HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 26-16

DECISION AND ORDER

FIDEL ROMERO, 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 Aug. 11, 2016 before Hearing Officer Valerie McNaughton. Appellant represented himself. Assistant City Attorney Jessica Allen appeared for the Agency, and Reza Kazemian served as Agency advisory witness. Christopher Gallegos and Reza Kazemian testified for the Agency, and Appellant testified on his own behalf.

I. STATEMENT OF THE APPEAL

Appellant Fidel Romero challenges his April 26, 2016 dismissal from the position of Senior Utility Worker (SUW) for the Department of Public Works Wastewater Management Division. He also raised a claim that the dismissal constituted disability discrimination. The parties stipulated to the admission of Exhs. 1 – 5.

II. FINDINGS OF FACT

At the commencement of the hearing, the parties stipulated to many of the facts found in the disciplinary letter, including the following: Appellant was first employed by the City in 2012, and began as a Senior Utility Worker with the Wastewater Division on July 7, 2014. His duties included assembling equipment for the two-person truck, working on sewer and storm drainage equipment, and filling in as needed for equipment operator specialists.

The parties also stipulated that Appellant was terminated for asserted violation of attendance rules on three occasions in January and February, 2016. He admitted the following facts regarding those dates: On Jan. 13th, he called his supervisor Christopher Gallegos, to inform him that he was sick and would not be at work. On Jan. 25, he called to say he was running late, and arrived 20 minutes after the start of his shift. On Monday, Feb. 8th, the day after the Denver Broncos played in the Super Bowl, Appellant was a no-call, no-show for his shift. Appellant's stipulated disciplinary history includes a verbal reprimand on Sept. 28, 2015, a written reprimand on Nov. 6, 2015, and a temporary reduction in pay on Dec. 28, 2015, all of which were for attendance issues.

Operations Supervisor Christopher Gallegos testified that the morning work shift for sanitary and storm sewers begins at 6:30 am, and the two-person crew of driver and

helper is to leave the yard by 7 am. The Equipment Operator Specialist is the driver, whose duties include inspecting the truck and ensuring it is in operating order before leaving the yard. Appellant's first job as helper is to assemble all the equipment needed for the day's scheduled assignments. Prompt arrival is necessary to complete preparatory work and permit the crew to leave on time. A day shortened by tardiness can affect the crew's ability to finish each assignment in the allotted number of minutes.

Gallegos supervised Appellant for two years, absent eight months during which Appellant was on light duty because of an injury to his hand. Upon his return, Gallegos recalled that Appellant arrived late on several occasions. Gallegos counseled him that he needed to arrive on time because it was affecting crew morale. Gallegos also emphasized punctuality during staff meetings. During the fall of 2015, Appellant was disciplined three times for tardiness and unauthorized leave. After each incident, Appellant was told that his late arrivals were creating additional burdens on crew members and negatively affecting their productivity. The last such incident was Dec. 28, 2015, and resulted in a temporary reduction in pay for eight pay periods, the equivalent of about four months. [Gallegos, 9:05 am; Exhs. 2, 3.]

The first of the three incidents supporting the current discipline occurred on Jan. 13, 2016, when Appellant called his supervisor to inform him he was sick and would not be in. Gallegos told him he had no paid time off (PTO), and it would be counted as an unauthorized absence. However, the Kronos records show that Appellant was credited with eight hours of PTO for that day. [Exh. 5-6.] Next, Appellant called Gallegos on Jan. 25, 2016, to let him know he was running late. Appellant arrived at 6:50 am, twenty minutes after the start of the shift.

The third incident occurred on Feb. 8, 2016. The day before, Sunday, Feb. 7, 2016, Appellant and Gallegos were texting each other about the Super Bowl game. Gallegos had bet Appellant that the Broncos would beat the Carolina Panthers that day. When he lost that bet, Appellant texted Gallegos that he would not be able to pay him at work because he was going to take the day off. Gallegos replied, "I'm already off it don't matter." Appellant asked, "So I still have to call in?" Gallegos answered, "Yep." Appellant commented in response, "Wtf Chris can you have my back for once god damn." [Hearing stipulations, 8:49 am; Exh. 1-2.]

Division Director Reza Kazemian was the decision-maker in this case, as well as for the previous disciplinary actions imposed in the fall of 2015. Kazemian testified that he and Gallegos were attempting to change Appellant's behavior by counseling him and imposing progressively higher penalties in order to emphasize the seriousness with which the Agency treats punctuality for work crews. The Agency has annual and daily goals for maintaining and cleaning its jet units, catch basins and sanitary pipe, which are based on the results of a time-and-motion study establishing average times for each task performed on manholes and storm drains. Kazemian noted that one late-arriving employee can idle a team, forcing a supervisor to re-work the day's schedule in order to make the best use of personnel and resources already at the job site.

Appellant testified that his problems at work began in earnest upon his return from light duty on Sept. 1, 2015. He came back without taking a medically recommended additional two weeks of recovery because some employees told him management would try to fire him if he did not come back soon. [Appellant, 9:45 am.] On his first day

back, one co-worker greeted Appellant with the words, "[y]ou still work here?" Appellant believed that kind of negative comment was making the work atmosphere hostile to him, but admitted he did not raise that issue to either his supervisor or the Division Director. Thereafter, he was late because of a flat tire, and received a verbal reprimand. On another day, he was two minutes late because of travel delays caused by two inches of snow.

Appellant is the father of a three-year-old son with a health condition that sometimes affects the child's breathing. Appellant testified that Gallegos has approved time off for Appellant "multiple times" to take care of his son due to health emergencies, and admitted he had a good relationship with Gallegos before his light duty. [Appellant, 10:18 am.] Thereafter, Appellant believed his supervisor did not like him because he took more time off than necessary because of the injury.

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 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 prove his discrimination claim. In re Diaz, 72-06A (CSB 9/20/07).

A. VIOLATION OF DISCIPLINARY RULES

1. Neglect of duty and careless performance of duties, CSR § 16-60 A and B.[1]

Neglect requires proof of a complete failure to perform a known duty, rather than an inadequate or delayed performance of that duty. In re Gutierrez, CSB 65-11, n1 (4/4/13). The evidence does not establish that any duty was left unperformed because of the two absences and one tardy arrival alleged here. A violation of this rule has therefore not been proven.

Carelessness is established when an employee performs a duty poorly. *See* In re Leslie, CSA 10-11, 8 (12/5/11). The disciplinary letter does not allege that Appellant performed any duty inadequately; in fact, the Agency concedes that Appellant was a very good employee. The evidence did not establish carelessness in violation of this rule.

2. Failing to comply with orders, CSR § 16-60 J.

This rule contains two types of violations: failure to comply with a reasonable order, and failure to perform assigned work an employee is capable of performing. In re Abbey, CSA 99-09, 8 (8/9/10).

Appellant stipulated that Appellant's supervisor told him he needed to call in if he intended to be absent on Feb. 8th. Appellant's texted reaction to this instruction

[1] CSR Rule 16 was amended on Feb. 12, 2016. The former version of Rule 16 is applicable in this appeal, since the conduct on which it is based occurred prior to that amendment. Am. Comp. Ins. Co. v. McBride, 107 P.3d 973, 977 (Colo.App.2004.)

was, "wtf Chris can you have my back for once god damn." Gallegos testified that Appellant asked him, "What if I tell Lupe that I thought I put in for it, and it was approved?" Gallegos replied, "Do what you want. I'm not going to lie." In spite of that exchange, Appellant failed to either call in or report to work the following day. [Gallegos, 9:11 am.] Appellant testified that he was drinking during the Super Bowl while texting his boss, and assumed in that state that he was asking Gallegos for the time off. However, the text itself indicates that he understood Gallegos' instruction, but resented it. He also explored whether his boss would support him in giving a false explanation for his absence, and received no encouragement to do so. Appellant failed to either call in or report to work, despite his supervisor's instruction and his own knowledge of the enforced attendance policies.

The evidence proved that Appellant was ordered to call in if he intended to take the day off after the Broncos ended up unexpectedly - at least for Appellant – winning the Super Bowl. Appellant conceded that employees were invited the previous Friday to ask for the Monday after Super Bowl off if they wanted it. Appellant testified that the line to request the day off was long, and he believed the fill-in supervisor may have implied that "it will all get dealt with" when Gallegos returned to work. Appellant did not rebut Gallegos' testimony that Appellant asked him, "what if I tell Lupe I thought I put in for it?", or that Gallegos did not agree to support him in that plan. Thus, Appellant could not have been under any misapprehension that his absence had been approved. I find that Appellant failed to comply with his supervisor's clear and reasonable instruction, reinforced by frequent counseling and policy, that he was to call in or appear for work on Feb. 8, 2016. The Agency therefore proved a violation of the first part of this rule.

3. Reporting to work after the scheduled start time of the shift, CRS § 16-60 T.

Appellant stipulated that he arrived twenty minutes late on Jan. 25, 2016. Gallegos testified that one or two late arrivals can be excused, but that he warned Appellant after this incident, "You have already been disciplined. This is becoming a problem. Please come in on time; I don't want this to go any further." [Gallegos, 9:10 am.] The Agency proved that Appellant violated this rule based on his Jan. 25th tardiness.

4. Appropriateness of penalty imposed

Before the three attendance problems included in this discipline, Appellant had received three other disciplinary actions for arriving late on Sept. 28, Oct. 29, Nov. 9 and 30, 2015. [Exh. 3.] He had been counseled on several occasions about the importance of timely arrival both to the morale of the team and its achievement of the annual objectively established production goals. The efforts of his manager and supervisor to change his behavior by coaching and progressive discipline did not succeed in correcting the problem.

Appellant's testimony indicated that he was a good employee who sometimes had reasonable excuses for his tardiness or failure to call in, such as weather delays or a lost phone. He believed that the Agency began to see him in a negative light after his hand injury. The only evidence he offered on that issue was unattributed comments by co-workers. Kazemian and Gallegos both credibly testified that they had little

knowledge of his injury, and no interest in holding it against him. Their only goal was to ensure he arrived on time so the work team could leave on time and get the work done.

As found above, I do not conclude that Appellant violated any attendance rule on Jan. 13, 2016. The official Kronos time records show that he was given eight hours of paid time off on that date, and the Agency admitted he called in on time to request that leave based on illness. [Exh. 5-6.] The Agency's claim that he had no paid leave was effectively contradicted by that exhibit.

However, I have also found that Appellant was late on Jan. 25, 2016, and that he inexcusably failed to call in or report to work on Feb. 8, 2016 after being instructed by his supervisor to do one or the other. His text messages amply demonstrated that he understood the order. Even without the Jan. 13th incident, the Agency reasonably concluded, consistent with the Career Service Rules, that Appellant's continued attendance issues could not be addressed by any less serious discipline than termination.

B. DISABILITY DISCRIMINATION CLAIM

On his appeal form, Appellant claimed his termination constituted disability discrimination based on a broken hand. Appellant testified that his hand was injured in late 2014 or early 2015, leading to eight months of light duty. He was returned to full duty on Sept. 1, 2015, with no requested accommodation for any lingering effects of the injury. However, he perceived that he was "under the microscope" after his return because of his supervisors' belief that a hand injury should be resolved with three months' recovery. That impression was based on statements made to him by other employees that he was now on the "bad list." Appellant did not present any direct evidence of those statements, and admitted that none of the attendance incidents leading to this discipline were caused by either his hand injury or his son's health condition.

The Agency rebutted the suggestion that Appellant was on a "bad list" by the testimony of Kazemian and Gallegos that they were not influenced by Appellant's hand injury, and were not aware he sought any accommodation for it. Appellant presented no evidence in support of his claim that he had a disability, or that the termination was motivated by it. Thus, the evidence did not establish that the discipline was motivated by disability discrimination.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency decision imposed on April 26, 2016 is affirmed.

Dated this 23rd day of September, 2016.

Valerie McNaughton
Career Service Hearing Officer