

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 58-07

DECISION

IN THE MATTER OF THE APPEAL OF:

TIMOTHY SANDROWSKI, Appellant,

vs.

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

The hearing in this appeal was held on Dec. 10 and 28, 2007 before Hearing Officer Valerie McNaughton. Appellant Timothy Sandrowski was present and represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Joseph Rivera. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following order:

I. STATEMENT OF THE CASE

Timothy Sandrowski appeals his dismissal dated Aug. 30, 2007 by the Denver Department of Public Works. Appellant filed a timely appeal of the action on Sept. 6, 2007 pursuant to the jurisdiction provided in the Career Service Rules (CSR) § 19-10 A. 1. a.

The parties stipulated to the admissibility of Exhibits 1 - 21. Exhibits 22, 23 and 25 were admitted during the hearing.

II. ISSUES

The following issues are raised in this appeal:

1. Did the Agency prove by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules, and

2. Was dismissal within the range of discipline that could be imposed by a reasonable administrator?

III. FINDINGS OF FACT

Appellant Timothy Sandrowski has been employed by the City and County of Denver for six and a half years, and was a Crew Supervisor in the Street Maintenance Division for the Department of Public Works at the time of his termination. On August 30, 2007, Appellant was dismissed from his employment based on a traffic accident with injury that occurred on April 4, 2007. [Exh. 8.]

On the day of the accident, Appellant was driving a one-ton pickup truck towing a trailer west on Colfax Avenue in the right lane of that two-lane city arterial. Traffic was moderately heavy because it was lunch hour. As he approached the Downing Street intersection, he noticed a bicyclist in front of him in his lane riding next to the curb. The biker passed three parked cars at meters on the north side of Colfax. Half-way down the block, he moved right and entered a bus lane which ends at the corner of the Downing Street intersection. Across Colfax west of that intersection, there are no parking spaces or bus lane. As a result, Colfax narrows by seven and a half feet, leaving only the two traffic lanes. [Exh. 2.]

Appellant's job duties include "producing computer generated street plans, processing permit requests, setting traffic control devices in the street, and supervision of a small crew to set-up traffic control to maintain safe traffic operations." [Exh. 8-3.] Appellant testified that it is a part of his job as road crew supervisor to know the size and details of city streets in order to create traffic plans that allow city crews to work on streets safely and protected from traffic. He is familiar with the intersection of Colfax and Downing because he grew up in the neighborhood, and he has driven through it many times a day for years. He stated that after the accident he measured the length of the bus lane east of Downing as 193 feet long, and the distance from the west side of Downing to the alley as approximately 173 feet. The sidewalk on the northwest corner of the intersection is ramped at the curb for wheelchairs and strollers. He testified that he observes vehicles turning right onto Downing from the bus lane almost every time he drives past. Short stripes at the end of the bus lane form a right turn lane north to Downing. [Exh. 22.]

When the bicyclist on that day continued riding in the bus lane, Appellant decided that the biker would either turn right onto Downing, a one-way street going north, or ride straight across the intersection onto the ramped sidewalk on the west side of Downing. Appellant moved a little to the left in his lane, and drove by the biker, who was then riding in the bus lane to Appellant's right. Appellant observed while passing the biker that he did not turn, but rode straight across the intersection. Appellant then assumed the biker intended to ride up the ramp to the sidewalk in order to be safe, as there would be little room for the bicyclist to ride beside Appellant's truck and trailer in the narrowed street beyond Downing. [Testimony of Appellant; Exhs. 2, 5-4, 17.]

After Appellant's 50-foot truck and trailer cleared the intersection, he slowed down because of heavier traffic ahead on Colfax Avenue. When he looked in his rear-view mirror, he noticed that the bicyclist had moved into his lane, and was behind the trailer near the right curb. The biker began to wobble, and then fell into the side of the trailer near the back, close to the intersection. Appellant stopped his vehicle and got out to check on the bicyclist. Appellant asked if he was okay, and the biker replied that a bus just hit him. Appellant called his supervisor to report the accident.

A motorist who was following Appellant's truck, Mr. Anton, also stopped to assist. Appellant observed that the bicyclist argued with the police officer and fire department personnel about going to the hospital, and his clothes were dirty and wet. Appellant and Mr. Anton mentioned to each other that they thought the bicyclist was intoxicated. [Exh. 4-4.]

Mr. Anton gave an oral statement to Joseph Rosales, the Agency's safety officer, who testified that Mr. Anton told him the following:

[Mr. Anton] had seen the bicyclist coming to the back end of the street maintenance vehicle. As [the cyclist] was getting closer to the back end of the street maintenance vehicle, [Mr. Anton] noticed that he seemed committed, he wasn't able to maneuver left and right, the lane seemed to narrow . . . The witness [Mr. Anton] was saying that he could see the bicyclist looking like he was starting to have some difficulty maneuvering, that the lane was thinning out or getting tighter for the bicyclist, and suddenly [Mr. Anton] had realized that the [bicyclist] felt committed, and then got caught and fell to the side. . . . He was going forward, he didn't have anywhere else to go, he wasn't going to stop.

[Testimony of Joseph Rosales.]

In his written statement given that same day, Mr. Anton said, "I was traveling W-bound on Colfax and saw a bicyclist swerve into trailer. It appeared to me that the cyclist had nowhere to go but into the curb. It also appeared that the trailer had no room to swerve to traffic in outside lane." [Exh. 4-2.] Mr. Rosales testified that he believed the written and oral statements were consistent.

Denver Police Officer Kevin Smolka arrived at the scene a few minutes after the accident. The bicycle had been placed on the sidewalk, and the city truck and trailer were stopped at the curb about half-way between the alley and the corner of Downing and Colfax, at the location of the two green squares on Exh. 17, which were added to the exhibit by the officer during his testimony. The

officer noted the place where he met Mr. Alexander and Appellant with a red circle on the same exhibit.

The bicyclist introduced himself to the officer as John Alexander. Mr. Alexander told him that he was riding next to the curb when a truck came up alongside him. He then ran out of room and got squeezed. Mr. Alexander told the officer, "[t]his is where it happened". The officer testified that he presumed Mr. Alexander meant that the point of impact occurred close to where they were standing.

Officer Smolka noticed Mr. Alexander was jittery and nervous, and that he had an abrasion on his forehead. The officer talked to him for awhile to persuade him to allow himself to be transported to the hospital to get his head injury checked out. Mr. Alexander expressed reluctance because of his worry about his bicycle. After the officer assured him the bike would also be transported, Mr. Alexander agreed to go. Officer Smolka did not smell alcohol during their interview.

Officer Smolka did not recall at hearing if he asked Appellant where the accident occurred, and he did not take measurements of the truck or street. Based on the bicyclist's statements, Officer Smolka estimated that the accident occurred 150 feet from the Downing intersection, and that Appellant was at fault for passing Mr. Alexander in the same lane occupied by Mr. Alexander. He communicated his conclusions to the second officer at the scene, Officer Brett Lane, who prepared the accident report and concluded the investigation.

Officer Lane arrived after Mr. Alexander had been taken to the hospital and Appellant's truck and trailer had been re-parked in a nearby lot. Based on Officer Smolka's statement to him, Officer Lane estimated the point of impact as 150 feet from the Downing intersection, and recorded that estimate on the traffic accident report. [Exh. 3-2.] Officer Lane testified that he understood the accident to have occurred at the location of the red circle on Exh. 17. The red circle was placed on the exhibit by Officer Smolka to represent the place where Officer Smolka had met Appellant and Mr. Alexander. Officer Lane also testified that he relied on the statements of Officer Smolka and Appellant to conclude that Appellant had passed the biker in the biker's lane of traffic. He stated that Appellant told him he tried to pass the biker on the left, but that while he was going around, the biker got scared, and the truck hit the bicyclist at the rear of the truck. The officer also said Appellant told him the bicyclist appeared nervous and intoxicated. This statement was not included in the accident report. [Exh. 3.]

Officer Lane concluded that Appellant was at fault in the accident based on his finding that Appellant passed the bicyclist as they were both traveling in the same lane on the west side of Colfax, and that Appellant struck the bike when he attempted to merge back into that lane. He testified that his conclusion would be different if Appellant had passed the bicyclist in the intersection. The

officer also testified that Appellant could have passed the bicyclist legally if the latter were in the bus lane at the time, as the bus lane is considered a lane of traffic for that purpose.

No traffic citation was issued at that time due to the policy between the city and the Denver Police Department to have the Denver City Attorney's Office review the facts involving accidents with city vehicles prior to issuance of a ticket. A citation for overtaking a vehicle on the left was ultimately issued to Appellant in September 2007. [Exh. 5.] There was no evidence presented about the outcome of that citation.

Appellant's supervisor, Operations Supervisor Douglas Legg, arrived shortly after Appellant informed him of the accident by telephone. He testified that Appellant told him he first saw the bicyclist when he was approaching Downing, and believed the biker was going to turn north on Downing. Mr. Legg stated that Appellant passed the bicyclist in the intersection at the point Mr. Legg marked with an "S" on Exh. 23. Appellant was in the right side travel lane, and the bicyclist was in the bus lane. Mr. Legg concluded that Appellant was at fault because he passed the biker while they were both in the same lane, as a bus lane is not considered a separate lane. Mr. Legg recalled that the front of the city truck was parked as shown on Exh. 23. At that location, the truck would have blocked the entrance to the alley west of Downing Street.

Mr. Legg decided that Appellant violated Agency safety regulations by having a preventable accident; that is, an accident caused by Appellant's failure to be extra cautious and go above and beyond to "identify potential hazards" and take "extra precautions when operating city vehicles", as required by Appellant's Performance Enhancement Program Review (PEPR). [Exh. 1-4.] Mr. Legg believed that Appellant could have complied with that standard by staying behind the bicyclist until he was dedicated to a different path, or changing lanes before passing the cyclist. He stated that assuming the behavior of other traffic is a violation of Agency safety regulations. Mr. Legg also concluded that Appellant had taken the right of way from the bicycle, since he believed Appellant passed the bicyclist in the same lane in the intersection, in violation of Colorado laws that treat bicyclists as any other vehicle. [Exh. 20, D.R.M.C. 54-564; Exh. 21, D.R.M.C. 54-565.]

Mr. Legg found that Appellant also violated the Agency's safety rules as stated in his PEPR by not identifying a potential hazard - the cyclist riding down Colfax ahead of him in his lane - and not taking extra precautions to prevent an accident as he passed him. [Exh. 1-4.] Mr. Legg based that conclusion on his finding that Appellant's trailer collided with the bicycle west of Downing when Appellant attempted to merge back into the lane they were sharing. Mr. Legg testified he did not know exactly where west of Downing the collision occurred.

Senior Safety Analyst Joseph Rosales performed the investigation into the accident. He teaches defensive driving, accident prevention and many other courses to Agency employees. In those courses, he instructs them not to assume the behavior of other persons, but to keep any potential hazard in front of their vehicle until sure of the direction or action the other person will take. He also advises city drivers not to look in the rear view mirror, since that may cause a front-end collision by failure to react to hazards in front of the vehicle.

Mr. Rosales interviewed Appellant, who told him he passed the biker in the intersection. Based on that statement, Mr. Rosales initially believed the accident was not Appellant's fault. Later, after reviewing the Vehicle and Property Damage Report prepared by Mr. Legg and Appellant's statement included in the report, Mr. Rosales changed his conclusion about where Appellant passed the bicycle, and his determination of fault. He found that Appellant first saw the bicyclist in the bus lane next to him east of Downing, where the biker was riding behind a bus.¹

Mr. Rosales testified he believed Appellant safely passed the bicyclist east of Downing. The biker then turned into Appellant's lane, and caught up to Appellant west of Downing when Appellant slowed down for heavy traffic ahead. Mr. Rosales found that the bicyclist rode between the trailer and the curb, lost control of the bicycle, and fell into the back right side of the trailer just short of the alley. [Exh. 13.] Mr. Rosales determined based on the police report that the point of impact was 150 feet west of the intersection, just south of a brick wall. During his testimony, he marked that spot with a red triangle on Exhibit 22. Mr. Rosales recalled that Mr. Legg informed him the accident took place back by the alley.

Mr. Rosales stated that the bicyclist could not have been in front of Appellant's truck west of Colfax, since the width of the lane and the city vehicles would have prevented him from riding on the right side of Appellant and reaching the point of impact at the back of the trailer. Appellant's passenger, retired Equipment Operator Jorge Cervantes, told Mr. Rosales he did not see the bicyclist until he fell against the trailer.

Mr. Rosales ultimately found that Appellant violated the Agency's safety rules by assuming that the biker would not move from the bus lane into the right traffic lane, but would ride up the sidewalk or turn right on Downing. By passing the bicyclist in the bus lane, Appellant took the right of way from the bicyclist, Mr. Rosales concluded. He further determined that the accident could have been

¹ Mr. Rosales admitted on cross-examination that Appellant's statement did not mention a bus, and he did not include a bus in his drawing of the accident scene. [Exh. 16.] However, Mr. Rosales testified that the existence or non-existence of a bus in front of the bicyclist would not change his conclusion that Appellant was at fault. [Exh. 4.]

prevented if Appellant would have stayed behind the bicycle and waited to see what direction the biker was going to take. Finally, Mr. Rosales stated that Appellant could have prevented the accident even after the bicyclist caught up with him west of the Downing intersection if he had stopped, let the biker pass him on the right, and kept the biker in front of him thereafter.

Director of Street Maintenance Kelly Duffy testified that she and the Accident Review Committee unanimously voted to find the accident preventable based on the police report's conclusion that Appellant took the right of way from the bicyclist. Ms. Duffy stated Mr. Rosales told her that Appellant passed the bicyclist west of Downing.

After the pre-disciplinary hearing, Ms. Duffy made the decision to terminate Appellant based on her conclusion that Appellant "failed to allow the right of way to the bicyclist. The bicyclist was in front of you, his lane merged and ended, you passed him, he had no place to go, he was forced over and struck by the City trailer." [Exh. 8-4.] Ms. Duffy determined that Appellant violated the law by taking the right of way from the bicyclist, and that termination was appropriate based on the seriousness of the violation and a 2002 30-day suspension for unauthorized absence. [Exh. 10.] Ms. Duffy stated the Agency was required by the principle of progressive discipline to escalate this discipline to termination, since the Agency could impose no more lengthy suspension than 30 days. Appellant's past disciplinary history also included a five-day suspension in 2006 for unauthorized absence. [Exh. 9.]

IV. ANALYSIS

In an appeal of a disciplinary action, the Agency has the burden to prove the action was taken in conformity with Rule 16 of the Career Service Rules, and that the degree of discipline was reasonably related to the seriousness of the offense, taking into consideration the employee's past record. CSR § 16-20.

The discipline in this appeal is based solely on the Agency's conclusion that Appellant's actions on April 4th violated Agency and Career Service Rules. However, the Agency's witnesses gave conflicting evidence about what those actions were, and how they supported its conclusions.

The first conflict in the evidence relates to where the accident occurred. Appellant testified that he passed the bicycle as it entered the intersection, and that the back of the trailer had cleared the intersection before the bicyclist entered the lane and fell into the back of the trailer, several feet west of Downing Street. Appellant measured the distance between Downing Street and the alley west of Downing as about 173 feet. [Testimony of Appellant; Exh. 2.] That dimension appears consistent with the scale printed on the city's aerial GIS photos. [Exhs. 17, 22, 23.]

The Agency's witnesses stated that the point of impact was 150 feet west of Downing Street, and cited the police report as the source of that information. [Testimony of Lane, Legg, and Rosales.] The evidence was clear that this number was based on an estimate by the first officer on the scene, Officer Smolka. He testified that he met Appellant and Mr. Alexander at the location of the red circle on Exh. 17, after both vehicles had moved from the site of the collision. He estimated without measuring that they were about 150' from the Downing Street curb, and that the accident had occurred close to that location. In contrast, Mr. Rosales measured 150 feet from the curb as at the brick wall close to the alley, marked as a red triangle on Exh. 22. The scale of the Agency's maps indicates that the red circle on Exh. 17 is located approximately 85 feet from Downing Street. Officer Lane accepted Officer Smolka's estimate without measuring, and recorded it in the police report. Thereafter, the Agency's investigation and evidence at hearing relied on that number from the police report, without obtaining statements as to the point of impact from any of the eyewitnesses to the collision: Appellant, Mr. Alexander, Mr. Anton, or Mr. Cervantes.

At the hearing, Mr. Legg stated he did not know the point of impact. However, Mr. Rosales testified that Mr. Legg told him the accident occurred back by the alley, and that Mr. Rosales relied on that statement in his investigation. Mr. Rosales placed his mark indicating the point of impact, a red triangle, at 150' west of the Downing Street curb, based upon the map scale. [Exh. 22.] That mark is several feet east of the red circle indicated by the officer on the scene.

Agency Safety Officer Joseph Rosales drew two diagrams of the accident scene. In the first, drawn as a part of the Vehicle and Property Damage Report, the truck and trailer are shown a few feet east of the alley. The point of impact is shown as a large cross at the back right side of the trailer, which appears to be at least the length of the truck and trailer, 50 feet, to the east of the alley. [Exh. 4-3.] The second diagram shows the front of the city truck blocking the alley, with the point of impact about three-quarters of the way from the Downing Street curb to the west side of the alley. [Exh. 16.] If Appellant's measurement of that span, 173 feet, is correct, that would place Mr. Rosales' mark of the accident location, a green number symbol, at about 130 feet from the Downing Street curb. [Exh. 19.]

Appellant was the only eyewitness who testified at the hearing. He stated the accident occurred ten to fifteen feet from the Downing Street curb. His passenger, Jorge Cervantes, testified that he did not see the bicyclist until the accident, which tends to prove the bicyclist was not riding ahead of the truck in the city vehicle's lane. If Mr. Alexander had preceded Appellant into the eleven-foot wide lane west of Downing Street, Appellant and Mr. Cervantes would have noticed him as they followed in a truck with extended mirrors measuring almost eight feet wide, pulling a slightly wider trailer. [Exhs. 11-6, 11-7, 19.] It is undisputed that the bicycle's left handlebar hit the trailer close at the back right

side. [Exhs. 11-4 – 11-6.] Given the width of the city vehicles and the narrowness of the lane, it is unlikely that a bicyclist could maneuver between the trailer and the curb more than a short distance. The evidence of the relative speed and size of the vehicles is consistent with a conclusion that the bicyclist entered Appellant's lane after Appellant did, and caught up to the back right side of the trailer only after Appellant slowed down for heavy traffic ahead.

Officer's Smolka's memory of his meeting place with the parties to the accident is more reliable than his 150' estimate of distance, given the contradiction between that estimate and the distance scale contained on the Agency's GIS maps. It is further corroborated by Appellant's eyewitness testimony that the bicycle fell into the trailer ten to fifteen feet away from the intersection. Mr. Alexander's statement that the accident occurred "here" (i.e., at the red circle on Exh. 17) is improbable given the 50-foot city truck and trailer's need for space to effect a stop after the accident, and is further weakened by his previous erroneous statement that he was hit by a bus. The point of impact must have been east of the place where the parties stopped after the accident, as both vehicles were headed west and Appellant needed space to stop. I find based on Appellant's eyewitness testimony and his knowledge of the intersection that the bike fell into the trailer approximately forty feet west of the Downing Street intersection.

The Agency's evidence was also inconsistent as to where Appellant passed the bicyclist. Both police officers concluded that Appellant passed Mr. Alexander in the same lane west of Downing Street. Ms. Duffy determined that the passing took place west of Downing based on her recollection that Mr. Rosales told her that was where it occurred.

In contrast, Mr. Rosales, the Agency's safety investigator, testified that the bicycle could not have been in front of the city vehicles west of Downing given the respective width of the lane and the truck and trailer. He found that Appellant safely passed the bicyclist in the bus lane east of Downing while the latter was riding down the bus lane behind a bus. Mr. Legg testified that Appellant drove by the biker in the intersection as the biker was next to him in the bus lane.

In spite of these varying findings as to where and how the accident occurred, all of the Agency's witnesses concluded that Appellant was at fault. The police officers and Ms. Duffy, the Agency's decision-maker, found that Appellant took the bicyclist's right of way by passing him in his own lane west of Downing. Mr. Legg concluded that Appellant violated the law by passing Mr. Alexander in the bus lane at the intersection, since he believes the bus lane is part of the adjacent traffic lane. Mr. Rosales concluded Appellant took the biker's

right of way by driving by him in the bus lane east of the intersection, without knowing for certain the direction the latter would take.²

Significantly, Ms. Duffy's conclusion that Appellant passed the bicyclist west of Colfax is inconsistent with the disciplinary letter's finding that Appellant "made the assumption that [the cyclist] was either going to go on to the sidewalk or turn", and its statement that "if you do not know the location of another vehicle on the road, as a City driver, it is your responsibility to find out where the other vehicle is on the road and allow the right-of-way whenever appropriate." [Exh. 8-4.] If Appellant was behind the bicyclist west of Downing Street, Appellant would have known at that point that the biker was neither turning north nor going up the sidewalk ramp at Downing.

The physical facts of the accident make it clear that the bicyclist overtook the trailer, and not the reverse. Appellant entered and cleared the intersection with his 50-foot truck and trailer well before the bicycle. The bicyclist merged left from the bus lane into Appellant's lane west of the intersection, and caught up with the trailer as traffic slowed ahead. He then rode the bicycle to the right between Appellant's trailer and the right curb, lost control of the bike, and fell into the back right side of the trailer. [Exh. 11-4.] Under the circumstances, it cannot be concluded that the bicyclist had the right of way, since Appellant entered the lane well ahead of him.

1. CSR § 16-60 B. Carelessness

An employee violates this rule when he fails to exercise ordinary care in the performance of a job duty. In re Richmond, CSA 18-07, 5 (8/7/07). The Agency based its finding of carelessness on its determination that Appellant failed to drive the city vehicle using ordinary care when he "failed to allow the right of way to the bicyclist. The bicyclist was in front of you, his lane merged and ended, you passed him, he had no place to go, he was forced over and struck by the City trailer." [Exh. 8-4.]

Ms. Duffy testified that the Agency determined Appellant took the right of way from the bicyclist by passing him in the same lane west of Downing, resulting in injury to the bicyclist when he fell into the trailer. She found that Appellant should have either stayed behind the biker or passed him on the left. The evidence clearly demonstrates that Appellant entered the lane west of Downing well before the bicyclist, and therefore Appellant did not pass the bicyclist at that location. Moreover, Mr. Anton's statement shows that Appellant could not have moved to the left lane west of Downing because there was traffic already in that lane. [Exh. 4-2.]

² Officer Lane contradicted both Legg and Rosales by his testimony that Appellant would not be at fault if he passed the biker in the intersection or bus lane.

Mr. Rosales, who investigated the accident for the Agency, determined the facts differently. He concluded that Appellant drove by the biker while the latter was in the bus lane, and that he took the biker's right of way in doing so. Mr. Rosales later admitted that it is possible the bicyclist gave up the right of way when he moved from Appellant's lane to the bus lane. The Agency offered no legal or other support for the argument that a biker in a ten-foot wide bus lane has the right of way in the adjacent traffic lane. I find that the bicyclist did give up the right of way when he moved into the bus lane, and that Appellant had the right of way in the right traffic lane.

The Agency asserts that Appellant should have anticipated the bicyclist's actions which led to the accident. After Appellant drove by, the biker moved back into Appellant's lane, caught up with him, rode his bike between the trailer and the curb, lost control of the bike, and fell into the trailer. Such a maneuver by the bicycle violated the traffic laws requiring that "the driver of a vehicle", including a bicycle, "overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle." [Exhs. 14-2; 20-2; 21-2, D.R.M.C. §§ 54-229; 54-564, 54-565.] The Agency did not establish that Appellant improperly passed the bicyclist east of Downing, or that the rules of the road require a driver to anticipate that other drivers will violate the traffic rules.

Generally speaking . . . a motorist ahead owes no duty to a motorist to the rear except to use the road in the usual way, in keeping with the laws of the road, and until he or she has been made aware of it, by signal or otherwise, the driver has the right to assume either that there is no other vehicle in the close proximity to the rear or that, being there, the driver to the rear had his or her vehicle under such control as not to interfere with the free use of the road in front of and to the side of him or her in any lawful manner.

8 Am. Jur. 2d *Automobiles and Highway Traffic* § 915 (2007).

The Agency also argues that in order to avoid the accident, Appellant could have stayed behind the bicyclist until he got through the intersection, or allowed him to overtake the truck from the right, and thereafter kept the biker in front of him. [Testimony of Mr. Rosales.] The Agency impliedly argues that it was carelessness for Appellant not to take these extra precautions. Given the size of the lanes and vehicles involved, the heavy lunchtime traffic, and the bicyclist's failure to obey the traffic rules, the Agency did not establish that any of the suggested actions would have prevented the bicyclist's impact with the trailer. Appellant operated the city vehicles in accordance with the traffic rules. The accident was caused by the bicyclist's action in overtaking the trailer on the right in Appellant's lane, without sufficient room to safely pass Appellant's vehicles.

A reasonable person following the bicyclist would not have interpreted his actions as creating a hazard on the road at the time Appellant made his decision to drive by the bicyclist. Appellant could not have reasonably anticipated or prevented the bicyclist's subsequent illegal and dangerous actions. Moreover, a reasonable driver of a 50-foot truck and trailer on a busy city street would not determine that staying behind a bicyclist riding on the side of the road was exercising ordinary care.

The Agency claims that the narrowing of Colfax is a special circumstance that should have alerted Appellant to the need to make sure of the bicyclist's direction before driving by him. However, the evidence shows that the right lane used by Appellant was eight feet wide east of the Downing intersection, and widened to over eleven feet west of the intersection. It did not narrow until the alley 150 feet west of the intersection, and then by a mere two inches. [Testimony of Joseph Rosales; Exh. 16.] As the accident occurred within 20 feet west of the intersection, the slight narrowing close to the alley had no effect on the actions of the bicyclist. Since the bus lane ended in turn markings, Appellant acted reasonably in assuming the bicyclist would turn north on Downing. In any event, the Agency failed to establish that the bus lane should have been considered part of Appellant's traffic lane, in light of Officer Lane's more authoritative testimony to the contrary.

There is no evidence that the accident could have been prevented if Appellant drove behind the bicycle, or that Appellant had been instructed never to pass or drive past bicycles in a parallel lane. Therefore, the Agency did not establish that Appellant failed to exercise ordinary care in the manner in which he operated the city vehicles.

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

A violation of this rule is proven by 1) a prior-established standard, such as one would find in a performance evaluation, classification description, or in agency or division policies and procedures, 2) clear communication of that standard to the employee, and 3) employee's failure to meet that standard. In re Simpleman, CSA 05-06, 7 (5/16/06); Pabst v. Industrial Claim Appeals Office, 833 P.2d 64, 64-65 (Colo. App. 1992).

The Agency alleged that Appellant had an accident when a bicycle fell into the right side of his trailer near the back. It argued that Appellant failed to comply with statements made by the Safety Instructor during defensive driving training that drivers should keep any potential hazard in front of them, and look forward rather than consult the rear-view mirror. [Testimony of Mr. Rosales.] The disciplinary letter quoted Appellant's PEPR as requiring that Appellant take action to prevent injury or harm to others and city equipment, and observe city and agency safety rules and procedures. [Exh. 8-1, 8-2.]

The Agency failed to establish that Appellant was given notice that the statements made in the safety class constituted an established standard of performance, the violation of which would subject him to discipline under this rule. Moreover, the statements are by their nature subject to interpretation and the exercise of judgment by experienced drivers. It cannot be assumed that the Agency intended to convey that bicyclists are always to be considered hazards on the road, or that a city driver is prohibited from driving by a bicycle riding parallel to him in a bus or other lane or space. Appellant's PEPR defines the applicable safety standard as identifying "potential hazards or problems in the workplace and [taking] appropriate action", and taking "extra precautions when operating City vehicles and observes and adheres to the rules of the road." [Exh. 1-4.] Statements made during a safety class that amount to mere cautions do not rise to the level of a similar performance standard or an Agency rule or procedure. Therefore, the Agency failed to establish a clear and prior-established standard of performance, clear communication of that standard, or that Appellant failed to meet that standard.

The disciplinary letter also alleges that Appellant failed to meet the performance standards governing accountability and ethics. Since no evidence was presented in support of that allegation, the Agency failed to establish that Appellant violated that performance standard.

3. CSR § 16-60 L. Failure to observe Agency regulations

Agency regulations state that "it is in the best interest of all employees to review safety procedures frequently", that "[e]mployees are required to comply with all Occupational Safety and Health Administration (OSHA) regulations, Department of Transportation (DOT) regulations, Executive Orders, and Public Works Policies," and that "[e]mployees driving City vehicles . . . shall obey all traffic laws rules and regulations". [Exh. 8-2.]

The Agency did not offer evidence that Appellant failed to review safety procedures, or that he violated any regulations, procedure, or traffic law. Therefore, this allegation has not been established.

4. CSR §§ 16-60 O, V and Z

The Agency did not present any evidence that Appellant failed to maintain satisfactory work relationships, or that he failed to use safety devices. Likewise, there was no evidence offered that Appellant engaged in conduct prejudicial to the good order and effectiveness of the Agency. Therefore, those allegations are determined to be unfounded.

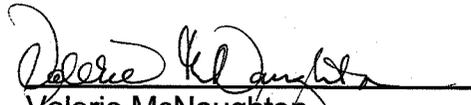
2. Penalty

The Agency failed to establish that Appellant violated any Career Service disciplinary rule as a result of the actions alleged in the disciplinary letter. Therefore, no penalty is appropriate, and the Agency action must be reversed.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer orders that the Agency's action terminating Appellant dated Aug. 30, 2007 is REVERSED.

Dated this 6th day of February, 2008.


Valerie McNaughton
Career Service Hearing Officer

I hereby certify that a copy of this decision was sent to the following on this 7th day of February, 2008:

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