

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 14-07

DECISION

IN THE MATTER OF THE APPEAL OF:

DANIEL HILL

Appellant,

vs.

DENVER INTERNATIONAL AIRPORT,

and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

The Appellant, Daniel Hill, appeals his dismissal from employment at Denver International Airport (the Agency) on April 1, 2007, for alleged violations of Career Service Rules relating to misconduct for tardiness, sleeping while on duty, and for taking unauthorized breaks. A hearing concerning the appeal was conducted by Bruce A. Plotkin, Hearing Officer, on June 1, 2007. The Agency was represented by Joseph A. DiGregorio, Assistant City Attorney. The Appellant represented himself.

Agency Exhibits 1-12 were admitted over the Appellant's objection. The Appellant did not offer any additional exhibits. The following witnesses testified for the Agency: the Appellant as an adverse witness; Brian Vallee; Ron Lotman; Porfirio Olguin; and Ron Morin. The Appellant did not offer any additional witnesses.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant violated any of the following Career Service Rules: 16-60 A, B, J, K, L, or Z;

B. if the Appellant violated any of the aforementioned Career Service Rules, whether dismissal was warranted under CSR 16-20.

III. FINDINGS

The Appellant was employed by the Agency for seven years as an Equipment Operator (EO). His duties included driving equipment for snow removal and for trash collection. Some of his duties, such as trash collection at bus stops, took place in the public-access areas of the airport (landside), and some, such as snow removal from runways, taxiways, and concourse areas, took place in restricted areas (airside).

Maintenance staff are required to log in at work. Their arrival and departure times are recorded and preserved by a computerized system called Kronos. Airport rules allow no tardy log-in, even by one minute. Between October 11, 2006 and January 31, 2007, the Appellant had 13 unexcused tardy log-in times. Both the Appellant's immediate supervisor, Pofirio Olguin, and his second-level supervisor, Ron Morin had counseled the Appellant on several occasions about his tardiness. On January 22, 2007, Olguin advised the Appellant he was not allowed to drive to the maintenance center, log in, then park his car in the employee lot. Then on February 13 the Appellant again logged in before parking his vehicle.

Just as log-in requirements are strictly enforced for airport maintenance personnel, so are break times. The Appellant was aware of his scheduled break times. His latest schedule was issued November 28, 2005 at which time he was personally advised he must adhere to that break schedule. The Appellant also received a verbal warning and reminder on January 9, 2006, [Exhibit 6], for violating his scheduled break times, and he was reminded in his annual review in April 2006 that any deviation from the break schedule required written supervisor approval.

EOs' snow removal work is a critical airport function, as the traveling public is not only inconvenienced by delays, but endangered if runways and taxiways are not promptly cleared. As part of their job requirements, airport EOs are required to report for 12-hour shifts on snow emergency days. Private contractors are paid \$186 per hour for airside snow-removal work, so it is essential that each EO on snow-removal duty pull his own weight in order to minimize overtime and private contractor payments.

The winter of 2006-2007 was especially onerous for snow removal at the airport. The volume of snow from a series of storms, beginning in December, created additional concerns for snow removal operations. For example, runways and taxiways are cleared first by moving the snow to piles in between runways and taxiways. If the piles are not removed promptly to more remote locations, wings and engines of large aircraft may plow into those piles. In one such instance not related to this case, the airport had to pay for the replacement of a jet engine at the cost of \$1 million.

December 24, 2006 was a snow emergency day at the airport. The Appellant's 12-hour shift began at 3:00 p.m. His assignment was to load snow from the area between B and C concourses, then dump it at a designated remote dump site. The 3:00 p.m. shift crew assembled outside the maintenance center shortly after 3:00 p.m., but the Appellant, who had taken his truck to get fuel, did not return, so Lotman, the

crew supervisor, led the rest of the crew to the work site. At about 5:00 p.m. Lotman noticed the Appellant's truck was still not in the work area. He radioed to the Appellant several times but received no answer. Lotman left the work area, which had active aircraft activity, to look for the Appellant. Between 5:30 and 6:00 p.m. Lotman found the Appellant asleep in his truck outside the maintenance center, and had to pound on the door several times to awaken him. The Appellant followed Lotman out to the work site.

Each time the entire crew does not travel as a group to and from the work site there is an added element of danger due to necessity of crossing active taxiways. There is also the added danger of the close working proximity between snow removal and aircraft operations at the worksite, so it is critical for supervisors to ensure the crew takes the fewest possible trips to and from the airside worksites.

Later that same night, Lotman noticed the Appellant's vehicle was not in the work area for about 45 minutes, so Lotman radioed to him, but the Appellant did not answer. Lotman left the work area again to find him. At about 12:45 a.m. Lotman found the Appellant asleep in his truck at the airside snow dump which was active with the functions of large snow removal equipment. Lotman had to knock on the door several times to awaken the Appellant. Lotman reported both incidents to the Appellant's immediate supervisor, Olguin. [Exhibit 9-1].

On January 30, 2007, a snow emergency day, at about 4:00 a.m. Vallee attempted to check out truck #1-3, but the keys were missing. He searched for the truck and spotted it, parked with the engine running and lights on, in a secured area airside. He peeked inside the darkened cab and saw a figure resembling the Appellant sleeping. Later, he asked Olguin who checked out #1-3, Olguin told him he had checked it out to the Appellant, and asked why. Vallee told him what he saw.

On February 27, 2007, a snow emergency day, Lotman ordered the Appellant to take truck #1-242. The Appellant complained that truck was dirty inside and muddy outside. He refused to take it, telling Lotman he did not want to drag mud across the taxiways. Lotman replied he wasn't assigned to go to or near the taxiways, and repeated his order to take #1-242, adding the Appellant should take the vehicle first to the wash bay, power wash off the mud, and continue on his assignment. The Appellant refused, and instead sought out and took a different, clean vehicle on his own without telling Lotman. [Lotman cross exam].

Later that same night, the Appellant was assigned to trash removal in the landside parking lot. Olguin received a phone call at about 11:00 p.m. that truck W-1-323 was parked at the Landside Parking Lot with an individual sleeping inside. Olguin left his duties, took Lotman from his duties, and drove to the reported location, arriving at 11:30. They both observed W1-323 running, lights on, and the Appellant sleeping inside for 5-6 minutes, until a shuttle bus starting up nearby awakened him. This location is in public view. Pursuant to a pre-existing directive from Morin, Olguin and Lotman required the Appellant to punch out, sent him home, and placed him on

investigative leave. Olguin and Lotman jointly documented the incident that night. [Exhibit 11].

On March 5, 2007, the Agency served notice on the Appellant that it was contemplating discipline, advised the Appellant of his right to representation, and held a pre-disciplinary meeting on March 22, 2007. [Exhibit 1]. The Appellant appeared with his union representative, Cheryl Hutchison. On March 29, 2007, the Agency dismissed the Appellant. [Exhibit 2]. The Appellant filed his appeal on April 2, 2007.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A. 1. as a direct appeal of a dismissal. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency must prove the Appellant violated one or more cited sections of the Career Service Rules, and must prove its decision to terminate the Appellant's employment complied with CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

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

To sustain a violation under CSR 16-60 A, the agency needs to establish each of the following elements by a preponderance of the evidence: 1) the Appellant had an important work duty; 2) the Appellant was heedless or unmindful of that duty; 3) no external cause prevented the Appellant's performance of that duty; 4) the Appellant's failure to execute his duty resulted in significant potential or actual harm. In re Martinez, CSA 30-06, 4-5 (Order 10/3/06). See also In re Simpleman, CSA 31-06 (Order 10/20/06).

a. Important work duty. The Agency's evidence amply proved, and the Appellant did not dispute, that his timely snow removal duties were critical to public safety and to airport costs. [Exhibit 4-6, 5-2, 6, Olguin testimony, Lotman testimony].

b. Heedless or unmindful. The Appellant protested that he was not sleeping while on duty during any of the four incidents cited by the Agency. He claimed if he had been sleeping he would have been disciplined immediately. Given the Agency's extensive testimony concerning the public safety and cost concerns for EOs who give less than 100% effort during their shifts, the Appellant's claim raises some question about the

Agency's delay, but not about its proof. The Appellant did not raise any issue concerning the motive of any witness who observed him sleeping. While he questioned their observations, it is apparent that the witnesses' observations of the out-of-the-way location of the Appellant's truck, their close proximity to him, their observations of his head leaning on the window, eyes closed, feet propped up across the seat and lack of movement were all clear evidence he was sleeping on all four occasions as claimed by the Agency. [Vallee, Lotman, Olguin testimony].

In addition, with respect to the delay in discipline, Morin credibly testified the airport had a series of eight snowstorms in eight weeks. He therefore was deluged with work, but as soon as he became aware of the claims against the Appellant he acted promptly upon them. Moreover, the Appellant's claim regarding delay in prosecuting the case against him does not undermine the veracity of the claims.

The Appellant seemed to claim, alternatively, that he was on break on December 24 and January 30 when he was seen sleeping. However, the Appellant did not dispute the times he was observed, and none was at a break time as established by Exhibit 6, and by other evidence. The evidence establishes that the Appellant was well-advised about his break times. [Exhibit 4-6, Exhibit 6, Exhibit 12]. For this and other reasons stated immediately above, I find the Appellant was sleeping on duty twice on December 24, 2006, again on January 30, 2007, and again on February 27, 2007. His sleeping on duty was unauthorized, and heedless and unmindful of his work duties on those dates, in violation of CSR 16-60 A.

c. External Cause. The Agency hinted that the Appellant may have had secondary work which was the cause of fatigue resulting in his sleeping on duty, but the Appellant denied the accusation, the Agency offered no additional proof, and I find even if the Appellant had secondary work, it was a self-imposed, not an external cause for his heedless failure of duty.

d. Significant harm.

The Appellant did not dispute the criticality of snow removal operations at the airport. Given the vital causal relationship between snow removal and public safety and the intimate relationship between snow removal effort and cost to the Agency, I find the Agency established by a preponderance of the evidence that the Appellant's sleeping on the four occasions referenced above, caused significant actual or potential harm to the Agency's costs and significant potential cost to public safety.

The Agency established each of the elements for the Appellant's neglect of duty by a preponderance of the evidence. The Appellant's responses were unconvincing for reasons stated above. This claim is proven by a preponderance of the evidence.

2. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

A violation of this rule occurs for performing poorly, rather than neglecting to perform, an important duty. The Agency did not allege that the Appellant's work was substandard; rather it claimed he neglected his duties by sleeping. Since the Agency alleged the Appellant violated this rule by omission rather than commission, there can be no violation of this rule.

3. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

On January 22, 2007, Olguin specifically ordered the Appellant to desist in the Appellant's practice of driving to the maintenance center, logging in, then parking his car in the employee lot. [Exhibit 2-2], however the Appellant did so again on February 13. The Appellant did not dispute that Olguin ordered him to desist on January 22, nor did he dispute that Olguin's order was lawful. He therefore failed to comply with Olguin's January 22nd order.

The Appellant's latest break schedule was issued November 28, 2005 at which time he was personally advised he must adhere to that break schedule. The Appellant also received a verbal warning and reminder on January 9, 2006, [Exhibit 6], for violating his scheduled break times, and he was reminded in his annual review in April 2006 that any deviation from the break schedule required written supervisor approval. [Exhibit 4-6]. The Appellant did not dispute having been so advised, nonetheless, he claimed he was on break when he was observed sleeping in his work truck on December 24, 2006 outside his established break times. [Exhibit 2-2, Exhibit 9-3, Lotman testimony]. I find this incident was a failure to comply with a supervisor's lawful order.

On February 27, 2007 Lotman was the Appellant's shift supervisor. He ordered the Appellant to take truck #1-242, but the Appellant refused as described, above. Findings. The Appellant's stated reason to refuse was unjustified and therefore his refusal was a failure to comply with a lawful order of his supervisor.

Finally, it was apparent from the Appellant's work review that he was capable of performing his snow-removal and trash-removal duties. Therefore, his unjustified sleeping while on duty on December 24, 2006, January 30, 2007, and February 27, 2007 constitute a failure to perform those assigned tasks he was capable of performing. Each of the incidents described here and immediately above constitutes a violation of CSR 16-60 J.

4. CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards...

This rule covers performance deficiencies that can be measured either by qualitative or quantitative standards, such as those one would find in a performance evaluation. In re Castaneda, CSA 79-03, 12 (12/18/02). The Agency claimed the Appellant failed to meet the following work performance standards.

STARS PEP – SECTION II

Accountability

Employee takes responsibility and ownership of job.
Takes personal responsibility for decisions and behaviors.
Follow or comply with all applicable rules, regulations, policies, procedures, executive orders and ordinances.

Morin testified the Appellant violated this standard for the same reasons he neglected his duties as stated previously, for excessive tardiness and ignoring scheduled break times. I have ruled on these same claims elsewhere in this Decision, and find other CSR violations cited in this Decision have addressed these claims with specificity.

5. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules. The Agency claimed the Appellant violated the following written policies.

a. Maintenance Policy – Special Operations –Page 16

3. Failure to respond for special duty may be cause for disciplinary action.

The Agency presented no evidence that the Appellant failed to respond for special duty, only that he was late. The two concepts are distinguished and the Career Service Rules treat them separately. CSR 16-60 S., T. Therefore the Agency failed to establish this Agency rule violation against the Appellant.

4. Employees shall respond for snow duty within 1 hour 30 minutes of a call to report for duty.

The Appellant was late 15 days in 2006, and 8 days between January 1 and February 20, 2007. [Exhibit 7, Exhibit 2-2]. Of those 23 days, 9 were unexcused late arrivals on special operations (snow) days. [Morin testimony]. The Appellant did not dispute Morin's testimony. Therefore this violation is proven by a preponderance of the evidence.

6. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

Here, the agency must prove the Appellant's conduct hindered the agency mission, negatively affected the structure or means by which the agency achieves its mission, In re Simpleman, CSA 31-06, 10 (10/20/06), or endangered the integrity of the City. Morin testified the Appellant's sleeping on duty on February 27, 2007 in a location where the public could have seen him compromised the integrity of the City. [Morin testimony]. I disagree. Some imminent, less speculative consequence is required; otherwise, a violation of any other rule could violate this broadly-worded rule as well.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

The Appellant's tardiness, alone, would not have justified dismissal, particularly where, of 13 days cited by the Agency in Exhibit 8, six were for punching in one minute late, and four were for between two and six minutes late, with the remainder less than fifteen minutes late. However, the Appellant's sleeping on duty endangered public safety and cost the Agency significant loss of man-hours. In addition, under the circumstances of this case, it is important to adhere to the Agency's break schedule. The Appellant had been extensively counseled and even disciplined for taking unauthorized breaks, yet continued to do so.

The Appellant's sleeping on duty endangered the very mission of his department, to maintain safe conditions for the traveling public. For this and other reasons stated in this section, I find the Agency's election to dismiss the Appellant was within the range of reasonable alternatives available to it. The Appellant's continued failure to acknowledge wrongdoing, including at hearing, suggests a lesser penalty would not have corrected the inappropriate behavior.

VI. ORDER

The Agency's termination of the Appellant's employment on April 1, 2007 is **AFFIRMED**.

DONE on June 8, 2007.



Bruce A. Plotkin
Hearing Officer
Career Service Board