FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE
UNDER DELEGATION FROM THE CIVIL SERVICE COMMISSION

RUBEN DELAROSA RIVERA	)	
	)	RECEIVED Civil Service
Appellant	)	Commission File:
v.	)	MAY 05 2011 **CSC 10-02-013**
	)	
SEATTLE PUBLIC UTILITIES	)	City of Seattle CIVIL SERVICE COMMISSION
Respondent	)	

Introduction

Ruben Delarosa Rivera was terminated from his employment at Seattle Public Utilities and appealed the termination to the Civil Service Commission. Pursuant to SMC 4.04.250.L.7, the Civil Service Commission delegated the appeal to the City of Seattle Hearing Examiner for hearing and decision.

The hearing on the appeal was held on April 27, 2011 before the Hearing Examiner (Examiner). The Appellant was represented by Frank J. Prohaska, attorney-at-law. Seattle Public Utilities (Department) was represented by Amy Lowen, Assistant City Attorney.

After considering the evidence in the record, the Examiner enters the following findings of fact, conclusions and decision on the appeal.

Findings of Fact

1. In November of 2003, the Appellant was hired as a Drainage and Wastewater Collection Worker in the Drainage and Wastewater Operations Division of the Department's Field Operations and Maintenance Branch. The position required a Commercial Driver's License (CDL) as well as a Personal Driver's License (PDL), and the Appellant had both.

2. The Department has adopted Workplace Expectations that apply to all employees, including the following: "You will are expected to secure, maintain and renew proper certifications and licenses required for your job title." Exhibit 1 at 2.

3. In November of 2005, the Appellant was arrested for driving his personal vehicle while under the influence of alcohol and/or drugs (DUI). As a result, the Appellant's PDL and CDL were suspended for 90 days, effective February 3, 2006.

4. The Appellant requested and received a voluntary, short-term reduction to a Maintenance Laborer position in the same division, pursuant to PR 4.6.200 until he could reinstate his licenses. To accommodate the Appellant's short-term inability to drive, the Department agreed to assign him to work as part of a team.

5. In July of 2006, the Appellant reinstated his PDL and CDL and returned to his prior position in the Department.

6. In June of 2007, as a result of the Appellant's failure to comply with the terms of deferred prosecution granted for the 2005 DUI, his license was again suspended. The Appellant testified that the "failure to comply" consisted of missing an insurance payment on his vehicle.

7. The Appellant was allowed to seek reinstatement of his PDL within 45 days, and did so successfully, but his CDL was suspended for one year. Consequently, in August of 2007, the Appellant sought and received a permanent voluntary reduction to the Maintenance Laborer position.

8. Maintenance Laborers maintain the grounds of 53 Department facilities. They visit between six and eight facilities per day, sometimes work alone, and need to be able to drive themselves and their tools and equipment to the facilities. Thus, as the Appellant acknowledged at hearing, the position requires a valid PDL.

9. In June of 2008, the Appellant received a memo concerning expectations for reporting unscheduled absences. The memo noted several incidents in which the Appellant failed to appear for work as scheduled and failed to notify the Department. In August of 2008, he received a verbal reprimand for a continuing pattern of unscheduled absences and failure to follow the expected procedure for reporting them.

10. In July of 2008, the Department checked the online records of the Washington State Department of Licensing to determine whether the Appellant had gotten his CDL reinstated. The record showed a PDL, but no CDL. Upon being questioned, the Appellant indicated he would be getting his CDL after an upcoming court date. However, on August 27, 2008, the Department again checked the online licensing records and determined that the Appellant no longer had any driver's license.

11. A fact finding meeting into the status of the Appellant's licenses was held on August 28, 2008. The Appellant stated that he had not received notice that his license was suspended, but that he had several outstanding traffic citations and had not paid a ticket issued for failure to provide adequate proof of insurance. He was scheduled to go to court on September 12, 2008, so the Department allowed him to continue in his Maintenance Laborer position, but again had to assign him to work that did not require driving or pair him with others who could drive a vehicle.

12. A second meeting on the status of the Appellant's license was held on September 17, 2008, during which the Appellant acknowledged that there was yet another citation to be

dealt with before he could seek reinstatement of his PDL, and that a court date of October 10, 2008 was scheduled for addressing the issue.

13. On October 7, 2008, the manager of the Department's Drainage and Wastewater North Operations filed a written recommendation that the Appellant be terminated for failure to maintain the licensing required to perform his job. The recommendation stated that without a license, the Appellant could not be assigned the full body of work of a Maintenance Laborer, which impacted the Department's ability to meet its workload requirements. The work assigned to the Appellant would normally be accomplished by one person who would drive himself and his equipment to each worksite. The recommendation of termination proceeded up the chain of command.

14. Under the former Department Director, upon the first loss of a license, employees were suspended and/or permitted to take a voluntary reduction during the pendency of their license suspension.

15. Although the Appellant had lost his license three times, the former Department Director suspended him for three days rather than terminating him. However, the former Director's disciplinary letter stated that "[f]uther incidents related to the loss of your driver's license will result in your termination." Exhibit 11 at 1. The Appellant did not appeal the suspension.

16. In January of 2009, the Appellant received a written reprimand for a further incident of violating the workplace expectation requiring employees to report to work as scheduled.

17. In September 2009, there was a recommendation for a two-day suspension "for your failure to maintain regular and reliable attendance". Exhibit 15. The recommendation noted a pattern of the Appellant's improving his attendance for a short period of time each time he received disciplinary action on the attendance issue, but then reverting to further unscheduled absences.

18. In October of 2009, the Director suspended the Appellant for two days for failure to meet Department policies and workplace expectations regarding attendance. Following this suspension, there were no further issues with the Appellant's attendance.

19. On March 14, 2010, the Appellant was arrested for a second DUI while driving his personal vehicle. However, he was allowed to continue driving for 60 days, until May 14, 2010. Exhibit 18. On March 16, he informed his manager of the DUI and the possibility that he would lose his PDL. This was the last information the manager received about the matter.

20. On May 18, 2010, the Appellant sustained a shoulder injury on the job and was out until May 26, 2010. When he was released to modified duty, he was temporarily assigned to the Department's Customer Service Group located in the Seattle Municipal Tower.

21. The Appellant's Division Director gave him a memo dated March 22, 2010 concerning the DUI, requiring that "within one business day of receiving information on court dates, administrative hearings, or changes to your driver's license, you must provide a copy of such information to your manager." Exhibit 3. The memo reminded the Appellant that "a Washington State driver's license is a condition of employment." *Id.*

22. During the spring and summer of 2010, the Appellant had various court dates related to the DUI for which he received documentation. Exhibit 40.

23. On June 18, 2010, the Appellant was sent a Final Order from the Department of Licensing stating that, as a result of the second DUI, his PDL would be suspended effective June 25, 2010 for a period of two years. Exhibit 17. A copy of the Final Order was sent to the Appellant's attorney.

24. The Appellant testified that he copied all documents relating to his DUI and gave them to his crew chief, Kevin Flanagan, who said he would give them to the Appellant's manager. He also testified that he left the documents on Mr. Flanagan's desk and that on one occasion, he slid a copy under the door of his manager's office.

25. On several different occasions, the Appellant's former crew chief, Scott Hayden, saw him making copies of various documents. The Appellant told Mr. Hayden that he was making copies of documents related to his license to give to his current crew chief. Mr. Hayden saw the Appellant place documents on Mr. Flanagan's desk once but did not know what the documents were, could not recall whether he saw him do so on other occasions, and could not remember the month, or even the time of year, that he saw the Appellant making the copies.

26. On June 30, 2010, the Appellant's Division Director checked the Department of Licensing's website to determine the status of the Appellant's PDL. The website indicated that he had no driver's license of any kind. The Division Director checked with the Appellant's manager and determined that the manager had not been informed of the license suspension.

27. Upon the advice of the Department's Labor Relations Coordinator, the Division Director scheduled a fact-finding meeting for the afternoon of July 7, 2010 about the status of the Appellant's PDL. She told the Appellant about the meeting at 9:00 a.m. that day and gave him his *Weingarten* rights.

28. The fact-finding meeting was attended by the Division Director, the Appellant and his union representative. The Appellant gave the Division Director a copy of the Final Order revoking his driving privileges for two years, a Temporary Driver's License dated July 7, 2010, and an undated blank form entitled "Ignition Interlock Driver License Application". He also gave her several documents from Pierce County District Court related to the DUI. The Appellant stated that he was unaware of the Final Order until he called his attorney that day and the attorney faxed it to him. He also told the Division

Director that he had given copies of all these documents to Kevin Flanagan, who assured him that he would give them to the Appellant's manager. When asked how he got the documents to Mr. Flanagan in the South Operations headquarters while the Appellant was working at SMT, he stated that he was mistaken, and that he did not give the documents to Mr. Flanagan or anyone else. When asked about upcoming court dates and whether he would be able to get his license reinstated in the future, the Appellant stated that when the temporary license expired on August 10, he would be eligible for license reinstatement if he installed an ignition interlock device on his vehicle. The Division Director requested confirmation from the Department of Licensing that the Appellant was authorized to drive under the temporary license, and the Appellant agreed to resolve the problem. The Department of Licensing later confirmed by telephone that the Temporary Driver License authorized the Appellant to operate a vehicle until August 10, 2010 despite the suspension of his PDL.

29. The Division Director interviewed Kevin Flanagan, who stated that the Appellant had asked for time off to go to court several times, but had never provided documents or elaborated on the reasons for the court dates. She also spoke with the Appellant's manager, Andres Macadangdang, who told her that he had received no information or documents from the Appellant following issuance of the Division Director's March 22 memo requiring that he be kept informed.

30. On July 16, 2010, the Division Director sent a Fact Finding Investigation report and a Recommendation for Disciplinary Action to the Deputy Director of the Field Operations and Maintenance Branch. The Division Director recommended that the Appellant be terminated for "repeated failures to maintain the appropriate licensing required of his position ... and failure to notify his manager as directed when the status of his driver's license changed." Exhibit 8. The Division Director testified that in making the recommendation for termination, she considered the Appellant's license history and failure to communicate with his managers about the status of his license, his disciplinary history, the fact that the progressive discipline steps taken had not resulted in a change of behavior, and the fact that the Drainage and Maintenance Operations Division had no job that the Appellant could do on a long-term basis without a valid license.

31. On August 9, 2010, the Deputy Director sent a letter to the Department Director concurring with the recommendation for termination and noting that this "is the fourth time in four years that [the Appellant's] actions jeopardized his driver's license." Exhibit 8. The Deputy Director also sent a letter to the Appellant attaching the letters recommending termination "for repeated failures to maintain the appropriate licensing required to perform the work in the Drainage and Wastewater Division, for failure to notify your manager as directed when the status of your driver's license changed, and for failure to provide copies of any correspondence from the Washington Department of Licensing immediately upon receipt." Exhibit 8. The letter noted that the Appellant had "disregarded workplace expectations, as well as direct instructions from your director." Exhibit 8. The letter placed the Appellant on administrative leave and informed him that his *Loudermill* meeting with the Department Director was scheduled for August 16, 2010. The meeting was later continued to August 25, 2010.

32. On August 11, 2010, the Appellant received an "Ignition Interlock License," which allowed him to drive only vehicles equipped with a functioning ignition interlock device. If an employer-owned vehicle lacks such a device, the employer can sign a declaration authorizing the employee to operate the vehicle without it. Exhibit 19.

33. At the *Loudermill* meetin g, the Appellant maintained that he had provided all information related to the DUI to Kevin Flanagan, who had agreed to provide it to the Appellant's manager. He stated that he had completed two phases of a treatment program and had an interlock device installed on his personal vehicle. Letters from his attorney and treatment director were also supplied. Exhibits 41 and 42. The Appellant conveyed the idea that he was approaching the problem differently than he had in the past and wanted to keep his job.

34. Following the *Loudermill* meeting, the Department Director followed up with Mr. Flanagan, who repeated that he was not given information about the Appellant's DUI. The Department Director also asked for and reviewed a copy of an abstract of the Appellant's driving record. Exhibit 22.

35. On September 9, 2010, the Appellant was released to return from modified duty to his regular job as a Maintenance Laborer. However, he remained on administrative leave pending a discipline decision from the Department Director.

36. The Department Director considered the Appellant's statements and length of service, the recommendations for termination, the repeated loss of the Appellant's license and its implications for the Department, the Appellant's disciplinary history, and the discipline imposed in comparable circumstances. Since becoming Director in 2009, he had terminated three other employees for license-related issues, and none had had as many license suspensions as the Appellant. *See* Exhibit 23. He determined that there was substantial evidence to support the findings in the recommendation for termination and concluded that termination was the appropriate discipline.

37. On October 11, 2010, the Department Director issued a letter terminating the Appellant for "failure over the years to maintain this [driver's] license." Exhibit 44. The letter also states that the Appellant's "failure to notify your management in a timely manner on the status of your license" was equally important. Exhibit 44. However, at hearing, the Department Director stated that while failure to inform management was an "aggravating factor," he would have terminated the Appellant for the repeated license suspensions alone.

38. The Department has never agreed to allow an ignition interlock device to be installed on a City vehicle, nor has it allowed an employee with an Ignition Interlock License to drive a City vehicle without such a device if one was required on the employee's personal vehicle. The Department bases this policy on concerns about public safety and potential City liability in the case of an on-the-job accident.

39. The Appellant's performance reviews have always been average to above average. Some have noted a problem with attendance, but stated that when the Appellant was at work, he did a good job.

40. Under Seattle Personnel Rule (PR) 1.3.3.C, a regularly appointed employee may be terminated only for justifiable cause, which requires the following:

> 1. The employee was informed of or reasonably should have known the consequences of his or her conduct;
> 2. The rule, policy or procedure the employee has violated is reasonably related to the employing unit's safe and efficient operations;
> 3. A fair and objective investigation produced evidence of the employee's violation of the rule, policy or procedure;
> 4. The rule, policy or procedure and penalties for the violation thereof are applied consistently; and
> 5. The suspension or discharge is reasonably related to the seriousness of the employee's conduct and his or her previous disciplinary history.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to delegation from the Civil Service Commission under SMC 4.04.250.

2. The Department must show by a preponderance of the evidence that the Department's decision to terminate the Appellant was made with justifiable cause. CSC Rule 5.31.

3. The Appellant had been fully informed of the consequences of having his PDL suspended. Over the four year period during which his license was suspended four times, the Appellant was repeatedly warned that a valid driver's license was a condition of his employment. More to the point, when the former Department Director rejected a recommendation of termination and imposed a three-day suspension for the Appellant's failure to maintain his license in 2008, the disciplinary letter clearly stated that additional incidents related to the loss of his driver's license would result in termination.

4. The Appellant was also fully informed of the requirement to notify his manager of changes to his license status, and he does not dispute this.

5. The Department's workplace expectation requiring that employees "secure, maintain and renew" the licenses required for their jobs is reasonably related to the Department's safe and efficient operation. The Appellant's position as a Maintenance Laborer required that he be able to work alone or in a team, and be able to transport himself and his equipment to various sites throughout the City. Although for short periods of time the Department had accommodated the Appellant's inability to drive, the accommodation resulted in a loss of efficiency that could not be sustained. Without a PDL, the Appellant could not be assigned the full body of work for his position.

6. The requirement that the Appellant keep his manager informed about the status of his license was reasonably related to the Department's need to assure that employees with driving duties were legally licensed to drive. The requirement was all the more reasonable in this case, where the employee's license had been suspended repeatedly in the past.

7. The Appellant claims that he was not working in a position that required a PDL when his license was suspended. However his customer service assignment on May 18 was a temporary accommodation while he fully recovered from an injury. He was not transferred out of his Maintenance Laborer position, and was cleared to return to it on September 9, 2010, prior to his termination.

8. There is no evidence to suggest that the investigation in this case was anything but fair and objective, and the Appellant does not really claim that it was. He suggested at hearing that the Division Director failed to interview two people-Marlene Allen and Scott Hayden-whom he said could corroborate his statement that he had kept his crew chief informed about the status of his PDL. Yet, there is no evidence that information from either individual would have changed the Division Director's findings and recommendation of termination. Since the Appellant did not call Ms. Allen as a witness, the Examiner must assume that her information would have been similar to the testimony provided by Mr. Hayden at hearing. Consequently, the Examiner concludes that if the Division Director had contacted either Mr. Hayden or Ms. Allen, any information they would have provided would have been too vague to have had an impact on the investigation.

9. The investigation produced evidence that the Appellant had violated the requirement that he retain the PDL required for his position. There is conflicting evidence as to the exact date the Appellant's PDL was suspended: Exhibit 18 shows the date of suspension would be May 14, 2010 (60 days from the date of arrest); Exhibits 17 and 40 show the date of suspension as June 25, 2010. Regardless, it is clear that the Appellant was without a PDL from at least June 25, 2010 through the morning of July 7, 2010, when he obtained the temporary license. He was also without a PDL from August 11, 2010 through the date of his termination.

10. The Appellant's claim that he was not aware that his PDL was suspended until he was asked about it on July 7, 2010 is not credible. The Appellant had been through the DUI-related license process in 2005/2006 and was familiar with the steps involved in it. Further, the Final Order revoking his PDL, Exhibit 17, states on its face that it was sent to him, with a copy to his attorney. The Appellant presented no evidence that the address to which the document was sent was incorrect. Further, the Appellant stated that his attorney faxed the document to him on July 7, but no physical evidence was offered to support his statement, and there is nothing on the face of the document to indicate that it is a faxed copy.

11. The Appellant argues that his Ignition Interlock License, obtained on August 11 2010, is a valid Washington driver's license and equivalent to a PDL. The Appellant is

mistaken. Unlike a PDL, an Ignition Interlock License is a limited license that allows the holder to drive his or her personal vehicle only if it is equipped with an interlock device, and to drive an employer's vehicle without an interlock device during work hours only if the employer provides written authorization for such use. Also, unlike a PDL, the Ignition Interlock License states on its face that it may not be accepted "in other states, territories or provinces." Exhibit 19. The two are not equivalent and are clearly distinguished from one another by the Washington Department of Licensing. *See* Exhibit 4.

12. The investigation also produced evidence that the Appellant had violated his Division Director's order that he keep his manager informed about the status of his license and all proceedings related to it. The Appellant's claim that he provided all documents related to his DWI to Mr. Flanagan, who promised to give them to Mr. Macadangdang is not credible. Mr. Flanagan and Mr. Macadangdang both stated that they received nothing about the Appellant's license or associated proceedings from him after he first notified Mr. Macadangdang of the DUI in March of 2010. The documents the Appellant gave his Division Director at the fact-finding meeting were all dated after the date he was assigned to temporary modified duty at SMT. He could not explain in that meeting how he got the documents to Mr. Flanagan at the South Operations headquarters. The Division Director's Fact-Finding Investigation Report, Exhibit 6, states that he replied that he "was mistaken" and that "he had not given those specific documents to Kevin". The Report also states that he could not produce any documents that he had given to Mr. Flanagan. The Appellant did not challenge these statements in the Division Director's Report. And the expected corroborating testimony from Mr. Hayden was vague and unreliable.

13. There is no evidence of an inconsistency in applying the rules or imposing penalties for violating them. Exhibit 23 shows the discipline given by the Department for licensing issues over a period of 11 years. The names of other employees have been redacted, but testimony established that during that time period, just one employee, other than the Appellant, had more than one licensing issue. That employee was involved in two disciplinary proceedings for licensing issues. The present Department Director has terminated three employees for license-related issues, and all three had fewer prior license-related disciplines than the Appellant. Only the Appellant has had three license suspensions and still remained employed by the Department.

14. The evidence shows that the Department requires fully licensed drivers in many of its positions, including the Maintenance Laborer position. Despite an unambiguous warning that the next loss of license would result in termination, the Appellant lost his PDL for a period of two years and no longer meets the licensing requirements for the Maintenance Laborer position. The Department Director's decision terminating the Appellant is reasonably related to the seriousness of the Appellant's conduct and his previous disciplinary history.

15. The Department has shown by a preponderance of the evidence that its decision to terminate the Appellant was made with justifiable cause, and it should be affirmed.

Decision

The Department's decision is **AFFIRMED**.

Entered this 4th day of May, 2011.

Sue A. Tanner
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner is subject to review by the Civil Service Commission. To be timely, the petition for review must be filed with the Civil Service Commission no later than ten (10) days following the date of issuance of this decision, as provided in Civil Service Commission Rules 6.02 and 6.03.