access, furniture”, although the next day only a computer tower was found in front of the unit. [Exhs. 1-12 to 1-28.] Appellant did not address these allegations during the disciplinary process.

Appellant does not contest the charge that he did not change the filters in the work orders noted in the random audit. He asked questions related to a possible argument that he could not find the work sites, or that they were not sufficiently dirty to warrant a change. However, he presented no evidence in support of those arguments. In further support of the Agency’s position, it is not disputed that filters were to be changed on a schedule according to manufacturers’ instructions, not based on their appearance. Moreover, the pictures show without a doubt that the filters in question were much too dirty a few weeks after Appellant’s service call to have been changed under the schedule. [Exhs. 1-11, 1-15, 1-18, 1-20.] I find that Appellant established Appellant’s failure to change the filters constituted neglect of duty.

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

Carelessness is proven by work performance conducted in an unsatisfactory manner. In re Gomez, CSA 02-12, 3 (5/14/12). Benavidez based her finding that Appellant violated this rule on Appellant’s failure to clean the work sites, change filters, and fix vibrations while performing preventive maintenance. [Benavidez, 8/28/14, 11:07 am; Exhs. 1-10, 1-12, 1-14, 1-18, 1-20.] I find that Appellant established Appellant’s failure to change the filters constituted neglect of duty.

The Agency submitted testimony and exhibits showing that Appellant did not clean his work site on at least one occasion covered by the audit. [Martinez. 10:42; Exh. 1-12.] As found above, Appellant did not complete the work ordered in eight assignments, and did not fix the vibration in the Judge’s HVAC unit in another. Appellant concedes that the work orders list the duties to be performed at each site, and the exhibits demonstrate that all work listed was not completed. The evidence thus shows Appellant was careless in his performance of the work orders, in violation of this rule.
3. **Falsification of records related to official duties under CSR § 16-60 E.**

Director Benavidez relied on two types of conduct in determining that Appellant falsified records: 1) the filters were dirty, yet Appellant reported them clean [Exhs. 1-10 to 1-20]; and 2) Appellant’s notes showed he did not do the work on three work orders, yet reported a substantial amount of work hours [Exhs. 1-10, 1-26, 1-27]. In one such work order, Appellant reported 1.25 work hours, although he performed no work. [Exh. 1-10; Benavidez, 8/28/14, 11:09.]

At hearing, Appellant did not address this allegation. The only evidence presented by either side was that of Appellant’s notes on his work orders. In the majority of the orders audited, Appellant affirmatively stated the filters were “clean.” The pictures taken a few weeks later show they were very dark in all but one instance. In the sole exception, the filter was more dark than light. [Exh. 1-18.]

Ms. Benavidez found that Appellant’s reports of work time were also falsehoods. The most serious example was his report of 1.25 hours where no work was done. In another four orders, Appellant reported up to the estimated time for completing the job, although the pictures showed the filter had not been changed. [Exhs. 1-14, 1-19, 1-26, 1-27.]

At the very least, Appellant’s statements on his work records were incorrect. The job policies and procedures are unambiguous about the obligation to change filters on schedule. The requirement to track time on each work order was a practice of long standing. Appellant had several years of experience on the job, and was given frequent coaching about his job duties by his supervisors. Appellant conceded that he was aware of the importance of accuracy on his reports.

In the absence of any evidence from Appellant about these demonstrably inaccurate statements, I must evaluate whether the circumstances support inadvertence or falsehood. I rely on the pictures in finding that his statements that the filters were clean were intended to mislead the Agency that the work had been done. As to work hours, I find a written statement that 1.25 hours of time was spent on a job when no work was done is not believable on its face. Excessive time was also reported in three other orders where no work was actually performed. [Exhs. 1-10, 1-12, 1-14, 1-19.]

Based on the totality of the circumstances related to the work orders, I find that the Appellant falsified records related to official duties, in violation of this rule.

4. **Failure to comply with lawful orders under CSR § 16-60 J.**

A violation of this rule requires proof that a supervisor communicated a reasonable order, and an employee violated that order under circumstances demonstrating willfulness. In re Mounjim, CSB 87-07 1/8/09. The nature of the conduct in question can support a finding of willfulness. In re Dineen, CSB 56-11, 3 [12/20/12].

Benavidez found that Appellant willfully refused to perform the tasks on the work order, in violation of this rule. However, the type of misconduct targeted by this rule is wholly different in nature from a mere failure to perform job duties. Knowing disobedience to an order indicates an intent to refuse the authority of the supervisor to direct the work, a much more serious offense than mere neglect. A supervisor may issue an order in any words that would convey to a reasonable employee that the conduct at issue is mandatory.
A work assignment is general in nature, and occurs in the ordinary course of a person's duties. In contrast, an order is specific. An employee must have some notice that a supervisor's direction is intended as a direct order of specific behavior. Without notice of that fact, we cannot infer the employee intended to refuse that order. If this rule was interpreted broadly to prohibit any neglect of duty as a failure to comply with an order, the rules would merge into one. Statutory language must be presumed to mean something, and a broad interpretation of this rule is inconsistent with that presumption. Colorado Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., 109 P.32 585 (Colo. 2005.)

Here, Appellant was clearly advised that his duties consisted primarily of completing his assigned work orders. While his PIP allowed him to engage in energy experiments or research with supervisor approval and after his preventative maintenance work was completed, it went no further. The evidence does not support a finding that Appellant engaged in experiments in violation of these restrictions, or that his failure to clean the filters was a refusal to obey an order.

In any event, the rule also prohibits a failure to do assigned work which the employee is capable of performing. Benavidez testified that she also based her finding of violation on the fact that Appellant failed to service the equipment as required by the work orders, including changing the filters as directed. [Benavidez, 8/28/14, 11:12 am.] The evidence indicated that Appellant failed to change filters on eight occasions, failed to fix vibrations in one unit, neglected to clean up his work area, and made inadequate notes on his work orders. That evidence supports a finding that Appellant violated this rule by not performing the tasks assigned in the work orders.

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

A violation of this rule requires proof that an agency established a performance standard, clearly communicated it to the employee, and the employee failed to meet that standard. In re Rodriguez, CSA 12-10, 9 (10/22/10).

The termination letter references Appellant's 2013 Performance Enhancement Plan (PEP) in support of the performance standard that building equipment must be maintained according to manufacturers' recommendations. [Exh. 2-2.] While general statements of duties in job specifications are not enforceable as performance standards (In re Gutierrez, CSA 65-11, 6 (8/28/12). Appellant's PEP is specific: "complete 95% of preventive maintenance within assigned timeframe in accordance with the manufacturers and City standards." He was by that language given notice of the standards to which he would be held accountable.

The evidence clearly showed that the Agency intended to strictly enforce its requirement that Appellant change HVAC filters every six months, as directed in his work orders. [Exh. 5.] It is undisputed that Appellant met that standard in less than 50% of the work orders reviewed. [Exh. 7; Macieyovski, 8/11/14, 9:12 am.] Therefore, the Agency proven that Appellant's performance violated its established standards of performance, in violation of this rule.

6. Failure to observe departmental regulations under CSR § 16-60 L.

An agency's written policies are enforceable under this rule if they are clear, reasonable, and uniformly enforced. In re Leslie, CSA 10-11, 11 (12/5/11). This Agency cites to
the INFOR EAM Facilities Model of Best Practices requiring employees to give preventive maintenance a priority over "special energy savings work". [Exh. 2-2, 2-3.] Administrative policies direct employees to keep their work sites clean and use care in handling city equipment and tools. [Exh. 6-7.]

The first allegation is that Appellant engaged in special energy projects without permission, thus neglecting his preventive maintenance duties. Benavidez considered the facts surrounding the claim that Appellant modified settings in the PAB, and rejected it. For the same reason, and because no evidence was presented at hearing to support this allegation, I find that the Agency did not establish a violation on this specific basis.

Next, the Agency presented evidence, undisputed by Appellant, that one audited work site was left dirty and a large hole in the wall stuffed with insulation had not been repaired. [Martinez, 8/11/14, 10:42 am; Exhs. 1-11, 1-12.] While Appellant claimed that the hole could have been there for the past ten to fifteen years, he presented no proof of that. I find it unlikely that the matter was ignored for years, given the Agency's six-month preventive maintenance regimen and its policy to note needed repairs for the INFOR EAM database. In any event, Appellant failed to prove that others were not disciplined for similar lapses. The evidence showed that Appellant failed to follow the Agency's written policy to keep his work site clean, in violation of this rule.

B. DEGREE OF PENALTY

Appellant does not directly deny the underlying performance issues proven in support of the discipline, but contends that termination was too harsh for the misconduct at issue. The Agency counters that it followed the city's progressive discipline policy by increasing discipline for similar conduct in order to provide deterrence to future misconduct, in accordance with CSR § 16-20. Appellant has three recent disciplinary actions, including a five-day suspension for, among other violations, failure to obey a supervisor's order, and an eight-day suspension for uniform violations. [Exh. 4-1, 1-7.] The Agency Director, Facilities Manager and Appellant's supervisor all agreed that they had done all they could do to coach, correct and encourage Appellant, and that nothing short of termination would bring his performance into compliance with the needed standards.

Under the circumstances presented, including the Agency's continued attempts to improve his performance just before the random audit, I find an administrator could reasonably conclude that no lesser discipline than termination could achieve the ends of discipline.

C. WHISTLEBLOWER CLAIM

The city's whistleblower ordinance prohibits retaliation against an employee on account of an employee's disclosure of official misconduct. Official misconduct is an act or omission that is: 1) a violation of law, rule, executive order or ethical standards; 2) a waste of city resources; or 3) an abuse of official authority. In re Wehmhoefer, CSA 02-08, 4-5 2/14/08); D.R.M.C. § 2-107(d).

Appellant claims that the timing of the random audits at the same time as his email to Ms. Benavidez complaining of waste of taxpayers' funds was too close to be mere coincidence. A few weeks later, he also complained to Chief Financial Officer Cary Kennedy about much the same matter: waste and mismanagement. A month thereafter, he was fired. In essence, Appellant argues that the Agency's intent can be read by the speed of its action against him.
An adverse action that occurs right after a protected activity is some evidence of an intent to retaliate for that protected activity. See Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001). On the other hand, taking a protected activity is no shield against legitimate personnel actions. Coleman v. District of Columbia, 893 F. Supp. 2d 84, 102-03 (D.D.C. 2012). Other factors must be evaluated, including whether the discipline was supported by good cause, was not unduly harsh in light of the seriousness of the conduct and compared to actions taken against similarly situated employees, and was based on believable evidence from which a reasonable administrator would take such action.

It is noteworthy that Williamson's order to Martinez to conduct random audits actually occurred a week before Appellant's email to Benavidez, Appellant's claimed protected activity. In addition, both Williamson and Benavidez testified that they were unaware of the email to the CFO until three months after the termination letter was issued. See In re Norman-Curry, CSB 28-07, 50-08, 2 (9/3/09). Finally, Appellant presented no evidence that contradicted the essential facts in the disciplinary letter. The Agency's reasons for imposing the most severe discipline are supported by Appellant's employment and disciplinary history, and the Agency's substantial efforts to improve his performance, to no avail. On this evidence, the Agency's conclusion that further efforts would be useless was not unreasonable. I find no circumstantial or other evidence that supports a finding that the Agency was motivated by a desire to punish Appellant for his report of waste and mismanagement.

Order

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered as follows:

1. The Agency's disciplinary action imposed on April 22, 2014 is AFFIRMED.

2. Appellant's whistleblower claim is DISMISSED as unproven at hearing.

Dated this October 13, 2014.

Valerie McNaughton
Career Service Hearing Officer