

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

Appeal No. 02-07

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**JOHN ENCINIAS**

Appellant,

vs.

**DEPARTMENT OF PUBLIC WORKS, WASTEWATER MANAGEMENT DIVISION,**  
and the City and County of Denver, a municipal corporation,  
Agency.

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**I. INTRODUCTION**

The Appellant, John Encinias, appeals his dismissal from employment on January 9, 2007, for alleged violations of specified Career Service Rules and Agency regulations. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on March 19 and April 2, 2007. The Agency was represented by Joseph A. DiGregorio, Assistant City Attorney. The Appellant represented was represented by Michael O'Malley, Esq.

Agency Exhibits 1-16.1 were admitted. The Appellant offered no additional exhibits. The following witnesses testified for the Agency: the Appellant, Tyson Vigil, Quadalupe Martinez, and Reza Kazemian. The Appellant testified on his own behalf and presented witnesses Mario Abeyta and Cruz Vigil.

**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, D, E, J, L, or R; and
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss the Appellant conformed to the purposes of discipline under CSR 16-10.

### **III. FINDINGS**

The following facts are not disputed. The Appellant was employed at the Agency as an Equipment Operator Specialist (EOS). His immediate supervisor was Tyson Vigil, his second level supervisor was Guadalupe Martinez. The disciplinary decision maker was Reza Kazemian. The Appellant's primary duties revolved around driving and operating various specialized trucks, including a vacuum combination truck, also referred to as a Vac-Flusher, a Mini-Vac, or a Catch Basin Cleaner. This vehicle combines the vacuuming and spraying functions of two other Agency vehicles, and is used to service Denver's storm drains, called "catch basins" (CBs). The regular vacuuming and cleaning of CBs prevent flooding at intersections. Vacuuming CBs, rather than flushing them, also prevents debris collected in the CB from entering the river system, in compliance with the federal Clean Water Act.

The vacuum removes debris around and inside the storm drain and stores it in a truck-mounted chamber, while the sprayer loosens and washes out stuck or frozen debris which may then be vacuumed. The vacuum is powered by an auxiliary motor mounted behind the truck cab.

The Appellant's daily duties include filling out a vehicle inspection report to insure the needed equipment is on board and to check that the major systems function properly. [Exhibits 8-1, 10-1]. He also must submit a daily report which contains a space to mark the number of CBs completed that day. Every Tuesday, EOSs perform routine maintenance on their assigned vehicles before beginning their routes.

On December 6, 2006, the Appellant's work day was scheduled for 6:30 a.m. to 3:00 p.m. The temperature was below freezing. He was assigned a route to clean 39 catch basins (storm drains) near the Denver Tech Center using Catch Basin Cleaner #3913. Mario Abeyta, a Utility Worker, was assigned to assist the Appellant with manual labor.

A tracking system, which incorporates the Global Positioning System (GPS), records several functions for many Agency vehicles. The recorded measurements for #3913 include the location of the truck at 30-second intervals, whether the auxiliary motor switch is idling (on), and whether the vacuum is running. The Appellant first stopped at 6828 Quincy, a vacant area near, but not on, his assigned CB route. Cruz Vigil, who was assigned to assist the Appellant with traffic safety and control, arrived at 6828 Quincy in another Agency truck, a Power Flusher. The three employees remained at the Quincy location for 1 hour and 24 minutes, from 7:37 to 9:01 a.m., before proceeding to the designated CB route. Later, the Appellant's crew returned to 6828 Quincy for 41 minutes, from 10:14-10:55. The auxiliary motor for the vacuum operated a total of 14 minutes during the Appellant's shift on December 6. During that time the Appellant's crew vacuumed four or five CBs out of 23 he entered on his daily report.

Martinez, as is his custom, was conducting routine monitoring of Agency vehicles when he noticed #3913 was not moving for 1 hr. 24 minutes, so he had the

Appellant's immediate supervisor, Tyson Vigil, call on the radio, but the Appellant did not answer. Martinez sent Vigil to investigate. Vigil was already on the way at 12:30 p.m. when the Appellant radioed. The Appellant told Vigil he had received a call concerning a family emergency and was on the way back to base to take leave for the rest of the day. When he arrived, he submitted his vehicle inspection report and daily report. On both reports, the Appellant indicated two problems with #3913: the auxiliary motor had difficulty starting, and an external speaker to the radio was missing and needed to be replaced. [Exhibit 10-2, Martinez cross-exam]. On the daily report the Appellant wrote "23" next to the space for CBs. [Exhibit 8-1]. He then took authorized leave from 1:00 p.m. on.

Dubious of the Appellant's claim to have completed 23 CBs, since the vacuum registered "on" for only 14 minutes, Martinez directed Tyson Vigil, the Appellant's immediate supervisor, to re-trace the Appellant's December 6 route, take pictures of each CB, and report back regarding whether the reported CBs were clean. Vigil reported only four or five of the reported 23 CBs were actually cleaned.<sup>1</sup> Consequently, Martinez directed Vigil to have the Appellant view an aerial photograph of the December 6 route, and to circle which CBs he cleaned. The Appellant circled a total of 14 CBs. [Exhibit 12].

On December 26, 2006, the Agency sent a contemplation of discipline notice to the Appellant. Then on January 4, 2007, a pre-disciplinary meeting was convened. The Appellant appeared pro se and gave a statement. He acknowledged that on December 6 he was at 6828 Quincy for 1 hour 24 minutes.

The Agency issued its notice dismissing the Appellant on January 9, 2007, effective immediately. The Appellant perfected his appeal January 16, 2007.

#### **IV. ANALYSIS**

##### **A. Jurisdiction and Review**

Jurisdiction is proper under CSR §19-10 A. 1 as a direct appeal of the Appellant's 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**

In a disciplinary appeal, the agency bears the burden of persuasion to prove the employee violated one or more cited sections of the Career Service Rules, and to prove the degree of discipline complied with CSR 16-20. The standard by which the Agency must prove its claims is a preponderance of the evidence.

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<sup>1</sup> According to the Agency's Notice of Termination letter, Vigil claimed the Appellant cleaned 5 CBs, but later stated 4. At hearing, Martinez stated the Appellant cleaned only 2. The discrepancies may have been significant to show the Agency was not clear what constitutes a cleaned CB, but the Appellant did not pursue that line of questioning, and the evidence is otherwise not conclusive on this point.

## C. Career Service Rule Violations

The Agency dismissed the Appellant for two acts of misfeasance: for failing to clean catch basins assigned to him on December 6, and for filing a false report concerning the number of catch basins he cleaned. [Exhibit 2, Agency Opening Statement].<sup>2</sup> The Agency's case depends almost entirely upon one factual determination. Was the Agency's stated method for reporting completed CBs in the daily report clearly communicated to the Appellant by a preponderance of the evidence? If it was, then the Appellant's protestations concerning the details of cleaning amount to no more than irrelevant quibbling, and his December 6 CB count is dishonest. If the Agency did not clearly communicate its method for reporting completed CBs, then it may not hold the Appellant liable for failing his CB cleaning duty, nor may it hold the Appellant liable for dishonest reporting.

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

To sustain a violation under CSR 16-60 A), the Agency must establish the following 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). The Agency claimed the Appellant violated this rule by failing to clean the CBs assigned to him on December 6. [Martinez, Kazemian testimony 4/3/07, Tyson Vigil testimony 3/19/07, Exhibit 2-2]. It appears the Agency also claimed the Appellant violated this rule by failing to call in his vacuum motor malfunction. [Exhibit 2-2]. The Agency also appeared to claim the Appellant violated this rule by stopping at the Quincy St. location without performing any work there. The Appellant disputed his obligation to clean many of the CBs on his December 6 route, and disputed the Agency's count. He also disputed that he was obligated to call in for repairs he can effectuate himself.

a. First important work duty: CB accounting in the daily report. The critical issue is whether the Agency communicated to the Appellant a method for counting CBs on the daily report. All three Agency supervisors testified a CB may be counted on the daily report only after cleaning around and inside it, even if there is little or no debris. [Tyson Vigil, Martinez, Kazemian testimony]. Kazemian said there is no "drive-by cleaning." [Kazemian testimony 4/3/07]. Tyson Vigil stated, and Kazemian affirmed, Exhibit 9 is the directive that explains the procedure for counting CBs on the daily report. [Tyson Vigil cross exam 3/19/07, Kazemian cross exam 4/3/07].

There are several problems with the Agency's contention. First, the procedure in Exhibit 9 refers to two vehicles which are different from the one the Appellant drove on December 6,<sup>3</sup> and it is unknown if the Exhibit 9 procedure applied to the Appellant's

<sup>2</sup> The Agency's Notice of Termination letter stated the Appellant did not provide a reason at the pre-disciplinary meeting for a stop of 1 hr. 29 minutes on December 5 at the same location where he stopped for 1 hr. 24 minutes the following day. However it was unclear if the Agency was making a claim based upon the December 5th stop. Then, at hearing, the Agency appeared not to pursue the December 5 stop as only one perfunctory question was asked concerning it. [Appellant testimony].

<sup>3</sup> Exhibit 9 refers to "VAC-ALL" and "POWER-FLUSHER." vehicles. The evidence was clear a Power-Flusher serves a substantially different function than a CB

vehicle. Second, the procedure in Exhibit 9 refers to cleaning of siphons, and it is also unknown if the procedure is the same for catch basins.<sup>4</sup> Third, even assuming siphons and CBs were similar, Exhibit 9 describes the procedure to clean a siphon, but does not answer the question when to count it on the daily report. What if a CB is already clean? What if construction tarpaulins surround it?<sup>5</sup> An agency is free to create and implement regulations, but it must communicate those standards in a meaningful way to those bound by them. The Agency did not do so here. Martinez vaguely stated he believed he talked about the daily report standard in a meeting of supervisors "about a year ago," [Martinez cross-exam 4/3/07], and his testimony was exceedingly confusing as to how Exhibit 9 applied to the Appellant's obligation to fill out his daily report. *Id* and [Martinez testimony]. Similarly, Kazemian referred obliquely to a meeting where the directive regarding counting CBs may have been discussed. He also acknowledged that his directive is passed down to the EOSs only if the first-line supervisor tells them. [See Appendix A]. He did not know if this directive was passed on to the Appellant.

On the other hand, Cruz Vigil and Abeyta testified with certainty there is no set procedure for counting CBs on the daily report, either by written or oral instruction. Abeyta stated "everyone I've ever worked with, if there's a big rain storm or, you know, if they're washed out already, we count 'em. We don't have to clean 'em. There's nothing left for us to do." [Abeyta testimony 4/3/07]. They also testified they count CBs containing frozen debris without cleaning them. The Agency did not challenge the credibility of Abeyta and Cruz Vigil. I find they were as credible as the Agency's witnesses.

Tyson Vigil replied grates need to be cleaned, and basins vacuumed no matter how clean they appear, and frozen debris needs to be broken up by sledge hammer or pry bar. [Tyson Vigil testimony 3/19/07]. Vigil's statement was refuted by those who perform the work, the Appellant, Abeyta and Cruz Vigil. There was no evidence Tyson Vigil's directive was clearly communicated, in writing or otherwise, to EOSs generally, or to the Appellant particularly. Abeyta credibly testified no one ever instructed him to break up frozen debris inside the CB. "We just wait for it to unfreeze and let mother nature clean it out itself. If it rains, it'll wash [the debris] down the pipe, as long as the pipe's open." Abeyta stated he has served a number of EOSs and if CBs appear to be clean when they arrive, all EOSs count CBs on their reports without cleaning them. *Id*. Cruz Vigil credibly testified he was experienced in CB cleaning, and his practice was to count CBs which he deemed clean without re-cleaning them. [Cruz Vigil testimony].

In addition, the Appellant stated his vehicle and personnel were not equipped to climb into the deeper CBs. The Agency's response, that the Appellant was equipped with a

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cleaner. Cruz Vigil drove a Power-Flusher on Dec. 6 but it served merely as transportation and a traffic control device that day. That the "Vac-All" serves a different function than a CB cleaner was also evident in Exhibit 9. "[T]he Vac-All ... deals with the cleaning of siphons." In addition, the daily report, Exhibit 8-1, contains one space for reporting sets of siphons and a different space for reporting CBs, indicating a difference between the function of the vehicles.

<sup>4</sup> Kazemian's testimony gave reason to distinguish the procedures. He stated siphons hold water, while CBs hold only debris, and siphons may require significantly more time to pump. [Kazemian testimony 4/3/07].

<sup>5</sup> Private contractors cover CBs near their construction sites with tarpaulins to prevent construction debris from entering and clogging CBs. See, e.g., photographs 4, 5, and 20 in Exhibit 13. The Agency acknowledge if CBs are covered by such tarpaulins, the EOS is not required to clean them, but it remained unclear whether these CBs are to be counted on the daily report.

breaker bar, and should have had Abeyta climb down into the basin and break up frozen debris was not more convincing than the Appellant's testimony that they were ill-equipped to do so and lacked appropriate safety gear for accessing deep CBs.

The Agency claimed Exhibit 13 photographs, taken by Tyson Vigil the following day, were self-evident proof of the Appellant's failure to clean most of the CBs he counted in his daily report on December 6. Some of the photographs, for example ## 4, 5, and 20 were CBs in construction zones which the Agency acknowledged were not required to be cleaned (or counted?). [Tyson Vigil testimony 3/19/07, Kazemian testimony 4/3/07]. Other photos showed snow, ice or debris on or inside CBs, e.g., ## 11, 12, 15, 16, 25, 29, 30, 34, and 39, but it remains unproven whether the debris was frozen, and if so, whether the Appellant could or was bound by agency rule to break it up and vacuum it. Abeyta and Cruz Vigil credibly testified they were never so instructed, and credibly testified they know of no such requirement. Other photographs display CBs which could be interpreted either as clean or not, e.g. ## 2, 3, 6, 7, 13, 14, 17, 18, 19, 24, 25, 26, 27, 32, 35, and 38. At best, the photographs are inconclusive.

Finally, the Agency represented the Appellant knew or should have known his duty to report only those CBs he vacuumed, based upon "common knowledge" and based upon his experience. [Tyson Vigil cross exam 3/19/07, Kazemian testimony 4/3/07]. The Appellant did not dispute how to clean a CB, but disputed whether an already-clean CB needs to be re-cleaned, and whether construction-zone CBs are counted on the daily report. Abeyta and Cruz Vigil supported the Appellant's contention that there is no "common knowledge" concerning whether already-clean CBs and construction-zone CBs are to be counted. Both have regularly worked on crews where such CBs are counted on the daily report. [Abeyta and Cruz Vigil testimony]. Because the credibility of these witnesses was not challenged and their testimony contradicted that of the Agency witnesses, the Agency failed to prove its "common knowledge" claim by a preponderance of the evidence.

b. Second important work duty: to check for and call in for repairs. The Agency also claimed the Appellant had a duty to check the auxiliary motor before leaving the yard, but the Appellant and his witnesses credibly disagreed. Without additional evidence, the Agency failed to prove this claim.

Similarly, the Agency apparently alleged the Appellant failed his duty to call his supervisor if there was a problem with the auxiliary motor discovered in the field. Tyson Vigil testified the Appellant was obligated under Agency policy to report any vehicle problems in the field to him or to the fleet coordinator immediately. [Tyson Vigil testimony 3/19/07]. He also stated Agency policy requires if a vehicle is not operable for one half hour or one hour, the EOS is to notify him so that he can make necessary adjustments to the schedule. *Id.* It remained unclear how or which of these requirements is communicated to EOSs, or even if the Agency intended these allegations as a CSR violation. See Conclusions, *infra*.

Cruz Vigil agreed with the Appellant that there is no directive to call in every repair. He stated "I'm not aware of any [such] policy, no. I mean, we're out there, and [if] the truck needs to be fixed, and you can fix it, then you fix it. If not, then you call a mechanic." [Cruz Vigil testimony]. When asked whether he would take "an extended time" to fix a mechanical problem, Cruz Vigil stated "if I knew what I was doing, I'd stay until I fixed it, yeah." [Cruz Vigil cross exam]. This testimony was as convincing as the Agency's vague "policy" to call in vehicle problems.

c. Third important work duty: to work while on the clock. The Agency alleged the Appellant was not doing any work while at 6828 Quincy. [Exhibit 2]. Its evidence for this proposition was twofold: GPS readings indicating the vacuum was not running; and the location of 6828 Quincy was not on the assigned route. The vacuum issue was decided above. As for the location, a review of Exhibit 12-6.1 affirms the location was not part of the Appellant's assigned CB route, but the exhibit also shows it was nearby. Cruz Vigil credibly explained there was nothing unusual about the Quincy St. rendezvous with the Appellant, particularly since the CB route is on heavily traveled roads.

In summary: Exhibit 9 does not establish when to count a CB; the Agency failed to establish whether it communicated an order to the Appellant whether already-clean CBs and whether construction-zone CBs may be counted on the daily report; the Agency failed to establish a "common knowledge" obligation as regards counting CBs in the daily report, nor did the Agency establish the Appellant's experience would be reason to know which CBs may be counted; the Appellant presented a credible, alternate explanation for his rendezvous at a vacant area not on his CB route. For these reasons, the Agency failed to establish the Appellant was under a duty to count only those CBs he actually cleaned and vacuumed on December 6, 2007, and therefore failed to sustain a violation under CSR 16-60 A.

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

Kazemian testified he found the Appellant in violation of this rule for the same reasons as for CSR 16-60 A., Neglect of duty, above. For the same reasons as were found, above, the Agency failed to prove the Appellant violated this rule by a preponderance of the evidence.

## **3. CSR 16-60 D. Unauthorized operation or use of any vehicles, machines, or equipment of the City, or of any entity having a contract with the City, including, but not limited to, the unauthorized use of the internet, e-mail or telephones.**

It was not clear from the evidence how the Agency believed the Appellant violated this rule. Kazemian explained his basis for all other violations, but did not address this one. Other evidence indicates the Agency believed the Appellant was not working on

his truck during the two stops at 6828 Quincy on December 6, but it is not clear what unauthorized operation or use of the truck the Agency claims. This claim fails for lack of proof.

**4. CSR 16-60 E. Any act of dishonesty, which may include, but is not limited to:**

**1. Altering or falsifying official records or examinations;**

The Agency claims the Appellant intentionally misrepresented, on his daily work report, the number of CBs he cleaned on December 6. For reasons established above at CSR 16-60 A., Neglect of duty, the Agency failed to prove the Appellant falsified his daily work report for December 6.

**3. Lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours.**

The evidence points to three factual bases for the Agency's claim under this rule: the Appellant's stated reason for his 1 hour 24 minute stop at Quincy St. on December 6, his subsequent 41 minute stop at the same location, and the number of CBs he claimed on his daily report December 6. The false reporting has already been found not proven for reasons stated immediately above, and under CSR 16-60 A., Neglect of duty.

The 1 hour 24 minute stop. The Agency claimed the Appellant was dishonest about his activities during the 1 hour and 24 minutes that he spent at 6828 Quincy between 7:37 and 9:01 a.m. on December 6. [Exhibit 2, Exhibit 7-8]. The Appellant replied he was attempting to service the auxiliary motor during that time. Both Abeyta and Cruz Vigil supported the Appellant's claim. The Agency failed, as stated above, to prove these witnesses were unreliable.

The Agency also contended the Appellant's failure to submit his pre-trip report until the end of the day was evidence of his intent to falsify it. If the Agency had proven EOSs are required to submit their pre-trip reports before leaving the yards for their routes, that evidence would have carried some weight toward such an inference, but the Agency did not prove there is such a requirement. For these reasons, the Agency failed to prove the Appellant violated this rule by misstating the reason for his 1 hour 24 minute stop.

The 41 minute stop. The Agency's claim here is similar to the claim immediately above, that the Appellant's explanation for his 41 minute stop, between 10:14 a.m. and 10:55 a.m. on December 6, was dishonest. The Appellant explained he stopped for 41 minutes at Quincy St. in order to do paperwork and in order to reconnoiter whether CBs along the afternoon route needed to be cleaned. He explained he walked rather than drove his truck there so as not to create a traffic hazard due to the high volume of traffic.

While the Quincy location may have served as a logical rendezvous for the first stop of the day, the Appellant's explanation for the second stop at the same location is far less compelling. His reasons do not comport with the facts. The Quincy St. address is at least five blocks from the nearest point of the CB route for 12/6, [see Exhibit 12-6.1]. Also, Cruz Vigil was assigned to the Appellant for the specific purpose of controlling traffic. Both trucks were equipped with cones and flashing lights for the express purpose of traffic safety. If the Appellant found CBs in need of cleaning, he would then have to walk back 5 or more blocks in order to drive the vehicles to the CBs to clean them anyway. There is no logic in this scenario, unless the Appellant was expecting to find only clean CBs. That explanation defies the purpose for the reconnaissance, to see IF the CBs needed to be cleaned. In addition, the Appellant's witnesses, unlike their testimony concerning the 1 hr. 24 minute stop, were oddly silent about the subsequent 41 minute stop. These facts make the Appellant's explanation for his 41 minute stop unreasonable. In the absence of a credible, alternative explanation by the Appellant, the Agency's claim, that the Appellant was dishonest about the reason for the 41 minute stop, is proven by a preponderance of the evidence.

**5. 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.**

This rule defines two distinct violations, one for disobedience to a direct order and another for failure to perform. There are several important distinctions between the "failing to comply" portion of this rule and CSR 16-60 L. (failure to observe a written departmental or agency regulation, policy or rule), and CSR 16-60 K (failing to meet established standards of performance). First, the phrase "failing to comply" requires a specific order from a supervisor directed to a specific employee, rather than a pre-existing written departmental regulation, policy or rule. [See In re Espinoza, CSA 30-05, 3 (1/11/06) (Undersheriff's statement that all department regulations are also his direct orders insufficient basis under this rule) (decided under prior rule CSR 16-50 A. 7))]. Second, the order may be either oral or written, whereas CSR 16-60 K. and L. require a written standard only. Third, the failure to comply may be either intentional or unintentional disobedience.

Tyson Vigil, the Appellant's supervisor, gave the Appellant a specific order, on December 6, to cover a specific Vac-Flusher route. [Exhibit 8-1]. The "lawful order" requirement is therefore established. However, for reasons as stated above at IV C. 1, the Agency failed to prove what number of CBs on the daily report accurately describes compliance with the directive.

The second phrase, "failing to do assigned work which the employee is capable of performing" contains two elements, assigned work and the capability of performing it. The Agency appears to claim the Appellant violated both parts of the rule by his failure to clean all CBs assigned to him on December 6, and by his ample experience as an EOS, allegedly proving he was capable of the task. This claim fails because the assignment, to clean each grate and basin whether or not already cleaned or covered by a tarp, was not proven by a preponderance of the evidence.

**6. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.**

**1. Work Place Environment**

**The success of Public Works depends on employees who establish and maintain a proper business atmosphere. This includes maintaining a high level of customer service, and respect for co-workers and citizens.**

Kazemian did not address this rule violation, and the Agency's other evidence does not make it clear by a preponderance of the evidence how the Appellant allegedly violated it. Therefore, this claim fails.

**I. Employees Away from the Shop or Office**

**Employees working away from their shop or office must keep their supervisors advised of their locations at appropriate intervals as established by Agencies or Divisions. Employees assigned pagers and radios are required to respond when paged or called on the radio...**

Both in its notice of discipline and in testimony, the Agency emphasized the Appellant has been instructed that he is to call base if there is a problem with his vehicle. According to Kazemian "[y]ou have been made aware on several occasions that any issue with your assigned vehicle needs to be brought to my attention as well as Ms. Baird's immediately." [Exhibit 2-2]. Tyson Vigil testified an EOS is to notify him or Baird "if the truck is going to be down for a half hour or an hour" so that he can make the necessary changes to his daily work reports." [Tyson Vigil testimony 3/19/07]. He later testified an EOS is to contact him or Baird "immediately" if there is any problem with a truck, and they are not supposed to fix any problem themselves. *Id.* All the Agency witnesses, Kazemian, Tyson Vigil, and Martinez, were vague as to when, by whom, or under what circumstances this directive was conveyed to the Appellant or to EOSs generally. "It's common knowledge" was a phrase used by Tyson Vigil, and by Kazemian. The problem with "common knowledge" propositions is, when challenged, a quantum of proof is required. Tyson Vigil's imprecise recitation of the directive as either "a half hour or an hour" or "immediately" points out the lack of notice to the Appellant as to what is the directive.

On the other hand, the Appellant and Cruz Vigil were specific that there is no such directive about calling base for every truck problem. Both stated it is common practice for drivers to repair their own trucks in the field. Cruz Vigil credibly testified that the mechanics become upset when EOSs call for repairs they can correct themselves. That statement was the sort of odd detail that makes the testimony ring true. Moreover, from a practicality and budget standpoint, it would be illogical for an experienced EOS such as the Appellant to call in even small repairs that he can easily

fix himself. If the Agency intends for every vehicle problem to be resolved only by a mechanic, it is free to do so, but it did not prove it communicated such a directive to the Appellant by a preponderance of the evidence.

**7. CSR 16-60 S. \* Unauthorized absence from work; or abuse of sick leave or other types of leave; or violation of any rules relating to any forms of leave**

**defined in Rule 11 LEAVE.** \*[Although the Agency referred to this rule as 16-60 R, the rule was re-numbered to 16-60 S in June 2006].

Kazemian stated the two stops at 6828 Quincy were unauthorized absences in violation of this rule. [Kazemian testimony 4/3/07]. Even if the Appellant's actions were as alleged by the Agency, his actions fall outside the scope of this rule. During the 41 minute stop, Kazemian testified the Appellant's reconnoitering was outside the norm. Even if true, the Appellant was mis-performing an act within the scope of his employment rather than taking an absence from employment. As for the 1 hr. 24 minute stop, the Agency failed to prove the Appellant was not working on his truck or should not have been working on his truck. Either way, the Appellant's actions were within the scope of his employment rather than taken in the absence of it. The Agency did not claim abuse of leave. The Agency failed to prove the Appellant violated this rule.

**D. DEGREE OF DISCIPLINE**

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

1. The Appellant's past record. The Appellant's disciplinary history is extensive, but baffling. As reported by the Agency in its Notice of Termination letter, the Appellant's disciplinary history for the past five years consists of the following chronology:

<b>Date</b>	<b>Discipline</b>	<b>Offense</b>
9/5/02	Written reprimand	Vehicle accident
2/5/03	Verbal Warning	Unauthorized leave
4/30/03	Written Reprimand	Unauthorized leave
8/12/04	Written Reprimand	Unauthorized leave
10/07/04	14 day suspension	Unauthorized leave
3/29/05	Verbal Warning	Out of Assigned Area
10/26/05	Verbal Warning	Unauthorized leave
4/28/06	Verbal Warning	Out of Uniform

A decision maker is not required to follow progressive discipline before deciding on an appropriate penalty. CSR 16-20, 16-50 A. 1, 3. However, where the Agency head states he considered the Appellant's disciplinary history before deciding on termination, and the progression of discipline is illogical on its face (here, the penalties for unauthorized leave progressed from verbal to written to suspension, but then regressed to a verbal warning), such history begs for some explanation.<sup>6</sup> None was forthcoming here. In addition, the evidence was silent as to whether any of the prior disciplinary actions involved dishonesty, and the Appellant's work performance history contained only "exceeds" or "meets expectations."

## 2. The severity of alleged offenses.

The Agency emphasized its two most important findings were the Appellant's failure to clean catch basins assigned on December 6, and his filing a false report concerning the number of catch basins he cleaned. [Exhibit 2, Agency Opening Statement]. The consequence was a breach of trust in the accuracy of his daily reports that could not be repaired. [Kazemian testimony 4/3/07]. Due to the uncertainty of reporting CBs in the daily report, the basis for the Agency's principal claim is undermined. All that is left is the Appellant's dishonesty about the purpose of his 41 minute stop on December 6. Any act of dishonesty about an important work function is a serious matter. However, here the only proven loss was 41 minutes of work, since the basis for the Agency's principal claim - loss of trust in the Appellant's daily reports [Kazemian testimony] - was not borne out by the evidence.

Based upon the totality of the evidence, I find that the penalty of dismissal was not reasonably related to the seriousness of the only proven offense and did not adequately take into account the Appellant's past record. A review of recent cases involving termination shows termination was sustained in cases where the claims were substantially proven and the violations carried egregious consequences to the Agency or its mission, unlike the present case.<sup>7</sup>

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<sup>6</sup> The disciplinary rule is governed by principles which include personal accountability, reasonableness and sound business practice. CSR 16 Purpose Statement. If a facially illogical progression of discipline remains unexplained, those principles invite doubt about the choice of discipline.

<sup>7</sup> See, e.g. *In re Ortega*, CSA 81-06 (4/11/07) (termination sustained for a child support worker who lied about her relationship with the non-custodial father where the violation jeopardized the essence of the Agency's mission to insure proper child support is paid); *In re Salerno*, CSA 90-06 (2/27/07) (termination sustained for a court clerk who destroyed her own traffic ticket after soliciting another employee to assist her. This also was a direct violation of the Agency mission- to maintain the integrity of the judicial process); *In re Padilla*, CSA 45-04 (12/30/04) (termination justified for a supervisor in parking management who attempted to engage a subordinate to cover up his own parking tickets); *In re Simpleman*, CSA 31-06 (10/20/06) (termination sustained where a deputy sheriff had just finished serving a substantial suspension for dishonesty only one week before engaging in another incident substantially related to dishonesty, and the Sheriff's Department had recently placed heightened scrutiny over cases involving dishonesty of its deputies); *In re Feltes*, CSA 50-06 (11/24/06) (termination upheld where an employee who had supervisory responsibility over accounting, falsified official records, and lied to her supervisors over the course of the 2 ½ years in a premeditated pattern of false statements in an attempt to cover up a payroll clerk's dishonesty that resulted in financial impact to the City); compare *In re Hernandez*, CSA 03-06 (5/3/06) ("what this case boils down to is whether... firing someone is a reasonable action to take for calling a co-worker "babe" and saying "[your hair] is so soft." The Appellant had been ordered to desist using similar terms in prior incidents with other female co-workers. Dismissal modified to 30-day suspension); *In re Freeman*, CSA 75-04 (3/3/05) (Agency's principal claim of workplace violence not established for inadvertently hard slap to face where joshing was intended. Dismissal modified to 1-day suspension).

## **V. CONCLUSIONS**

The Agency substantially failed to prove its claims against the Appellant. Part of the difficulty in this case was that neither the pre-disciplinary notice nor the notice of discipline provided much notice to the Appellant what facts the Agency was relying upon to find him in violation of the stated Career Service Rules. The dearth of information required speculation as to link between the statements of fact and the rule violations. The testimony at hearing did not help make those connections. For example, the notice of discipline, Exhibit 2-3, ominously reviewed the Appellant's failure to call in on December 5. Was discipline assessed in part due to a failure to call in on December 5? At hearing, the Agency briefly asked the Appellant to review the log for December 4 and 5 then dropped the matter. Kazemian did not refer to December 5 at all in listing the reasons for having assessed discipline. [Kazemian testimony]. So, was the Appellant's failure to call in on December 5 a basis for discipline? I cannot conclude that it was by a preponderance of the evidence.

Another example of the Agency's failure to connect the dots is the Agency's extensive discussion, both in its notices [see Exhibit 2-1 through 2-3], and at hearing [see Tyson Vigil, Martinez, Kazemian testimony], regarding the Appellant's failure to call base. Was this considered a basis for discipline? What about the 41 minute stop referenced at Exhibit 2-3 and in hearing? Was the failure to call in that stop also considered a rule violation? If so, then which rule? The only cited rule that might be relevant is CSR 16-60 L, which, in turn, cites a department regulation requiring employees to "keep their supervisors advised of their locations at appropriate intervals as established by Agencies/Divisions." Did the Agency consider the Appellant's failure to call in his truck problems on December 6 a violation of his obligation to call in "at appropriate intervals?" If so what were the "appropriate intervals?" The Agency was silent on this important point. If the connection was made, it was so opaque as to become speculative. Where an agency's factual proof of a rule violation is so vague it requires the hearing officer to speculate as to the intended nexus, no violation may be found. To rule otherwise would require the hearing officer to assume a disciplinarian's cloak, in violation of his obligation to remain neutral.

The weakest link in the Agency's case is its dearth of written requirements upon which it based its discipline: the definition of what is a "completed" or "cleaned" CB, the requirement to call base immediately upon discovering a critical equipment problem. A problem of proof arises when unwritten requirements become subject to conflicting understanding and execution of the requirements. For example, the Agency stated that according to the Appellant, he cleaned 23 CBs in 14 minutes, the time the vacuum was running. According to the Agency's assumptions, this means the Appellant cleaned one CB at an average rate of 1.6 minutes each, a rate the Agency states is impossible. The problem is not the arithmetic, but the assumptions behind it. For example, what should the number reflect that an EOS writes next to "CB" in Exhibit 8-1? The Agency believes the Appellant's "23" means he avows having cleaned and lifted each of the 23 grates, cleaned the frame which holds the grate, and cleaned and vacuumed inside the basin, breaking up by hand any frozen debris. Nowhere is this procedure written, and credible witnesses provided conflicting


testimony about what is the standard. What if the CB is already clean due to a recent heavy rain? Tyson Vigil said it must be cleaned anyway before counting it. An agency may establish any reasonable regulation by fiat. Thus, even if logic dictates not to re-clean an already-clean CB, the Agency may impose such a requirement, but the Agency did not prove there is such a requirement by a preponderance of the evidence. Based upon the evidence presented, the argument could be made equally for either method of accounting and testimony was conflicting as to whether there is a standard method for counting.

In another example of the Agency's questionable assumptions, the Agency declared each CB requires at least 4-5 minutes cleaning. [Tyson Vigil, Kazemian testimony]. The Agency assumes the process is strictly a two-man, cumbersome job, as one person cannot safely lift a grate himself. The Appellant credibly testified he can easily lift a grate himself while carrying the vacuum hose over his shoulder. Indeed, Abeyta credibly testified he frequently observed the Appellant do so. Then, the Agency claimed such a one-man practice would violate safety rules, but provided no support for its claim. Moreover, when the Agency challenged the Appellant to lift a grate it brought to hearing, and the Appellant replied he'd be glad to, the Agency backed off its proposed demonstration. I infer from that exchange that the Appellant likely was capable of lifting a grate himself, the consequence of which might be to conserve time over a 2-man maneuver. Here, also, the Agency is well-within its authority to require any reasonable cleaning method it chooses, but it failed to prove it communicated such a requirement.

## **VI. ORDER**

The Agency's dismissal of the Appellant on January 9, 2007, is modified. The Appellant shall serve a 30-day suspension *nunc pro tunc* January 9, 2007. The Agency is ordered to reinstate the Appellant to the position he occupied before his dismissal, and to restore his pay and benefits *nunc pro tunc* January 9, 2007.

DONE on May 15, 2007.

  
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Bruce A. Plotkin  
Hearing Officer  
Career Service Board

## **NOTICE OF RIGHT TO FILE PETITION FOR REVIEW**

A party 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. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

### **BY MAIL OR PERSONAL DELIVERY:**

Career Service Board  
c/o Employee Relations  
201 W. Colfax Avenue, Dept. 412  
Denver CO 80202

**BY FAX:** (720) 913-5720. Fax transmissions of more than ten pages will not be accepted.

**APPENDIX A - CROSS EXAMINATION OF REZA KAZEMIAN 4/3/07**

Q: The procedures for counting [catch basins on the daily report], would have been - if I was to go ahead and map out mentally how it works - YOU make the decision of when something should be counted or not and then you turn to Mr. Lupe Martinez and say "this is the way it should be counted," and then he turns around to Tyson Vigil and tells him "this is when they should count and when they shouldn't count." Then it's up to Tyson Vigil to turn around to the employees and say "this is when you count it and this is when you don't count it cleaned. Isn't that correct?"

A: Well, it depends, you know, as I said the other monthly meeting with the operation supervisors, which is the second level, af... you know, after Mr. Martinez, that issue may come up in the system maintenance, uh, operations supervisors meeting. We may discuss it there as well.

Q: But, unfortunately, if there's no WRITTEN procedures, di...directing these things, everything is by word of mouth, and it's passed down through the chain of command. Correct?

A: Well...not entirely correct, what you said. You also have to realize that Mr. Encinias is a veteran EOS and every time they do a new job, they get training as far as what to do with that job. We don't send an EOS out there to run, for example, a piece of equipment that he never worked on, and ah, we send him with a... another person that worked on that one to train him.

Q: Right. And...[talking over Kazemian] Thank you. It's word of mouth training. It's "I'll send Mr. Encinias over to this operator and he will show him what to do.

A: Yes.

Q: And the reason for that is there's nothing written down. For example you had said that for...for some ki... uh, a particular form of job... of job training would be, that you would send an employee that needs to be trained to another employee that has already been trained and he would just spend some time with him and learn the job that way. Correct?

A: That's correct.

Q: O.K. And there's nothing written down so it's, again, up to that low-level supervisor to communicate properly...what to do. Correct?

A: Well... mm, Yes...That's...that is true.

**CERTIFICATE OF SERVICE**

I certify I forwarded a correct copy of the foregoing **DECISION** as indicated below on May 17<sup>th</sup>, 2007, addressed to:

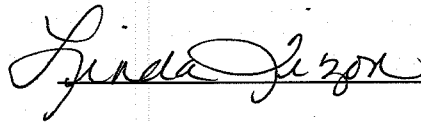
Michael O'Malley, Esq.  
1435 Stuart St.  
Denver, CO 80202

Mr. John Encinias  
3832 Zuni Street  
Denver, CO 80211

I further certify I forwarded a correct copy of the foregoing **DECISION** by depositing it in interoffice mail on May 17<sup>th</sup>, 2007, addressed to:

Joseph A. DiGregorio, Assistant City Attorney  
Litigation Section  
201 West Colfax Avenue Dept. 1108  
Denver, CO 80202

Reza Kazemian, P.E.  
Director of Operations  
Wastewater Management

  
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