

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ALLEN TEICH,

Complainant,

vs.

DEPARTMENT OF REVENUE, MOTOR VEHICLE DIVISION, DRIVER LICENSE SECTION,

Respondent.

Administrative Law Judge Mary S. McClatchey heard this case on May 9, 2002. Assistant Attorney General Joseph Haughain represented Respondent Department of Revenue ("DOR"). Allen Teich appeared and represented himself.

MATTER APPEALED

Allen Teich ("Complainant") appeals his demotion from Driver License Examiner II to Driver License Examiner I. For the reasons set forth herein, Respondent's action is affirmed.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

1. Complainant held the position of Driver License Examiner ("DLE") II in the Loveland office of DOR's Motor Vehicle Division, Driver License Section. He supervised one employee, a DLE I.
2. Complainant and his supervisee were responsible for issuing driver's licenses to

2002B094

applicants that came into the Loveland office.

3. Issuance of accurate driver's licenses and ID cards is essential to avoid fraudulent misuse of these valuable documents. Incorrect driver's licenses can be utilized to open bank accounts for illegal purposes, and to perpetrate various types of financial crimes. They can also be used by minors to illegally obtain liquor.
4. The issuance of a driver's license is a multi-phased task. Certain steps must occur in a particular order to assure accuracy of the demographic information, photograph and signature.
5. On May 6, 2001, Complainant's appointing authority, Donald L. Burton, Operations Manager in the Driver License Administration section at DOR, issued a memo in response to widespread problems with issuance of incorrect driver's licenses and ID cards. Entitled, "Capture Instructions-A Friendly Guide," the memo was designed to reinforce the importance of following a careful, step-by-step process in "capturing" correct photos and signatures on driver's licenses and ID cards. It noted,

"As you are all painfully aware, we are still having problems out there with incorrect images being captured and sent to the server with the wrong demographics. We are now aware of twelve documents that have in fact left the office. . .

Driver License Administration, contrary to popular belief, does not enjoy punishing good employees. The attachment is our step by step guide to help all employees complete the capture process without making this drastic mistake. . .

I want every employee to be given a copy of their own. I want a copy at every camera station for employees to follow. . . ."

6. Burton's May 6 memo contains 19 separate, numbered, steps for DLE's to utilize to assure that the demographic information, photographic image and signature are correct. The memo provides at least four separate opportunities to confirm that the photograph is correct. While these steps were not new to DOR employees, the memo underscores their importance and reiterates that shortcuts are unacceptable.

Saving, Voiding, and Self-Reporting

7. After a DLE has followed the appropriate steps to assure the demographic information, photograph and signature appearing on the driver's license are accurate, the DLE then takes the final step of "saving" it onto the computer. "Saving" generates a hard copy of a driver's license or ID card, and creates a permanent record on the computer.

8. In the event the DLE then discovers that the "saved" information was incorrect, and that a modification must be made before a correct driver's license can be issued, he or she must "void" it on the computer. DLE I's can void demographic information themselves but must report these voids to the DLE II's. Only DLE II's are authorized to "void" incorrect photographic and signature images captured and saved on the computer.
9. DLE II's are charged with monitoring the number of voids generated by DLE I's, and with reflecting an excessive number thereof on the DLE I's Performance Measurement Evaluations.
10. DLE II's are in turn required to self-report their own voids and to turn in the voided documents to their Regional Manager.
11. If any employee in the system, at any level, fails to self-report voids and turn in the inaccurate documents, there is no means to assure that a citizen has not gained possession of a document useful for fraudulent purposes. Therefore, the self-reporting policy is a crucial component of success in the Motor Vehicle Division at DOR.
12. Regional Managers in the Motor Vehicle Division periodically audit the driver's license databases for voids, as a means of quality control. They then compare the voided records in the database with the self-reported voids. If a voided record has not been turned in with the actual driver's license or ID card issued, the Regional Manager then addresses it with the employee as a performance issue.

Complainant's Voids and Failure to Self-Report Them

13. On May 8, 2001, Complainant short-cutted the mandatory steps and issued a driver's license with the wrong photograph on it. He voided the record on the computer, but failed to report it to his Regional Manager, Doug Barbee.
14. On May 18, 2001, Complainant again short-cutted the mandatory steps and issued a driver's license with the wrong photograph on it. He voided the record on the computer, but again failed to report it to Barbee.
15. Complainant testified that the two incorrect driver's licenses did not leave the Loveland office, and there is no reason to disbelieve this testimony.
16. Barbee discovered the May 8 and 18 voided records in the course of a routine audit. He issued Performance Documentation Forms to Complainant regarding both errors and his failure to report them. In Barbee's meeting with Complainant to discuss the incidents, Barbee made it clear it was critical he self-report voids and turn in improperly issued driver's licenses.

17. On July 9, 2001, Complainant again short-cutted the mandatory steps and issued a driver's license with an incorrect photo image, and failed to self-report it. On October 3, 2001, appointing authority Burton issued a Corrective Action to Complainant for this incident. At the meeting wherein he issued the Corrective Action, Burton stressed the importance of self-reporting voids and turning in the incorrect documents. Complainant acknowledged this and agreed to do so in the future.
18. The Corrective Action, effective July 9, 2001 through January 9, 2002, noted that any future failure to capture the correct image might subject Complainant to further disciplinary action up to and including dismissal. It noted,

"Our new image capture system provides the file photo of the driver for the examiner to view in order to ensure that the person pictured is the applicant standing before the driver license employee. If the image is NOT available on the imaging screen, it is then that the secondary process of comparing signatures will fall into place. These procedures have been thoroughly explained to all driver license staff, along with the importance of issuing correct documents. . . The importance of issuing accurate driver licenses and ID cards is underscored by the fact that a statewide task force was created to discuss this problem of document fraud, which has proven to be expensive to public and private organizations."
19. Complainant did not appeal the corrective action.
20. On September 18, October 9, and October 30, 2001, Complainant again short-cutted the mandatory steps and issued driver's licenses with incorrect photos. Complainant voided each incorrect record on the computer, but failed to self-report any of the three mistakes or turn in the inaccurate documents to Regional Manager Barbee.
21. Barbee discovered these additional three mistakes in the course of another routine audit. Barbee issued three additional Performance Documentation Forms for these, noting on each the total number of times Complainant had failed to report such instances to his Regional Manager.
22. After learning of the additional mistakes in capturing the correct photographic image and Complainant's continuing failure to self-report them, Burton issued a notice of pre-disciplinary Rule R-6-10 meeting to Complainant.
23. At the R-6-10 meeting, Complainant admitted that he knew he was required to self-report to his Regional Manager, but had not done so in fear of disciplinary action.
24. On February 28, 2002, Burton issued his disciplinary action, demoting Complainant from DLE II to DLE I. He noted Complainant's failure to capture the correct image in

2002B094

a one-year period on at least five occasions, and his failure to notify his supervisor of the mistakes. He noted that as a DLE II, he was charged with "setting the standard for staff for the day to day functioning of the office," and that he had failed to do so.

25. Burton considered other disciplinary penalties, but chose demotion because Complainant had demonstrated he could not be trusted in a leadership position, and had failed to set a high standard in the office by repeatedly shortcutting the mandatory steps and failing to self-report. Burton also felt that if he did not demote Complainant, he would have set a double standard for management versus line employees in the enforcement of agency rules.

DISCUSSION

I. Standard of Proof.

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct or violation of the State Personnel Board rules or the rules of the agency of employment;
- (3) willful failure to perform or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen, supra*. The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. Complainant committed the acts for which he was disciplined.

Complainant committed the acts for which he was disciplined. As the supervisor in his unit, he was responsible for setting and maintaining high standards. Complainant failed to do this in two ways: 1. by choosing not to follow the mandatory steps, resulting in his repeated capturing of the incorrect photo image; and 2) by violating direct orders and agency policy in refusing to self-report his errors.

Complainant argues that because he corrected each inaccurate computer record via the voiding process, and because no inaccurate driver's licenses left the Motor Vehicles office, no harm has been done and his actions were not serious. This argument reveals a

2002B094

troubling disregard for the potential for fraud in the system. If the agency makes an exception for Complainant, then it must, to be consistent, make an exception for the next errant DLE II, who might be part of a criminal scheme to issue incorrect driver's licenses for fraudulent purposes. DOR cannot make exceptions to its self-reporting policy, especially for managers, because of the critical, front-line role they play in fighting fraud.

III. Respondent's action was not arbitrary, capricious or contrary to rule or law.

In Colorado, arbitrary and capricious agency action is defined as:

(a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

Lawley v. Dep't of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001), citing *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

Complainant argues that demotion was too harsh a response to his performance problems. This argument is rejected on a number of grounds. First, Respondent used progressive discipline with Complainant by first issuing performance documentation forms, then a corrective action, and, finally, when Complainant demonstrated that he was unwilling to modify his behavior, disciplinary action. In view of the repeated warnings he received, and his persistent refusal to do what was expected of him, the discipline was not excessively harsh.

Second is the knowing and intentional nature of Complainant's actions. After issuance of the Corrective Action on October 3, Complainant willfully violated its terms twice in that very month. By refusing again to self-report his voids to Regional Manager Barbee, Complainant demonstrated he was unwilling to follow directives from superiors at DOR, and therefore was unworthy of the trust needed of a supervisor-level employee.

Third, Respondent's argument concerning the potential for imposing a double standard is persuasive. Respondent simply cannot allow a supervisor to repeatedly make the same mistakes and refuse to self-report them, when that supervisor is expected to monitor and report those same mistakes in supervisees' performance evaluations. Uniform enforcement of performance standards is the hallmark of fairness in the performance management system.

Lastly, demotion serves the public interest in this case. As noted above, DLE II's are charged with front-line responsibility for fighting fraud in the issuance of driver's licenses and state ID's. If a DLE II, such as Complainant, cannot be trusted to perform this function through the self-reporting process, then it is appropriate for DOR to remove him from the DLE II

2002B094

position.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

INITIAL DECISION

For the reasons set forth above, Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
May, 2002, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of _____, **2002**, I served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** by placing same in the United States mail, postage prepaid, addressed as follows:

Allen Teich
400 Hickory, #28
Fort Collins, Colorado 80524

and by courier pickup to:

Joseph Haughain
Assistant Attorney General
Consumer Protection Section
1525 Sherman, 5TH Floor
Denver, CO 80203
