BEFORE THE CITY OF SEATTLE CIVIL SERVICE COMMISSION

Russell Aquino, Appellant v. Seattle Department of Transportation, City of Seattle, Respondent	**DECISION ON HEARING** **CSC No. 06-01-012**

I. INTRODUCTION

The hearing in this matter was held on February 6 and 7, 2007. The Seattle Department of Transportation (SDOT) was represented by Christine Andrade, Human Resources Director; and Appellant Russell Aquino represented himself until the closing briefing stage of the hearing, at which time he was represented by John Scannell, attorney.

Three employees of SDOT were disciplined for allowing a temporary worker to ride in the back of a dump truck on arterial roadways while they drove to a restaurant. Appellant Aquino received the highest level of discipline of the three: a 3-day suspension. Truck driver Nate Barnes received a 1-day suspension, and a third worker, Jim Valencia (cement finisher), received a written reprimand. Sal Souryadet (laborer) was the 3-month temporary worker that rode in the back of the dump truck.

II. ISSUE

Whether SDOT had just cause to impose a 3-day disciplinary suspension for Appellant's conduct on June 3, 2006?

III. FACTUAL BACKGROUND

On Saturday June 3, 2006, Appellant, a senior cement finisher, was assigned to work overtime on three jobs in West Seattle. He was designated the "lead" worker on the assignment sheet. For the "lead" designation, Appellant was paid more and was expected to be "in charge" of the job. This type of assignment out-of-class per job appears to be a standard practice. (Ravert, Masterjohn) Appellant Russell Aquino was assigned to work with Truck Driver Nate Barnes and Cement Finisher Jim Valencia. Jim Valencia had 23 years of experience, Barnes, 18 years, and Appellant, more than 23 years. (Ravert, Valencia)

Ravert believed all the crew had abused time that day (Appellant, Barnes, Valencia). She testified that they showed up later than they should have to the initial job site, even given leeway for a morning break. There was significant testimony about three different job sites, late arrivals, the crew not coming to certain job sites when expected and failing to communicate their location or that they were taking a lunch

break, and failing to conduct a radio check in the morning. She was told by crewmembers they got lost that day, or went to the wrong job sites (at least twice), but she did not believe these assertions were truthful. (Ravert)

At some point in the day, temporary laborer Sal Souryadet, ended up working with Appellant's crew. A decision was made to drive to another work location. There were not enough seat belts in the cab of the dump truck for all four people. Sal testified that Appellant asked him to ride in back. Barnes and Valencia said they expected Sal to ride in back because he was "the low man on the totem pole." The other crewmembers were senior level employees with an average of about 20 years experience. (Crunican) Sal had worked for about 3 months and was a laborer, the lowest level employee present. He was a temporary employee, who had not yet been granted a regular position with the City. From Sal's testimony it was evident that English is not his first language and he is not fluent in English. Sal is a member of a protected class. (Ravert)

Sal described the decision to get into the truck as "everybody said let's go." He described going to the passenger side of the cab and asking "where sit?" Appellant told him to "sit in back." Sal testified that he "didn't know" if it was safe, but believed it to be only a short distance, to the next job site. He said he "Didn't ask because I'm temp, I do what he say." He repeated that, "I'm a temp . . . I can't say nothing." While Valencia and Barnes testified that Sal volunteered to ride in back, Sal testified that Appellant told him to ride in back. Appellant did not controvert Sal's testimony on this point.

Sal said there was no seat, and a "couple of lumber" in the back, "not heavy, not to kill me." He testified that he "standed up" at first, but when the truck went beyond where Sal expected, "when he go far away on main road, I sat again on lumber." A decision was made by the three in the cab to stop at a 7-11 store and then proceed to Kentucky Fried Chicken (KFC) some distance away. This distance was described as 10-15 minutes one-way on arterial streets, for a total driving time of 20-30 minutes. (Valencia) Arterial street speed was described as about 25-30 miles per hour. Sal described the trip as "too far" and "too fast." At KFC, Valencia and Barnes got out and purchased food. Appellant and Sal remained in the vehicle. (Valencia and Barnes)

On Monday, Tammy Ravert, crew chief for these employees, learned from manager Bob Effrig that a citizen had called in a complaint concerning a City dump truck driving on arterials with a person "bouncing around" with rubble in the bed of a dump truck traveling at a high rate of speed. (Ravert) At this time, Ravert was considering an investigation about abuse of time, equipment, communication and dishonesty, but it was the complaint about the employee riding in the back that spurred her to investigate what occurred on June 3, 2006. She verified that the truck identified by the citizen by number was driven by Nate Barnes, and included the crew: Appellant, Valencia, and Sal. The crew admitted that Sal rode in the back. Everyone but Appellant admitted that they ended up driving to a Kentucky Fried Chicken (KFC) restaurant some distance away. Valencia and Barnes testified that they were in a hurry, because cement was getting hot at the job site. Neither Barnes, Valencia nor Appellant testified about the speed of the dump truck.

Ravert testified that generally her work crews were not complying with the expectation that they do a radio check in the morning. The testimony was inconsistent concerning how much time was taken for transportation, and breaks. The crew did not deny that they failed to make communication with their supervisor regarding Sal riding in the back of the truck, and the "break" for 7-11. All of the crew, except Appellant, admitted that they had driven to KFC. Ravert testified that Appellant was "less than forthcoming," when he maintained that the crew had only taken 10 minutes to go to a nearby store. When asked if Appellant believed having Sal ride in back was dangerous, he told Ravert in the investigation, "No, because the job site was not that far away." Appellant did not testify at the hearing.

After Ravert investigated the citizen complaint and surrounding circumstances, she issued recommendations for discipline for Appellant, Valencia and Barnes. The disciplinary documents for Valencia and Barnes were not introduced into evidence, but testimony indicated that the recommendation for Valencia was a written reprimand, for Barnes, a 5-day suspension, and for Appellant, a 5-day suspension. Ravert's rationale for the higher recommendations for Barnes and Appellant was because of Barnes's position as the Truck Driver and Appellant's position as the designated "lead" of the crew that day. Ravert testified that a lead is paid more and expected to be in charge of the crew for the shift, and the Truck Driver is responsible for the safety of his passengers. Valencia was a senior cement finisher, like Appellant, but not the designated lead on that day.

In, Exhibit C-5, Ravert outlines the basis of her 5-day recommendation for Appellant as follows: **improper use of City time and equipment, not communicating with your Supervisor, and allowing a serious safety violation to occur at your job site**. She stressed that safety is an especially important responsibility of the leads, and that as the Senior Cement Finisher, Appellant was expected to serve as a role model. The letter also includes a recitation of workplace expectations:

- Taking responsibility for your job performance
- Seeking appropriate assistance to resolve problems or difficulties that interfere with your work
- Performing all your job duties within the standards set for your position, and notifying your Supervisor when backlogs or unexpected priority work threaten to delay essential tasks
- Refraining from wasting time on the job or leaving the workplace during working hours without your supervisor's knowledge
- Teamwork is a group of individuals working together for the common good, high production and safe operations
- Accepting Safety as a personal responsibility
- Understanding and complying with applicable government and Department safety regulations

The final disciplinary letter issued after the *Loudermill* hearing with Director Grace Crunican, Exhibit C-1, does not mention abuse of time or equipment, inefficiency,

or lying during the investigation (about going to the KFC). Director Crunican reduced the 5-day suspension to 3 days and outlined the basis for the suspension as a safety violation, and general communication with crewmembers and the crew chief. She notes that she expects the lead to set an example with regard to communication with co-workers and subordinates, and to take responsibility for his actions. She testified that she reduced Barnes 5-day suspension to 1-day because he accepted responsibility for the safety violation. Crunican was concerned that Appellant did not appreciate that he had done anything wrong, and gave him 2 more days than Barnes because of his attitude. Appellant's union representative John Masterjohn testified Appellant was calm and straightforward, not indignant or disrespectful, during the *Loudermill*. Jim Dare testified that Appellant was confrontational about notice for the meeting, and challenged whether having a person in the back of a truck could be a safety violation when it was not illegal under Washington State law.

Additionally, as part of Appellant's discipline, he was assigned to read and review the Safe Driving Policy and Workplace Expectations, especially the communication section. The Workplace Expectations, discuss open communications (resolve issues early, follow direction of supervisor, using appropriate language . . .). Exh. C-3, p. 2. The Workplace Expectations include a section entitled, "Work Safely and Properly Use Equipment, Clothing, Supplies, and Property." Exh. C-3, p.3. This section directs employees to accept safety as a personal responsibility, (1), and report hazardous conditions to one's supervisor (7).

IV. ANALYSIS

A. Applicable Rules

The personnel rules, SMC 1.3, provide that the disciplinary action imposed depends upon the seriousness of the employee's offense and such other considerations as the appointing authority . . . deems relevant. Progressive discipline is required, except that in cases of "major" disciplinary offenses, a verbal warning or written reprimand are not appropriate.

Major disciplinary offenses are listed in SMC 1.3.4(A), and include:

- Use of city time, equipment or facilities for non-city purposes;
- Endangering the safety of, or causing injury to, the person or property of another through negligence or intentional failure to follow policies or procedures;
- A knowing or intentional violation of workplace rules (policies, procedures and workplace expectations); and
- Other offenses of parallel gravity.

In determining the level of discipline to impose the appointing authority shall consider factors that he or she deems relevant to the employee and his or her offense, including but not necessarily limited to:

- Employment history
- Extent of injury/damage caused
- Employee's intent

- Whether the offense constituted a breach of fiduciary responsibility or of the public trust; SMC 1.3.4(B)

The City can suspend an employee only for justifiable cause, defined as including these factors [SMC 1.3.4(C)]:

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

For Employees who are subject to a collective bargaining agreement, these personnel rules apply to the extent they do not conflict with the terms of the collective bargaining agreement. SMC 1.3.2(B) No evidence was presented regarding any such conflict.

B. Safety Violation

Appellant argues that there is insufficient notice that riding in the back of a dump truck was a safety violation because there is no specific rule prohibiting riding in the bed of a dump truck, and in fact, it is not against state law. In addition he argued that there are circumstances where employees do ride in the back of a truck while performing certain jobs. He also asserted that the Safe Driving Policy applies to the driver of the vehicle, not employees simply riding in the vehicle.

The Workplace Expectations include a section entitled, "Work Safely and Properly Use Equipment, Clothing, Supplies, and Property." Exh. C-3, p.3. This section directs employees to accept safety as a personal responsibility, (1), and report hazardous conditions to one's supervisor (7).

The Safe Driving Policy states that "All employees shall comply with this policy," (p. 3) and "Employees shall comply with all driving laws, including using seat belts." Exh. C-2 (p. 5).

Crew Chief Ravert testified that assignments are made per vehicle so that all employees have a seat belt. If there are only 3 seatbelts, only 3 employees will be assigned to the dump truck, as she did on June 3, 2006. This is a standard procedure. Sal was initially assigned to and rode in another vehicle. Truck Driver Barnes testified that he let individuals decide whether to put on their seatbelts and did not think it was his responsibility—it was personal.

There was unrefuted testimony from a number of witnesses that there were times when employees rode in the back of trucks to perform two different specific duties: picking up barricades and pouring concrete into a certain curb machine. These tasks were done for short distances at very slow speeds, with more than one employee monitoring the task. (Barnes, Cedric Davis, Madelene Puloka, Valencia). There is nothing to indicate that these situations constitute a safety violation. The situation here is distinguishable.

Appellant told Ravert during the investigation that he thought it was safe to have Sal in the back because "the job site was not that far away." But at some point, without any input from Sal, the trip expanded to a much larger venture, involving driving for 20 or 30 minutes on arterial streets at speeds of 25-30 miles per hour. Appellant lied during the investigation when he told Ravert they had only gone to a store. Undoubtedly, part of the reason he lied was because the distance and speed of the trip have bearing on whether having an individual in the back was unsafe. The City need not promulgate rules for every conceivable unsafe condition. Employees, especially those with two decades of experience, should be able to identify obviously unsafe conditions. Sal's own testimony made it clear that he felt unsafe, but he was not in a position to complain. He said it was "too far," and "too fast." The citizen's complaint about the trip confirms that the speed appeared to be too fast to be safe, and that the occupant was "bouncing," not stable. Sal had to change positions from standing to sitting in an effort to find the safest way to ride.

In this particular case, having an employee ride in the back of the truck without a seat belt at speeds of 25-30 miles per hour for at least 20 minutes of drive time was an unsafe condition, and therefore a safety violation for those who encouraged and permitted it. Sal himself was not responsible for not wearing a seatbelt because of the circumstances surrounding his position—he was a temporary employee at the lowest level job, laborer. He naturally took direction from all of the others during jobs and regarding this trip. It was the responsibility of those senior employees who allowed him, and even expected him, to sit in the back "because he was the low man on the totem pole." Sal testified it was the Appellant who told him to sit in the back. This was not contradicted by Appellant. Appellant and the others were insensitive to Sal's vulnerability as a temporary employee, and his inexperience with the job and the English language. This insensitivity is an aggravating factor that should be considered in the level of discipline imposed.

The standard procedure was to transport individuals in the cab of trucks where there were seatbelts. No one testified that employees rode in the back of dump trucks as a mode of transportation. Barnes and Valencia testified, "they just weren't thinking," and were "in a hurry." Barnes recognized in his own *Loudermill* that having Sal ride in the back that day for that distance and speed was unsafe.

The City's policies that seatbelts be used, that everyone take personal responsibility for safety, and notify supervisors of hazardous conditions, are reasonable and related to the job. It is reasonable for the City to have guidelines stricter than state

law given their potential liability for injuries that result from their employees' conduct. There was sufficient notice here of the safety expectation because the standard procedure is that people are assigned to trucks per seatbelt. People are never assigned to ride in the back of trucks for transport. The two isolated types of jobs where individuals do ride in the back, at very slow speeds for very short distances, are quite different than driving the speed limit on arterials for miles. The difference should have been clear to Appellant. The investigation of this issue was sufficient and fair, and was not challenged by Appellant.

Finding: A Safety Violation Occurred—"Endangering the safety of . . . the person of another through negligence or intentional failure to follow policies or procedures;" and SMC 1.3. "Accept Safety as a personal responsibility." C-3, Workplace Expectations, p.3.

C. Communication Violation---Radio checks, informing supervisor of location and/or breaks, lack of seat belts/room

Both the recommendation letter and post-*Loudermill* letter discussed communication as a problem with Appellant's conduct that day. The testimony demonstrated that employees generally were not completing the morning radio checks that Ravert had requested. Appellant alone should not be disciplined for failing to follow this expectation when other violators were not disciplined for the same thing.

Appellant did not have the assigned cell phone that day, so failure to answer it or use it to call Ravert should not be considered the basis for discipline. If Barnes was not disciplined on this issue, and there is no evidence he was, then Appellant should not have been. Ravert testified she is not sure she used the radio to try to reach the crew, which might have been a more reliable way to communicate given the question about cell phone coverage and reliability. In addition, it was not clearly established that there was a particular responsibility to communicate whereabouts, or break times and locations, so there was insufficient evidence of a violation here. It if is the City's position that the crew should have communicated the need for another truck to pick up Sal, that issue is part of the safety violation already discussed above.

Finding: There Was Insufficient Evidence of a Violation Involving Lack of Communication. To the extent that a communication violation supported the 3-day suspension, such consideration was inappropriate.

D. Dishonesty on June 3, 2006 and During Investigation—Location, getting lost, reasons for being late/lost, going to KFC, going outside city limits

All crewmembers provided the same "we got lost" version of events to Ravert. There is no evidence Valencia and Barnes were disciplined for being dishonest about their whereabouts, why they were late, or for wasting time or being inefficient. Therefore, it would be inappropriate for this to be considered in Appellant's discipline.

With regard to the dishonesty during the investigation, Appellant did not contradict Ravert's testimony that Appellant was dishonest about the extent of the trip taken when Sal was in the back (his version, that they only went to a store, was contradicted by the 3 other employees present). Inexplicably, this finding is not included in the disciplinary recommendation by Ravert or final discipline issued by Crunican, although it is clearly a basis for discipline by itself. Dishonesty breaches the trust that employers must have in its workers.

Finding: There was insufficient evidence with regard to dishonesty on June 3, 2006. However, there was sufficient evidence to sustain a finding that Appellant was dishonest during the investigation when he told Ravert that the crew only went to a local store for about 10 minutes while Sal was in the back of the truck.

E. Abuse of Time/Equipment—taking lunch when paid for it, taking vehicle outside city limits, taking long morning break

The investigation of the issues surrounding abuse of time and equipment did not appear to be complete or thorough, and seemed to be abandoned by Director Crunican in issuing final discipline. Ravert testified she was not sure that the abuse of time/equipment could be proven, so the safety issue was her focus in the discipline recommendation. The City did not introduce in evidence any contract provisions or pay documents that might have shown that the employees were paid for lunch that day. There was conflicting testimony about timing and extent of breaks—which might have panned out to be a violation if fully developed, but insufficient evidence was presented at this hearing to support discipline on that issue. Crunican also testified that it was the safety issue for the most part that was the basis of the 3-day suspension.

Finding: There was insufficient evidence to support a finding of abuse of time or equipment, and therefore any portion of the discipline based upon that issue would be inappropriate.

F. Severity of Discipline

In addition to the Safety violation, Director Crunican clearly relied on some Communication failure as an issue she included in determining the level of discipline for Appellant. The discipline included an assignment that Appellant read a communication policy. But the references to communication are too vague to support any portion of the discipline. The City failed to demonstrate that the communication issues raised in the recommendation letter were consistently enforced against other crewmembers—the morning radio check and notifying the supervisor about break times/whereabouts. To the extent that communication about the lack of seatbelts was intended to be included, it is part of the safety violation already discussed.

Director Crunican testified that she gave Appellant a lengthier suspension than truck driver Barnes because of his attitude at *Loudermill*—that he failed to accept responsibility for the safety issue. There was inconclusive testimony about this. Mr.

Masterjohn testified that Appellant laid out his case in a straightforward manner and was calm. Supervisor Dare testified that Appellant was testy about the scheduling of the meeting. There is no dispute that Appellant presented facts about the law in the state of Washington (the fact that it is not illegal to have an adult riding in the back of a truck) and was insistent about it.

More compelling as an aggravating factor is the fact that Appellant was assigned as the lead in the workgroup that day. Appellant strains to argue that the trip with Sal in the back was a small deviation and the crew was on its way to the next location. At the same time he argues that he is not in charge while on break (away from an actual cement job). As a lead, Appellant had a heightened responsibility to keep the group on task and oversee the workday. This trip, which did not qualify as a lunch break according to the crew, was part of the work day. Appellant should not have permitted the unsafe situation to occur on his watch, particularly when it involved a subordinate temporary employee who was vulnerable, and in a difficult position to object.

What made Appellant's conduct worse, was the poor example he set by lying about the crew's trip to the KFC restaurant. As the lead he is paid more and more is expected of him. He should lead by example. He failed to fulfill the lead position he was paid for that day, by failing to prevent the unsafe situation and then lying about the extent of it.

Director Crunican also mentioned that prior disciplinary history concerned her, although she couldn't remember what it was when testifying at the hearing. It is not mentioned in her letter either. There was no evidence of prior discipline on a safety violation. Prior issues with Ravert included disrespectful communication and abuse of time, neither of which was close enough factually to be a factor in progressive discipline here. Nevertheless, the safety violation was serious enough to warrant deviation from strict progressive discipline.

Another factor to consider is the discipline provided to truck driver Barnes, a 1-day suspension instead of 3. As Truck Driver, Barnes also had a heightened responsibility to prevent an unsafe driving situation, and he failed to do that. In addition, he was on his own personal errand when he drove all the way to KFC, as he got out and purchased a lunch. Appellant did not get out of the truck. Barnes had more control over the situation given that he was the driver.

V. CONCLUSION

Appellant had a heightened level of responsibility as did Barnes, although for different reasons which are outlined above. Appellant's discipline should not include issues other than the safety issue. Appellant should receive the same amount of discipline as Barnes given the facts in this case.

VII. ORDER

IT IS HEREBY ORDERED that Appellant's 3-day suspension shall be reduced to a 1-day suspension. This suspension is sustained on the issue of Safety Violation only. Appellant shall be reimbursed for the two of the suspension days if those days have already been served and his disciplinary records should reflect this reduction in suspension.

Dated this 27th day of March, 2007

FOR THE CITY OF SEATTLE CIVIL SERVICE COMMISSION

Diane Hess Taylor, Hearing Officer

The decision of the Hearing Officer in this case is subject to review by the Civil Service Commission. Parties may also request that the Commission review the decision, by filing a petition of review of the Hearing Officer's decision, and asking the Commission to consider specific issues. 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.

CITY OF SEATTLE
CIVIL SERVICE COMMISSION

Affidavit of Service
By Mailing

STATE OF WASHINGTON }
COUNTY OF KING }

TERESA R. JACOBS, deposes and states as follows:

That on the 28th day of March, 2007, I deposited in the U.S. mail, postage prepaid, a copy of **DECISION ON HEARING** to:

R. Aquino
c/o John Scannell, Attorney
Action Employment Law
P.O. Box 3254
Seattle, WA 98114

And copies of same via interdepartmental and U.S. mail addressed to:

Mark McDermott, Director, Personnel Department
Christine Andrade, HR Director, SDOT
Diane Hess Taylor, Hearing Officer, CSC

In the appeal of:

Russell Aquino v. Seattle Department of Transportation

CSC Appeal No. 06-01-012

DATED this 28th day of March, 2007

TERESA R. JACOBS