

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

Appeal No. 168-02

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**JOHN EUGENE PEREZ**, Appellant,

Agency: DEPARTMENT OF PUBLIC WORKS, STREET MAINTENANCE DIVISION,  
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

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A hearing in this matter was held before Hearing Officer Joanna Lee Kaye on December 16, 2002 and January 15, 2003 in the Career Service Hearings Office. Assistant City Attorneys Jack M. Wesoky and Mindi L Wright represented the Department of Public Works, Street Maintenance Division ("the Agency"). Street Maintenance Director Steve Garcia served as advisory witness for the Agency. John Eugene Perez ("Appellant") represented himself.

**MATTER APPEALED**

Appellant challenges the Agency's decision to suspend him for forty-five days without pay for alleged acts of misconduct. Appellant seeks a reversal of his suspension with back-pay and a restoration of benefits.

For the reasons set forth below, the Agency's action is AFFIRMED.

**PRELIMINARY MATTERS**

**1. Appellant's counterclaim of retaliation.**

On October 17, 2002 the Agency filed a Motion for More Particular Statement concerning Appellant's allegations of retaliation raised in his appeal. The Hearings Office entered an Order to Respond to the Agency's Motion on October 24, 2002, with a Response due date of November 2, 2002. As of the commencement of the hearing on December 16, 2002, neither the Agency nor the Hearings Office had received a response and the Agency renewed its Motion at that time. Appellant argued that he did send a response to the Order to both the Hearings Office and the City Attorney's Office. However, Appellant was unable to produce any proof tending to establish this was the case. The hearing officer therefore granted the Agency's Motion to Dismiss the issue of retaliation.

## **2. Consideration of Appellant's prior disciplinary action in light of a settlement agreement.**

During the hearing while Appellant was on the stand, he adamantly protested when asked certain questions related to his prior disciplinary action, referencing the fact that the case had been settled by the parties through a prior settlement agreement. The hearing officer inferred from Appellant's reaction that he expected the matter would be kept confidential. When the hearing officer raised this question the Agency withdrew the line of questioning. However, this in turn raised further concerns that such a result might be based on a presumption of confidentiality that was not accurate. In light of these developments, the hearing officer requested a copy of the settlement agreement in question (Exhibit 19) and invited written arguments on this issue, which both parties provided on January 29, 2003.

The hearing officer has reviewed those written arguments, as well as the settlement agreement in its entirety. For the reasons set forth below, she has determined that Appellant's prior suspension can properly be considered as progressive disciplinary action in this case.

### **ISSUES**

1. Whether the Agency has shown by a preponderance of the evidence that Appellant engaged in the alleged acts.
2. If so, whether the acts constitute violations of CSR rules or other controlling authority, giving the Agency just cause to discipline Appellant.
3. If so, whether Appellant's suspension is reasonably related to the seriousness of the offenses in question, taking into consideration Appellant's past record.

### **FINDINGS OF FACT**

1. Appellant is a seventeen-year veteran employee for the Agency. His current position is Equipment Operator. He has an excellent performance record (*see*, Exhibit C, pp. 1-3), and one prior disciplinary action in December of 1999. Appellant appealed this disciplinary action and that case was settled by means of a settlement agreement entered on December 2, 1999. (Exhibit 19).
2. While the settlement agreement for the prior disciplinary action states that it is to "simply avoid further litigation," this reference is to the disciplinary action in that case only. That prior disciplinary action is not being retried here. There is no language in the settlement agreement suggesting that the modified discipline was to be kept confidential. On the contrary, the agreement specifically states that the modified disciplinary letter would be returned to Appellant's file. Once returned to the file, the modified disciplinary action became an established part of Appellant's personnel history. The agreement does not otherwise contain any express prohibition against considering that modified disciplinary action as prior discipline in a subsequent case under Career Service Rules (CSR) 16-10 and 16-20. Therefore, consideration of the modified disciplinary action as prior discipline is

proper. The disciplinary action was taken in that case for Appellant's failure to maintain satisfactory relationships in violation of CSR 16-51 A. 4) and failure to observe the Agency's motor vehicle policy in violation of CSR 16-51 A. 5) (*see*, Exhibit 12).

3. The Agency maintains the following work schedule. The work shift begins at 7:30 a.m. and ends at 3:30 p.m. Two 15-minute breaks and a half-hour lunch are permitted. Both types of breaks include travel times (*see*, Public Works Policies and Rules Handbook, hereinafter "Handbook," Exhibit 14, pp. 10-11). However, employees have the option of waiving one 15-minute break, instead leaving 15 minutes early at the end of the day. Employees can also use one of their 15-minute breaks by adding it onto the end of their lunch hour, providing for a 45-minute lunch hour including travel time. (*See*, Exhibit 15.) Any additional variations from the duty schedule require a prior written leave request and approval by the supervisor. Employees are permitted to take City vehicles to lunch sites that are within ten blocks of the worksite. Any additional use of City vehicles for personal use is prohibited. (*See*, Exhibit 2-2; Handbook, p. 12; Exhibit 14-17.) Employees driving City vehicles are to radio in a "code 10" indicating they are going on a break or leaving the truck momentarily, and are to radio in a "code 20" with location when they are leaving the truck for a lunch break, and a "code 21" when returning to the truck after the lunch break. (*See*, Exhibit 2, p. 2; *see also*, Handbook, pp. 4-8; Exhibit 14 pp. 9 through 13.)
4. Street Maintenance for the City and County of Denver is divided into four areas supervised by four supervisors, with one supervisor assigned to oversee each area. Supervisor Amory Davis is responsible for the district east of Downing and north of Sixth Avenue. Supervisor Brian Nieto is responsible for the district west of Downing and north of Alameda. The other two areas were not involved in this case.
5. Prior to February of 2002, Appellant was assigned to the Roslyn Street facility located in Mr. Davis' district. During Appellant's tenure in Mr. Davis' district, there were two incidents of alleged conflict between Appellant and Mr. Davis, one in early 2001 and one in early 2002. In these incidents, both men leveled allegations of workplace violence against one another. (*See*, Exhibits 10 and 11.) The Agency investigated both incidents and did not substantiate actual "workplace violence" against either man (*see*, Exhibit 8, pp. 4-7).<sup>1</sup> However, Street Maintenance Director Steve Garcia transferred Appellant to a vacancy in Street Sweeping in Mr. Nieto's District around mid-February of 2002 to avoid further conflict between the two men. Mr. Garcia further directed Appellant and Mr. Davis to have no contact with one another, and ordered Appellant to refrain from entering the Street Maintenance offices located at 5440 Roslyn Street (apparently where Mr. Davis' office is located) at any time under any circumstances. (*See*, Exhibits 8, pp. 1-4.) While these letters do not specifically say as much, it is clear from the testimony of Mr. Garcia, Mr. Nieto and Appellant that it was further understood Appellant was to remain within his assigned work area and not stray into Mr. Davis' district. Appellant's new supervisor, Mr. Nieto, was specifically made aware that Appellant and Mr. Davis had direct orders from Mr. Garcia to refrain from entering one another's districts.

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<sup>1</sup> There are two pages in Exhibit 8 numbered "8-4." Executive Order 112 begins on the second of these.

6. Appellant's work assignment in Mr. Nieto's district primarily involves driving a Tandem Truck (also referred to by various witnesses as a "dump truck") behind street sweepers in designated areas in his assigned district, as well as hauling the debris collected from the street sweepers to a landfill at Hampden Avenue and Gun Club Road. Because of their size and weight, Tandem Trucks are classified as "heavy equipment." Their drivers are required to possess a Commercial Driver's License, or "CDL," indicating they have the necessary experience and qualifications to operate such vehicles safely.
7. The Agency took disciplinary action against Appellant for two main reasons. First are certain documented inappropriate activities by Appellant during surveillance. The second concern arises from events on the afternoon of August 9, 2002 involving Appellant allegedly faxing material to Mr. Davis in violation of the Agency's order to have no contact with Mr. Davis.
8. In or around April of 2002, some equipment operators anonymously made allegations to Mr. Garcia about Appellant engaging in non-work activities during work hours. Mr. Garcia determined through conversations with his director and manager that the Agency should hire an investigator. Mr. Garcia hired Richard Quiroga of Kolb, Stewart and Associates. Mr. Quiroga followed Appellant while he was on duty on April 30 and May 1, 7, 9, 20 and 22, 2002.<sup>2</sup> He observed the following relevant activities.<sup>3</sup>

***Disciplinary issue 1: surveillance results.***

9. Tuesday, April 30, 2002 (*see*, Exhibit 17, pp. 5-9):
  - a) Appellant's assignment on this day was to haul debris from Park Avenue Municipal Services Complex located at Park Avenue West and Globeville) to the landfill located at Gun Club Road and Hampden Avenue. (*See*, Exhibit 2-4.)
  - b) At approximately 10:48 a.m. Appellant left the landfill located at Hampden Avenue and Gun Club Road and drove to the alley behind his home on Decatur Street, where he arrived at 11:40 a.m. Appellant then loaded construction debris into the back of the dump truck from the alleyway as a favor to his neighbor. (*See*, Exhibit 3-E-2 and 3.) Appellant left that area at 11:50 a.m.

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<sup>2</sup> Mr. Quiroga also initiated surveillance of Appellant on May 6, and subsequently terminated surveillance when he learned that Appellant was on personal time that day.

<sup>3</sup>The findings here include Appellant's call-in reports for lunch (codes 20 and 21). Since there are no records tending to establish that any employees call in to document other breaks (codes 10 and 11), the hearing officer has disregarded any allegations of Appellant's failure to call in these codes. Finally, most of Appellant's briefer stops (*i.e.* running into a convenience store; stopping on a street corner to briefly converse with an individual) are described vaguely or by referencing street locations. It is not clear from the record whether these locations were more than ten blocks from Appellant's worksite, outside his work parameters, or off the beaten path of his trips to the landfill. The hearing officer has disregarded minor diversions unless their occurrence clearly contributes to the Agency's argument that Appellant's total breaks for the day exceeded the allotted time.

- c) Mr. Garcia testified that Appellant's use of the Tandem Truck to pick up the alleyway debris was unauthorized. He testified that the appropriate agency to pick up such debris is Solid Waste.
- d) At approximately 12:19 p.m. Appellant was videotaped double-parking the Tandem Truck in the vicinity of 19<sup>th</sup> and Champa, leaving the truck and going into a business briefly, then returning to his truck at 12:23 and leaving the area. Appellant admitted double-parking at 15<sup>th</sup> and Champa to run in and pick up his glasses. He further admitted that downtown Denver is a "bad place" for a dump truck, but noted that this was a construction area and he parked safely next to some street cones.
- e) Appellant then drove to King Soopers on 13<sup>th</sup> and Santa Fe where he arrived at 12:27 p.m., entered, and then emerged and got in his truck to leave at 12:40 p.m. He then drove to Alamo Placita Park near 3<sup>rd</sup> and Emerson where he remained until 1:04 p.m.
- f) At 2:43 p.m. Appellant drove to the corner of 11<sup>th</sup> Avenue and Humboldt where he parked the truck, got out, and walked into Cheeseman Park. Appellant walked through the park until 2:52 p.m. Appellant testified he went to Cheeseman Park that day to use the bathroom.
- g) The location of 11<sup>th</sup> Avenue and Humboldt is north of 6<sup>th</sup> Avenue and East of Downing Street, as is Cheeseman Park. Therefore, both locations are within Mr. Davis' district.
- h) The code call-in documentation (*see*, Exhibit 18, pp. A-1 through A-3) does not indicate that Appellant called a code 20 or a code 21 at any time during the day.
- i) Appellant's total time off during April 30 included morning and afternoon breaks in addition to around 45 minutes (including personal errands).

10. Wednesday, May 1, 2002 (*see*, Exhibit 17, pp. 10-12):

- a) On this day Appellant's assigned work parameters were from Alameda to 20<sup>th</sup> Avenue, and from Lincoln Street to Downing Street. (*See*, Exhibit 2-5.)<sup>4</sup>
- b) Appellant arrived at Alamo Placita Park (approximately on 3<sup>rd</sup> Street between Emerson and Ogden; *see*, Exhibits 16; 17-11) at 11:30 a.m. This park is within the assigned work area. He remained there until 12:59 p.m., approximately 1 hour and 29 minutes.
- c) The code call-in documentation for this day (*see*, Exhibit 18, pp. B-1 and B-2) does not indicate that Appellant checked out or back in again during this period.

11. Tuesday, May 7, 2002 (*see*, Exhibit 17, pp. 14-15):

- a) Appellant's assigned work parameters were again from Alameda to 20<sup>th</sup> Avenue, and from Lincoln Street to Downing Street. (*See*, Exhibit 2-5.)<sup>5</sup>
- b) Appellant drove to Alamo Placita Park at 3<sup>rd</sup> and Ogden where he arrived at 11:34 a.m. and remained parked there in the vehicle until some uncertain time. He left there and arrived at 11<sup>th</sup> and Downing, where he parked at 12:07 p.m.
- c) 11<sup>th</sup> and Downing is within Appellant's assigned work area for the day.

<sup>4</sup> These parameters, which appear in the disciplinary letter (*see*, Exhibit 2-5) are considerably wider than those which appear in the investigative report, which are 12<sup>th</sup> to 20<sup>th</sup> and Grant to Downing. (*See*, Exhibit 17-10.)

<sup>5</sup> *See*, above footnote. (*Cf.*, Exhibits 2-5; 17-14.)

- d) Appellant left the truck parked at 11<sup>th</sup> and Downing and walked to Cheeseman Park, where he walked around for a lengthy period of time observing his surroundings. Appellant stopped to sit on the grass for a few minutes on one occasion, and to speak briefly with unidentified female citizens on two occasions. Appellant was also observed tearing a page out of a phone book in the park. He returned to his truck and drove away at around 12:51 p.m.
- e) Appellant called in a code 20 from 11<sup>th</sup> and Downing at 12:06, and a code 21 at 1:00 p.m. (*see*, Exhibit 18, p. 19-C-1).
- f) Appellant's total break time for this day began at around 11:34 and continued until approximately 12:51. Appellant's total lunch break exceeded one hour and 15 minutes.

12. Thursday, May 9, 2002 (*see*, Exhibit 17, pp. 16-18):<sup>6</sup>

- a) Appellant's designated work parameters on this day were 6<sup>th</sup> Avenue to Colfax and Sheridan Boulevard to Interstate 25. (*See*, Exhibits 2-6; 17-17.)
- b) Appellant was followed to a shopping center at 7<sup>th</sup> and Sheridan where he arrived at 11:57 a.m., got out and walked around, then returned to his truck at 12:11. He drove to Lakewood Gulch Park located somewhere on 12<sup>th</sup> Avenue, where he arrived and parked at 12:20 p.m. Appellant was later seen leaving this location at 1:05 p.m., at which time he returned to his worksite.
- c) Appellant left the worksite again at an uncertain time and drove to a McDonalds where he arrived at 1:31 p.m. Appellant went in, got some food, returned to his truck and left at 1:38. It is not clear from the record how far this location was from Appellant's work area.
- d) The call-in log for that day indicates that Appellant called in a code 20 at 12:16 indicating he was at 9<sup>th</sup> Street and Knox (*see*, Exhibit 18-D-2). However, this is where Appellant was at 10:02 when he stopped briefly at a phone booth. As of 12:16 Appellant was documented to be at Lakewood Gulch Park on 12<sup>th</sup> Avenue. Exhibit 18 does not indicate that Appellant called in a code 21.
- e) Appellant took a morning break and an afternoon break, in addition to a forty-five minute lunch.

13. Monday, May 20, 2002 (*see*, Exhibit 17, pp. 19-21): Appellant's total time off for the day was a 43-minute lunch break. Surveillance revealed no inappropriate activities on this day.

14. Wednesday, May 22, 2002 (*see*, Exhibit 17, pp. 22-24):

- a) On this day Appellant's assignment was Sheridan Boulevard to Interstate 25 and 38<sup>th</sup> Avenue to 48<sup>th</sup> Avenue (*see*, Exhibit 2-6).<sup>7</sup>
- b) Appellant was observed driving his Tandem Truck from the work station to his home on approximately 46<sup>th</sup> and Decatur, where he parked in front of his home facing against traffic at about 7:47 a.m. Appellant walked up the block, approaching some the residents to tell them the street was to be cleaned that day. When Appellant returned to his truck,

<sup>6</sup> Exhibit 17-16 erroneously refers to this day as Wednesday.

<sup>7</sup> These parameters are significantly wider than those indicated in the investigative report. (*See*, Exhibit 17-22.)

his wife was standing next to the truck aiming a camera at it. Appellant's two school-age grandchildren then emerged from the cabin of the truck, by the driver's side door which was facing the curb. The truck was not running when the children were in the cab and the keys were in Appellant's pocket while the children were sitting in the truck. Appellant then left at 7:55 and went to the worksite.

- c) Mr. Garcia testified that allowing the children to enter an open door to a Tandem Truck was a safety risk and was not authorized. He testified that the Agency allows children to come to headquarters and view the trucks there under a controlled environment.
- d) Appellant was observed leaving the worksite in his Tandem Truck at an undetermined time and returning to this home, where he arrived at 10:07 a.m. He went inside the house, left again and drove away at 10:10. This time combined with Appellant's morning stop at home totaled 11 minutes not including travel time from Appellant's worksite.
- e) Appellant returned to his home a third time at 12:08 p.m. where he parked the truck and went in, apparently for lunch. He left again at 12:57 p.m., a total of 49 minutes.
- f) The Agency offered no documentation of the call-in and call-out activities for this day.

***Disciplinary issue 2: Appellant's alleged fax to Mr. Davis and surrounding events.***

- 15. The fax number for the Colfax office, which is the central office for Mr. Nieto's district, is (303) 640-2709. The fax number for the Roslyn Street office for Mr. Davis' district is (720) 865-4162.
- 16. On August 8, 2002 Ford Family Medical Center faxed a boilerplate medical release to Appellant at the Colfax office fax number (*see*, Exhibit 3-C-2). Both the fax legend at the top of this document and the document itself indicate that Ford Family Medical's fax number is (303) 635-0092.
- 17. On the morning of August 9, 2002 Appellant showed Mr. Nieto a passage from an Alcoholics Anonymous book (which appears in Exhibit 5-3) and asked Mr. Nieto if he could make a copy of it. Mr. Nieto allowed him to do this. Mr. Nieto observed Appellant with the Xerox copy of the page that morning.
- 18. Later in the afternoon of August 9, 2002 at around 2:00 p.m., Appellant asked Mr. Nieto for permission to send a fax to his health care provider. Mr. Nieto then observed Appellant in the fax room at around 2:05 to 2:15 p.m. A Transmission Verification Report dated August 9, 2002 indicates that someone attempted to send a fax to the number (303) 635-0092 (Ford Family Medical) at 1:48 p.m. (*see*, Exhibit 6-5, upper right-hand corner), but the fax number was busy at that time. This transmission verification report indicates that this fax was sent from fax number (303) 640-2709 (Colfax Office fax number).<sup>8</sup>
- 19. On August 9, 2002 at around 1:56 p.m. a fax was sent from the fax machine at the Colfax facility to Mr. Davis at the Roslyn facility. The fax contained the same page from the Alcoholic Anonymous book that Appellant had shown Mr. Nieto and made a copy of earlier that day (*see*, Exhibit 5, pp. 1, 3). The Transmission Verification Report attached to the fax

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<sup>8</sup> Mr. Garcia testified that in his experience with the office fax machine, when an outgoing fax encounters a busy line, the fax goes into the machine's memory for periodic resending until the receiving number becomes clear.

indicates that the transmission attempt at 1:56 p.m. originally met a busy response. (See, Exhibit 5, p. 4.)<sup>9</sup>

20. Mr. Davis called Mr. Nieto at approximately 2:20 p.m. on August 9 to report receiving a fax of the Alcoholics Anonymous page from Mr. Nieto's office. At approximately 2:45 Mr. Nieto went into the fax room and found the copy of the Alcoholics Anonymous prayer (Exhibit 5-3) in the room.
21. The Agency sent Appellant a Contemplation of Disciplinary Action letter ("Contemplation letter") on August 21, 2002 (Exhibit 4). The letter set forth a brief narrative of the surveillance results and described the incidents on the afternoon of August 9, 2002. A pre-disciplinary meeting was held on August 28, 2002. Present were Appellant and his attorney, Mr. Barbee and Ms. Garcia. Appellant was provided the opportunity to respond to the charges in the Contemplation letter at that time.
22. Mr. Garcia testified that in making a decision concerning Appellant's case, he considered all the information gathered during the surveillance, the incidents of August 9, 2002, the information offered by Appellant during the predisciplinary meeting, Appellant's excellent work record, and Appellant's prior suspension in 1999.
23. On September 12, 2002 the Agency sent Appellant a letter notifying him of its decision to suspend him for forty-five days without pay (Exhibit 2). Appellant then timely filed this appeal on September 13, 2002 (Exhibit 1).

## DISCUSSION

### **1. Burden of proof**

In *de novo* administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence*. This means that the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not. It has been previously established that the Agency responsible for disciplining a Career Service employee bears the burden of establishing, by a preponderance of the evidence, that it had *just cause* for the disciplinary action. The Agency must also demonstrate that the severity of discipline is reasonably related to the nature of the offense in question. See, In the Matter of Leamon Taplan, Appeal No. 35-99 (Decision entered 11/22/99).

### **2. Rules the Agency alleges Appellant violated.**

The Agency posits that Appellant's conduct constitutes the following CSR violations.

#### Section 16-50 Discipline and Termination

##### A. Causes for Dismissal:

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<sup>9</sup> See, footnote 8, above.

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

- 1) Gross negligence or willful neglect of duty.
- ...7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work which the employee is capable of performing.
- ...13) Unauthorized absence from work, including but not limited to... leaving work before completion of scheduled shift without authorization; or taking unauthorized breaks.
- 14) Failure to use safety devices or failure to observe safety regulations which: results in injury to self or others; jeopardizes the health or safety of others; or results in damage or destruction of City and County property.
- ...20) Conduct not specifically identified herein may also be cause for dismissal.

#### Section 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline....

- ...4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.
- 5) Failure to observe departmental regulations (namely, Public Works Street Maintenance Division's Rules and Regulations, set forth in relevant part below).
- 6) Carelessness in the performance of duties and responsibilities.
- 7) Unauthorized operation or use of any vehicles, machines, or equipment of the City and County.
- 8) Neglect in the care or use of City and County property.
- ...10) Failure to comply with the instructions of an authorized supervisor.
- 11) Conduct not specifically identified herein may also be cause for progressive discipline.

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The Handbook, as quoted in the Agency's disciplinary letter (Exhibit 2) sets forth as follows in pertinent part:

#### 2. Lunch and Break Period

All field employees are entitled to a 30-minute lunch period and two 15-minute breaks each day.... (O)ne 15-minute break period is added to the lunch break (making lunch periods 45 minutes) and the other 15-minute break period is observed at the end of the work day... (W)ith the exception of the lunch period, employees should not be engaged in breaks or personal activities during the normal work day.

...City equipment may not be driven more than 10 blocks (one way) from the work site or route when traveling to lunch. Travel time to and from lunch must also fall within the designated 45-minute period.

All employees are expected to follow these policies. Instances where employees are found to be engaged in personal activities during work time or outside of the 10-block distance limitation will be subject to possible disciplinary action.

5. Motor Vehicles

Each vehicle operator is responsible for the safe operation and condition of his/her vehicle or equipment.

Employees driving City vehicles or personal vehicles on official City business shall obey all traffic laws, rules, and regulations, even then (*sic*) on an emergency call, except where the nature of the work being performed required deviation...

\* \* \*

3. **Analysis of the evidence.**

*a. Observations of Appellant's activities during surveillance.*

Appellant contends that he was only trying to be a good public servant when he removed the debris from the alley for his neighbor on the morning of April 30, 2002. While the hearing officer finds this assertion credible, she is not persuaded that it justifies Appellant loading heavy debris into the Tandem Truck without authorization. Mr. Garcia credibly testified that this type of debris should be handled by solid waste.

Appellant further argues that double-parking by a construction area later that day was safe where access was limited by cones, even though it was downtown. The hearing officer is unpersuaded. Whether or not Appellant judged this act as safe or not, double-parking is still presumably illegal. Appellant has failed to show otherwise on this occasion in this location.

Appellant asserted that he parked his truck facing the wrong direction on the morning of May 22 in anticipation of the sweeper coming down the other side of the street. The hearing officer is unpersuaded by this explanation as well. While it might be a reason for parking on one side of the street instead of the other, it does not explain why Appellant parked the truck facing the wrong direction.

These activities were in violation of CSR 16-51 A. 5) proscribing failure to observe departmental regulations (namely, the Handbook which requires City employees to observe traffic laws), CSR 16-50 A. 9), unauthorized use of City vehicles, and CSR 16-51 A. 8) Neglect in the use of City property.

A preponderance of evidence does not support the Agency's argument that it was unsafe to simply let the children sit in the cabin of the truck to get their picture taken, where the truck was not running, the keys were not in it, and an adult stood observing nearby. The reasoning by

the Agency was that the truck is heavy equipment requiring special skills to operate, and that the children might accidentally place the truck in gear. However, these dangers were not shown to be present in this case. By the Agency's own testimony, children are allowed to sit inside City vehicles when they are not running at the facility where the vehicles are parked. There is no evidence that Appellant's activities caused injury to anyone or damage to any property, or otherwise jeopardized the health and safety of others. Therefore, the hearing officer concludes Agency has not shown Appellant's actions rise to the level of a violation of CSR 16-15 A. 14).

However, this was one of Appellant's many break periods, which have been shown more frequently than not to be longer than the permitted total of 45 minutes per day. On April 30, he took two breaks in addition to 45 minutes for lunch. On May 1 he took 1½ hours for lunch. On May 7 Appellant took breaks totaling approximately 1 hour 15 minutes. On May 9, he took two breaks in addition to a 45-minute lunch. On May 22 he went to his house twice during the morning in addition to taking a 49-minute lunch there. In addition, Appellant failed to call in one or both lunch codes on several occasions, and took breaks longer than some of his call-in codes would suggest.

Appellant has offered no clear explanation for why he took such excessive breaks, why he chose to call in on some days and not on others, or why he called in inaccurate times on some occasions when he did call in. Appellant also called in an inaccurate location on one occasion. Appellant asserts that he gave an inaccurate location because he feared Mr. Davis might find him and take some negative action against him.

Again, the hearing officer is unpersuaded and finds this assertion disingenuous. If Appellant feared Mr. Davis might find Appellant, the hearing officer doubts he would go strolling through parks in Mr. Davis' district during the workday. This claim is also inconsistent with the fact that Appellant gave accurate locations on other days.

The hearing officer concludes that the Agency has shown by a preponderance of the evidence that these actions were in violation of CSR 16-50 A. 13), proscribing unauthorized breaks or absence from work, CSR 16-51 A. 5), failure to observe the Agency's regulations as set forth in the Handbook, limiting break time to 45 minutes per day, CSR 16-51 A. 6), carelessness in the performance of duties and responsibilities, and CSR 16-51 A. 10), failure to comply with the instructions of an authorized supervisor.

Finally, as concerns Appellant's activities in Mr. Davis' district, he contends that on April 30, 2003 he just needed to use the bathroom. Appellant further argues that May 7, 2003 he parked the truck within his designated area and did not take it into the prohibited area. He asserts he did not believe the Director's Order addressed anything other than the location of his city vehicle, and did not think the order could be extended to prohibit him from entering any location on foot while he was on personal time.

The hearing officer is unpersuaded and finds Appellant's asserted understanding of the Agency's orders lacking in credibility. Appellant's claim of parking the truck in his designated area on May 7 does not explain his parking the truck in the prohibited area on April 30. Furthermore, the second visit was clearly to stroll about for a much longer period than just to use the bathroom. It

is clear that the purpose of the Agency's restriction is to keep the two men from running into one another. Appellant's actions appear to the hearing officer to be nothing less than repeated, deliberate invasions of Mr. Davis' territory in flagrant defiance of the Agency's order. These activities constitute violations of CSR 16-50 A. 7), Refusing to comply with the instructions of an authorized supervisor.

The Agency's most serious charge against Appellant is "gross negligence or willful neglect of duties" in violation of CSR 16-50 A. 1). "Willful neglect" implies that the wrongful conduct is a blatantly intentional or conscious violation. Citing Puget Sound Painters v. State, 45 Wash.2d 819, 278 P.2d 302, 303. Black's Law Dictionary (5<sup>th</sup> edition) defines it as "[t]he intentional disregard of a plain or manifest duty... Willful neglect suggests intentional, conscious, or known negligence – a knowing or intentional mistake." The hearing officer concludes that Appellant's strolls through Cheeseman Park in violation of the Agency's direct orders constitute willful neglect under the above definition.

***b. Fax incident on August 9, 2002.***

Appellant denies sending the fax to Mr. Davis on the afternoon of August 9. He contends that his fax activities took place a day earlier, on the 8<sup>th</sup>. He points to the fact that the date on the fax from Ford Family Medical is August 8, 2002. However, August 8 is the receipt date, not the sending date. This evidence is consistent with Mr. Nieto's assertion that Appellant asked to send them a return fax on August 9. In addition to the original fax, the transmission report (Exhibit 6-5) indicates that somebody tried to fax something from the Colfax fax machine to Ford Family Medical on August 9, 2002 at 1:48 p.m. This evidence, taken with Appellant's request of Mr. Nieto to do so that afternoon and near the same time, and Mr. Nieto's subsequent observation of Appellant in the fax room that day, establishes that Appellant more likely than not faxed the boilerplate release back to Ford Family Medical from the fax room in the Colfax facility at approximately 1:48 p.m. on August 9, 2002.

That afternoon, Mr. Davis received a fax of the same document Appellant had in his possession that morning, from the fax machine in the room where Appellant was seen only moments before. The copy of the document was still lying in the fax room only moments after Appellant left the room. There has been no suggestion that Mr. Nieto authorized or otherwise observed anyone else to be in the fax room that afternoon around that same time. This evidence demonstrates that Appellant was more likely than not responsible for sending the fax in question.

The hearing officer notes that the message that was sent is inspirational and highly benign. It addresses the reader's attitude toward others who have wronged him in some way and suggests that all people should serve as an example to others. This offense would have been seen as more serious if the message sent to Mr. Davis had been less benign. Nonetheless, the act was in violation of the Agency's direct order prohibiting Appellant and Mr. Davis from having any contact, in violation of CSR 16-50 A. 7), and CSR 16-51 A. 4), failure to maintain satisfactory working relationships with other employees.

Based on the totality of the evidence in this case, the hearing officer concludes that the Agency has shown just cause for disciplining Appellant.

### 3. Severity of the discipline.

In determining the appropriateness of a given disciplinary action, the test is whether the degree of discipline is "reasonably related" to the seriousness of the offense. *See, Leamon Taplan, above.* To be reasonably related, the discipline chosen must be "within the range of reasonable alternatives available to a reasonable, prudent agency administrator." *See, In the Matter of William Armbruster*, Appeal No. 377-01 (decision entered 3/22/02), *citing Adkins v. Div. of Youth Services*, 720 P.2d 626 (Colo. App. 1986). In determining the reasonableness of the discipline, the hearing officer will not substitute her judgment for that of the Agency unless the discipline is clearly excessive, or is substantially based on considerations that are unsupported by a preponderance of the evidence. *Armbruster, above; In the Matter of the Appeal of Dolores Gallegos*, Appeal No. 27-01 (entered 3/21/01).

Appellant appears to disregard traffic laws, regulations and orders governing his conduct and use of the City vehicle if, in his judgment, they are unreasonable or unworthy of observation. However, whether he believes they are reasonable or not, Appellant must abide by those laws, rules and orders. If he fails to do so then he must be prepared to be held accountable, particularly where he is a government employee driving a clearly marked City vehicle. As a City employee, Appellant is a representative of Denver. His position is one of trust. He is held to a higher standard of accountability because of this. *See, In the Matter of Louis Vigil*, Appeal No. 06-01 (Decision entered 8/13/02).

The hearing officer has found that the evidence supports nearly all of the allegations against Appellant. Based on the Agency's factual showing, in addition to existence of a prior thirty-day suspension for the related charge of misuse of a City vehicle, the hearing officer concludes that a forty-five day suspension was within the range of reasonable alternatives available to the Agency.

### CONCLUSIONS OF LAW

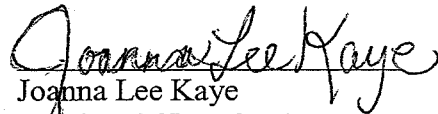
1. The Agency has demonstrated by a preponderance of evidence that Appellant engaged in violations of the following:
  - a) CSR 16-50 A. 1), Gross negligence or willful neglect of duty;
  - b) CSR 16-50 A. 7), Refusing to comply with the orders of an authorized supervisor;
  - c) CSR 16-50 A. 13), Unauthorized absence from work;
  - d) CSR 16-51 A. 4), Failure to maintain satisfactory working relationships with co-workers;
  - e) CSR 16-51 A. 5), Failure to observe departmental regulations;
  - f) CSR 16-51 A. 6), Carelessness in the performance of duties;
  - g) CSR 16-51 A. 7), Unauthorized operation or use of City vehicles;
  - h) CSR 16-51 A. 8), Neglect in the care or use of City property;
  - i) CSR 16-51 A. 10), Failure to comply with the instructions of an authorized supervisor.

2. The Agency has failed to show by a preponderance of the evidence that Appellant engaged in a violation of CSR 16-50 A. 14), Failure to use safety devices or failure to observe safety regulations resulting in injury to self or others; jeopardy to the health or safety of others; or damage or destruction of City property.
3. The Agency has demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
4. In light of the totality of evidence in this case, and taking into consideration Appellant's prior thirty-day suspension, the Agency's forty-five day suspension of Appellant is reasonably related to the seriousness of the offense.

### **DECISION AND ORDER**

Based on the Findings and Conclusions set forth above, the Director's decision to suspend Appellant for thirty days is AFFIRMED. This case is hereby DISMISSED WITH PREJUDICE.

Dated this 12<sup>th</sup> day of February, 2003.

  
Joanna Lee Kaye  
Hearing Officer for the  
Career Service Board

**CERTIFICATE OF MAILING**

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 18<sup>th</sup> day of February, 2003, addressed to:

John Perez  
4589 Decatur St.  
Denver, CO 80211

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the interoffice mail, this 18<sup>th</sup> day of February, 2003, addressed to:

Jack M. Wesoky  
Assistant City Attorney  
Employment Law Section

Bill Miles  
Department of Public Works

Stephen Garcia  
Street Maintenance Division

Charlotte A. Smith