HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 61-15

DECISION AND ORDER

BEN SILLER, Appellant,

v.

DEPARTMENT OF ENVIRONMENTAL HEALTH, DIVISION OF ENVIRONMENTAL QUALITY, and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on March 22, 2016 before Hearing Officer Valerie McNaughton. Appellant appeared and represented himself. Assistant City Attorney Kristen Merrick represented the Agency, and Bill Benerman served as the Agency's advisory witness. Bill Benerman, Gregg Thomas, LaToya Linzey and Gary Lasswell testified during the Agency's case. Appellant did not testify and presented no witnesses.

I. STATEMENT OF THE APPEAL

Appellant Ben Siller appeals his Dec. 3, 2015 involuntary demotion from Environmental Public Health Investigator III to Investigator II, with an 8% reduction in pay. The parties stipulated to the admission of Agency Exhibits 1 – 11, and Appellant's Exhibits A – D.

II. FINDINGS OF FACT

Appellant has been employed by the Agency in various investigative positions since 1984, and was reclassified from Investigator II to Investigator III in June, 2014. The Environmental Quality Section is an enterprise activity that handles inspections of stationary or chlorofluorocarbon (CFC) air pollution sources under a contract with the Colorado Department of Public Health and Environment (CDPHE), among other inspection work. The air contract defines the scope of work with specific time frames, and establishes payment amounts for completion of each segment of work, referred to as contract deliverables. The hours allowed for a field inspection depends on categorization of the source as either minor, synthetic minor, or major. Seven hours are allowed for inspection of a minor source, the only source at issue in this discipline. [Benerman, 9:45 am; Exh. 10-3.]

At the beginning of each calendar year, the CDPHE sends the Agency a list of inspections to be completed in the coming fiscal year. On July 7, 2015, the FY 2016 inspection list showed that Appellant was assigned to finish 87 stationary source inspections. [Exh. 10-1 to 10-4.] The Air Contract OTIS Award Program sets the performance targets and quarterly baselines for the two inspectors by their first names: Jeannette and Ben. [Exh. 4-46.] Baselines are the minimum number of inspections to be completed by the assigned inspector. In the first quarter of FY 2016, Appellant was required to complete a minimum of twenty-two stationary source inspections. [Exh. 4-47.] That quarter ran from July to September, 2015.

Appellant's work time is controlled to a large extent by the state contract, and his performance criteria are stated in the terms used in the contract. [Exh. 4-39.] About half of his project hours are spent performing stationary source air pollution inspections (SSIs). Most of the remaining project hours are allocated to handling complaints regarding environmental matters. He is given buffer hours to complete activities such as backup for other inspectors, meetings, timekeeping and other administrative tasks. As senior investigator and subject matter expert within Environmental Quality, Appellant was also the team lead over less experienced staff inspectors. [Exh. 4-36.]

Appellant's performance standards for SSIs require that he complete 100% of the inspections assigned to him quarterly in a Contract Inspection Target spreadsheet. In the first quarter of 2016, that number was twenty-two. The Environmental Protection and Response (EPR) Section Work Plan and Appellant's performance standards required him to submit 90% of his field inspection reports within 20[1] days of the completion of the inspection, and file 100% of those reports within 35 days of the inspection. If a report is returned by CDPHE for revisions, Appellant was to submit the corrected report within 30 days of the date returned. [Exhs. 4-40, 4-43.] Appellant was also required by the work plan to submit weekly project status reports to his supervisor by Friday at 5 pm. [Exh. 4-44.]

After the retirement of another inspector in Sept. 2014 resulted in a substantial increase in Appellant's SSIs, his supervisor Bill Benerman assumed most of Appellant's team lead duties, removed 56 other inspections from Appellant's schedule, and decreased the number of environmental complaint cases assigned to him. By mid-2015, new staff hired in late 2014 were able to work independently without Appellant's technical guidance, freeing Appellant from most lead work. [Exh. 1-4.]

On July 7, Benerman advised Appellant that he was not meeting air contract deliverables for inspection reports. Benerman began to track Appellant's work progress, and continued to do so for the rest of the quarter and beyond. [Exh. 4-1 to 4-31.] Benerman also discussed Appellant's inspection productivity with him at his mid-year review on July 20th, and again at a meeting requested by Appellant in July 27, 2015. At the end of the quarter, Appellant had completed five of the 22 assigned inspections, representing in Benerman's estimate less than 20 hours of work. That quarter, one of the inspection reports was five days late, and four others were more than 30 days late. At the hearing, Appellant admitted that he had not completed the required number of inspections, and conceded the correctness of the numbers in Benerman's tracking reports as to his production. [Hearing, 10:07 am; Exh. 4-31 to 4-33.]

On Aug. 14, 2015, Appellant informed Benerman that he disagreed with a number of the revisions requested by CDPHE. Benerman instructed him to meet the 30-day deliverable, finish the revisions he agreed with, and provide comments for those he did not. Appellant's report revisions were submitted between three and 30 days late for the quarter. Appellant submitted weekly updates as required by his work plan on Aug. 11 and 18, 2015, but submitted no updates for the remaining six weeks of the fiscal quarter.

The Agency held a pre-disciplinary meeting with Appellant on Nov. 10, 2015. After consideration of Appellant's statement, disciplinary history and the pre-disciplinary letter, Division

[1] All deadlines are measured in calendar days.

Director Gregg Thomas found that the performance issues had in fact occurred, and that a demotion to the position of Investigator II was the most appropriate penalty.

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 rules and applicable circumstances. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

Appellant first argues that the disciplinary letter was not served in compliance with Career Service Rule § 16-10.[2] Benerman conceded on cross-examination by Appellant that when he hand-delivered the disciplinary letter to Appellant, he had not included a certificate of delivery. [Benerman, 10:40 am.] However, LaToya Linzey testified that Benerman emailed her to confirm that Benerman met with Appellant and delivered a signed copy of the disciplinary letter and a certificate of service, which are maintained in the OHR records file. [Linzey, 11:55 am.] Benerman's meeting notes for Dec. 3, 2015 indicate by an "X" that he emailed a signed letter with delivery certification to Linzey after the meeting. [Exh. 4-37.]

Appellant did not rebut the contemporaneous business records which confirm that the Agency complied with CSR § 16-10. In any event, Appellant does not allege that he has been prejudiced in any respect by any defects in service of either the pre-disciplinary or disciplinary letters. Appellant acknowledged his actual receipt of the pre-disciplinary letter by his attendance at the pre-disciplinary meeting, knowledge of the allegations against him, and his attachment of both disciplinary letters to his timely appeal. It has been the law in Colorado since it achieved statehood that a party who appears generally in a matter waives any defects in service. Wyatt v. Freeman, 4 Colo. 14 (Colo. 1877); Globe Drilling Co v. Cramer, 562 P.2d 762 (Colo.App., 1977). Even if the Agency's records are in error, Appellant is deemed to have waived the absence of a signed certificate of delivery under § 16-10 by virtue of his active and informed participation in the disciplinary procedure and this appeal.

A. VIOLATION OF DISCIPLINARY RULES[3]

1. Neglect of duty, CSR § 16-60 A

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 complete seventeen SSIs during the first quarter of fiscal year 2016 constituted neglect of a known duty. His PEP compliance outcome # 1 is to "successfully complete assigned CHPHE air pollution contract deliverables for stationary sources and CFC sources meeting work plan time lines." [Exh. 4-40.] The number assigned for the first quarter of 2016 became 22 on July 6, 2015, upon the issuance of the OTIS program workload inspection targets. [Exh. 4-47.]

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[2] CSR 16-10 was amended on Feb. 12, 2016 to permit email service of notices under Rule 16 if requested in writing by the employee. That amendment was not in effect during this disciplinary process.

[3] 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 imposed, the earlier version of the rules applies.

Appellant admits that he did not perform those inspections, but argues that the workload was excessive and the deadlines unrealistic. He presented no evidence to support those arguments. Benerman acknowledged during his testimony that he was aware of Appellant's disagreement on these issues, and that in response he removed significant duties from Appellant's workload. [Benerman, 10:42, 10:51 am.]

The Agency offered substantial evidence on the reasonableness of its inspection deadlines. Most importantly, it stated without contradiction that the seven hours allowed to complete a minor inspection is a term of the City's negotiated contract with the State of Colorado. The contract deadlines were validated as reasonable based on the Division's past experience in the time needed to complete various types of inspections.

While Appellant's assigned SSIs for fiscal year 2016 had more than doubled, other significant duties were removed to allow him to handle the SSIs. In fact, Appellant finished four minor inspections in less than five hours each in July and August, 2015. [Exh. 4-21 to 24.] Moreover, Appellant received a PEPR rating of exceeds expectations and was given an OTIS award for the same outcome in the previous year. [Exh. A-2.] I find that Appellant understood the seven-hour SSI inspection performance standard, and met that standard for the inspections he completed in the first quarter. It was therefore a reasonable standard, and one that he had demonstrated his ability to achieve. Appellant neglected his duty to perform seventeen stationary source inspections during the first quarter of fiscal year 2016.

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

Carelessness is established when an employee performs work in an unsatisfactory manner. In re Macieyovski, CSA 28-14, 5 (10/13/14.) The disciplinary letter does not specifically allege that Appellant's work was in any respect slipshod or inadequate. His former supervisor regularly reviewed his work and found it satisfactory under the state standards. [Lasswell, 1:22 pm.] The evidence indicates that a more than permissible percentage of his reports were returned for revisions. However, the Agency did not prove any of those revisions were caused by unacceptable work by Appellant. The Agency therefore failed to prove this charge.

3. Failure to comply with orders or do assigned work, CSR § 16-60 J

This rule may be violated either by knowing disobedience of a lawful order of a supervisor or failing to perform assigned work he was capable of doing. In re Macieyovski, CSA 28-14, 6 (10/13/14); In re Vega, CSA 12-14, 3 (7/3/14). On July 7, 2015, Benerman ordered Appellant to submit daily verbal updates regarding his SSI project activities. At Appellant's request, Benerman revised this on Aug. 3rd to require only weekly updates. [Benerman, 10:15 am.] Benerman informed him that in those updates he only needed to identify his scheduled inspections for the coming week, which should take no more than a few minutes. Appellant complied for three weeks, but then failed to submit any more updates during the first quarter. [Exh. 4-26, -31.] Appellant did not respond to this evidence. I find that Appellant disobeyed the reasonable order of his supervisor to submit updates for six weeks.

The evidence also indicates that the Agency is alleging a violation of the second part of the rule. The Agency proved that Appellant was assigned 22 inspections for the first quarter of fiscal year 2016, and completed only five of them. As above stated, Appellant contends that his SSI workload was excessive because a colleague had retired in Sept. 2014, leaving

him to do the work of two inspectors. Under the air contract allowance of seven hours per minor source inspection, the additional seventeen SSIs would have taken another 119 work hours.

The Agency countered by evidence that Benerman removed significant other work to allow Appellant to meet this goal, including most of his lead work and all complaint work. That change freed up 480 hours, according to Benerman's spreadsheet of Appellant's work hours. [Exh. 4-36.] Those hours could have been used to complete the missing SSI inspections, a task which would use up only about a quarter of the time made available by elimination of those duties.

Other evidence also demonstrates that the workload was not unreasonable. Appellant completed four SSI inspections in 19 hours during that same quarter. [Exh. 4-22, -24.] In fiscal year 2015, from July 2014 to June 2015, Appellant completed 75 SSIs, while also training new staff and responding to environmental complaints. [Exhs. 1-5; A-2.] Once those duties were subtracted, an increase to 87 SSIs – twelve more than the number completed the previous year - does not appear to be an unreasonable workload.[4] By virtue of the evidence that Appellant failed to perform seventeen inspections during the first quarter, the Agency proved that Appellant failed to perform assigned work he was capable of performing.

4. Failure to meet performance standards, 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).

As noted above, both the Colorado air contract and Appellant's performance standards required compliance with the stated timelines for completion of stationary source inspections and reports. Appellant admitted that he did not meet his performance standards, but alleges that seven hours is inadequate to complete a minor field inspection. He presented no evidence or explanation of why that is so. His own records indicate it took him less than five hours each to do four of the inspections he completed during this quarter.[5] [Exh. 4-22, -24.] In view of the compelling evidence that the performance standards were reasonable and clearly communicated to Appellant, I find the Agency proved that Appellant's failure to meet the contractually-imposed timeliness and productivity standards violated this rule.

5. Failure to observe written departmental rules, 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); In re Macieyovski, CSA 28-14, 7 (10/13/14). The allegation must cite the specific regulation, policy or rule violated

[4] Twelve additional inspections would take an additional 84 hours, if done within the seven hours allowed for each inspection under the State air contract. [Exh. 10-3.]

[5] Appellant did not report the time consumed in finishing the fifth inspection. [Exh. 4-26.]

by the employee's conduct. In re O'Meallie, CSA 92-09, 5 (6/18/10). A rule is a general norm mandating or guiding conduct or action, and a policy is a standard course of action that has been officially established by an organization. Black's Law Dictionary (10th ed., 2014).

Here, the Agency cites only the Section's work plan, which itemizes assignments and time frames for completing them, specific to each employee. The work plan does not contain a general statement of uniformly enforced work rules, nor is it a standard course of action applicable to all Agency employees. Instead, it appears to set forth assignments and performance standards enforceable under CSR 16-60 K. Violations of 16-60 L have previously been found for such generally applicable policies as Sheriff's Department Rules, the Denver Code of Ethics, or an Agency's standard operating procedures or handbook. In re Leslie, 10-11, 11 (12/5/11); In re Macieyovski, 28-14, 7 (10/13/14); In re Rodriguez, 12-10, 13 (10/22/10); In re Norman-Curry, 28-07, 50-08, 5 (2/27/09). By citing only to its list of assigments and deadlines, the Agency failed to invoke a regulation, policy or rule, as required by § 16-60 L.

B. PENALTY DETERMINATION

The Agency held a pre-disciplinary meeting on Nov. 10, 2015. Gregg Thomas is the Director of the Environmental Quality Division and the decision-maker in this case. Appellant's supervisor Benerman and OHR Professional Linzey also attended. Appellant responded to the allegations made in the pre-disciplinary letter. He stated that the seven-hour estimate for completing a stationary source inspection understates the time needed to complete them. Appellant added that weekly updates are inappropriate due to the fluid nature of inspection work. In support, Appellant offered two documents, labelled Exhs. A and B: an email dated Oct. 30, 2015, and a document related to an inspection that required a special permit. Benerman and Thomas did not consider those documents as directly mitigating the performance issues, since they both related to a later performance period. Further, Benerman found that his email was actually an attempt to help Appellant by expediting receipt of a scanned copy of a document from CDPHE. As to Exh. B, the Agency found it had no control over whether CDPHE required a special permit in monitoring Appellant's workload, a contingency already considered in the setting of contract time frames.

Thomas reviewed the extensive performance tracking notes prepared by Benerman, and met with Benerman and Linzey to discuss the path forward given Appellant's failure to meet his quarterly goals. They summarized his level of productivity, past history of failure to meet performance standards, and his likely performance rating if the trend continued.

Appellant's previous supervisor Gary Lasswell shared with the group that Appellant had had previous productivity and timeliness issues, resulting in a 2009 performance improvement plan, and followed by a 2010 written reprimand. [Exh. 5.] Lasswell stated that after those corrective actions, Appellant's performance improved for a while but the improvement was not sustained. Lasswell told them Appellant's performance was generally satisfactory at the Investigator II level, a position that does not perform SSIs. Linzey advised that issuance of a written reprimand would not comply with the career service goal of progressive discipline. After consultation about the issues, Appellant's past history and performance, the group and decision-maker agreed that the most appropriate level of discipline was an involuntary demotion to Inspector II with an 8% reduction in pay.

Appellant argues in his appeal that the 4.55% reduction in pay in CSR § 16-74 is a more appropriate penalty. However, that rule was first amended to increase the minimum pay reduction to 6.9%, then later amended to require a minimum reduction in pay of 8%. See Career Service Board Rule Revision Memo 12D, issued July 31, 2015. Thus, the 8% pay reduction complies with the Career Service Rule that was in effect when the discipline was imposed.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the demotion action dated Dec. 3, 2015 is affirmed.

Dated this 6th day of May, 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
c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
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Career Service Hearing Office
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AND opposing parties or their representatives, if any.