

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 90-09

DECISION

IN THE MATTER OF THE APPEAL OF:

EDWARD VALDEZ, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Edward Valdez, appeals a five-day suspension assessed by his employer, the Department of Public Works, Wastewater Management Division (Agency), on October 2, 2009, for alleged violations of specified Career Service Rules and Agency regulations. A hearing concerning these appeals was conducted by Bruce A. Plotkin, Hearing Officer, on January 20, 2010. The Agency was represented by Robert D. Nespor, Assistant City Attorney, while the Appellant represented himself. Agency exhibits 1-5 were admitted. Mr. Valdez offered no additional exhibits. The following witnesses testified for the Agency: Zeke Zarco, Ahmed Soufiani, the Appellant, and Reza Kazemian. The Appellant did not present any other witness. For reasons which follow, the five-day suspension is AFFIRMED.

II. ISSUES

The following issues were presented for appeal:

- A. whether Valdez violated any of the following Career Service Rules: 16-60 A., B., D., E., F., J., K., S., Y., or Z.;
- B. if Valdez violated any of the aforementioned Career Service Rules, whether the Agency's decision to assess a five-day suspension conformed to the purposes of discipline under CSR 16-10.

III. FINDINGS

Edward Valdez is employed as an Operations Supervisor by the Agency. His shift runs from 6:30 a.m. to 3:00 p.m. His duties include planning and supervising daily repairs and projects for crew members, inspecting their work, and meeting with his crew at the end of each day. Valdez is required to spend 50% of his day with his crew in the field. He is assigned a truck that only he drives. As with many Agency vehicles, Valdez' assigned truck contains a GPS tracking system which monitors its location in 30 second intervals.

It was raining on the morning of June 2, 2009, when Valdez' supervisor, Ahmed Soufiani, asked Valdez if he was ready to effect an outside emergency repair they had discussed previously. Valdez replied "in this weather?" Soufiani affirmed it was a normal repair within normal circumstances. Valdez then told Soufiani the repair could be dangerous, and if any of his crew were injured, Soufiani would be responsible. Soufiani reminded Valdez it was his (Valdez') responsibility, as Operations Supervisor, to take all necessary safety precautions. Valdez did not demur further and accepted the assignment. Soufiani then contacted the Agency's safety officer who inspected the work site and assured Soufiani the work conditions were safe.

Soufiani called Valdez later in the morning, about 9:10 a.m., to find out how the repair was proceeding. Valdez said he was still in the office. Soufiani tracked Valdez' vehicle for that time and found it was at Valdez' residence.

At 9:17, Valdez called Soufiani to tell him he would be leaving the office in about five minutes. The GPS tracking system report showed Valdez left the office at 8:36.

Soufiani tracked Valdez' vehicle at 12:55 p.m. and found Valdez went to an address Soufiani later discovered was one of Valdez' rental properties. He also went home early without authorization, even though Valdez is required to meet with his crew at the end of each day in order to go over issues from the current day and to discuss the next day's assignments and equipment needs.

When Soufiani reported the GPS tracking information from Valdez' vehicle to Director of Operations Reza Kazemian, Kazemian then selected random days from the period between January and June 2009, and told Soufiani to obtain GPS tracking reports for Valdez' vehicle for those days. Soufiani found Valdez drove by or stopped at one of his properties nearly every one of the random days selected by Kazemian.

Kazemian met with Valdez on June 5, 2009 to discuss his GPS findings. Valdez explained that for one of the days where the GPS showed him at a location near his rental property, he had been requested to check an alley nearby. However, Valdez could not identify who requested the service call, whether he found any problem at the location, and Kazemian found no work order or service request in the

Agency's files for that location and date. Valdez also explained that, on another of the dates tracked by GPS, he had too many things to do and did not have the opportunity to report to another job site, while the GPS tracking system showed he stopped at one of his rental properties. Finally, Valdez admitted he stopped occasionally at one of his properties on company time to conduct private business. In a later meeting with Soufiani, Valdez admitted driving across town during his work hours to collect rent from his tenants.

The Agency issued a contemplation of discipline letter to Valdez on September 9, 2009. A pre-disciplinary meeting was held on September 17, 2009. The Appellant attended without a representative and gave a statement. On October 2, 2009, the Agency issued its notice informing Valdez he was suspended without pay for five days. This appeal followed timely on October 15, 2009.

IV. ANALYSIS

A. Jurisdiction and Review

Personal jurisdiction: As an employee of the Department of Public Works, Valdez is a member of the Career Service personnel system, and may appeal discipline under the Career Service Rules. Charter, §§ 9.1.1. E.(vi), 9.8.2.(A); CSR § 19-10 A.1.a.

Subject matter jurisdiction is proper under CSR §19-10 A.1.b., as the direct appeal of a suspension. 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

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend Valdez for five days complied with the purposes of discipline. CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

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

This rule is violated when an employee neglects to perform a job duty which the employee knows he or she is supposed to perform. In re Campos, CSB 56-08, 2 (5/21/09) *modifying In re Campos*, CSA 56-08, 14 (12/15/08). The Agency claimed Valdez violated this rule by engaging in personal business and by going home, without authorization, during work hours.

Valdez admitted he owns a house at 3092 Saulsbury St., plus four rental properties 03-06 listed in Exhibit 4-1.¹ On days randomly chosen by Kazemian, the Agency's GPS tracking data, [Exhibit 5], revealed that, out of seven days randomly selected by Kazemian, Valdez travelled at least six times to one of his rental properties, his home, or both, during working hours.²

Valdez' acknowledgement that he went to his rental properties during work hours for personal business establishes a violation of this rule. That Valdez attempted to explain away two of his violations, even if his explanations were true, does not excuse the remaining violations.

In addition, Valdez' explanations for the two disputed days were not credible in light of the following circumstantial evidence. (1) Valdez explained one of his detours to his rental properties as a response to a nearby repair call. However, there was no Agency record of the call, Valdez could not identify who gave him the order and could not identify the nature of the repair. (2) Valdez explained on the other occasion he had too many things to do and so was unable to effect a repair he was ordered to do. However, GPS data showed he travelled instead to another of his rental properties. (3) Finally, Valdez stated the Agency's GPS tracking data was inaccurate; [Valdez testimony]; however, he did not specify the nature of the inaccuracy, and presented no witness or document to authenticate his claim.

Valdez' admissions, above, and the GPS tracking data, combine to prove Valdez neglected his duties to supervise and meet with his crew on various dates specified by the GPS tracking date in Exhibit 5. The Agency therefore proved Valdez violated CSR 16-60 A.

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

While CSR 16-60 A) and CSR 16-60 B), share similar elements of proof, they are distinguished in that, under 16-60 B., it is the Appellant's acts (performance), rather than his omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, a violation under this rule occurs for performing poorly, rather than neglecting to perform, an important duty.

Kazemian testified the Agency's evidence that Valdez violated this rule was the same as for neglect of duty. Since carelessness is proven by poor performance and neglect is

¹ The agency did not dispute the Appellant does not own a 5th property at 3142 W. Florida Ave. [Exhibit 4-1, #01; Soufiani testimony].

² Soufiani's review of the GPS records for Valdez' vehicle on dates in 2009 randomly selected by Kazemian revealed the following: 6/2 Valdez went to 5190 W. Mississippi Ave., which Valdez did not dispute was one block from his rental property at 1100 S. Zenobia St; [Exhibit 5-20]; 5/7 he again drove by his rental property at 1100 S. Zenobia, St., next to the listed locations of 5073 W. Arizona, 1126 S. Yates, and 5075 W. Mississippi. [*Id @ 5-35*]; the same day he went to his rental property at 163 Knox Court. [Exhibit 5-36]; again on 5/7, he was across the street from his rental property at 2750 W. Tennessee Ave. [Exhibit 4-5, 5-41]; 5/29 Valdez drove by his rental property at 1100 Knox Court. [Exhibit 5-114, 115, 4-1]; again on 5/29 the GPS shows Valdez' vehicle at his rental property at 2750 Tennessee Ave. [Exhibit 5-119]; also on 5/29, he went home early [Exhibit 5-105]; 6/5 he stopped at his rental property at 2750 Tennessee Ave. [Exhibit 5-145]. This list is not comprehensive.

Kazemian testified the Agency's evidence that Valdez violated this rule was the same as for neglect of duty. Since carelessness is proven by poor performance and neglect is proven by the failure to perform, the proof of one will generally not prove the other. It was unclear from the remainder of the Agency's evidence what duty the Agency claimed was performed in a sub-standard manner. This violation is not proven.

3. CSR 16-60 E. Any act of dishonesty, which may include, but is not limited to... 3. Lying to superiors... with respect to official duties, including work duties ... or false reporting of work hours.

The Agency specified it was proceeding only as to subsection (3) of this rule. [Kazemian testimony]. Kazemian testified the basis for this violation was that Valdez lied to Soufiani as to his whereabouts on June 2, when Valdez told Soufiani he was still in the office and would be leaving in five minutes, while GPS tracking data showed Valdez had left earlier and was at his house at that time. Valdez' explanation, that the GPS data is sometimes incorrect, was already determined to be unfounded. This violation is proven by a preponderance of the evidence.

4. CSR 16-60 D., Unauthorized operation or use of any vehicles... of the City ... and CSR 16-60 F. Using official position or authority for personal profit or advantage...

Valdez admitted he drove his assigned supervisor's vehicle to his rental properties at least occasionally during working hours in order to engage in collection-related activities. His explanation - that he was sometimes on his way to a work site when he passed by his rental property - was unconvincing for reasons stated above. Valdez testified he had tenants who owed rent, so he would merely drive by to see if their cars were parked, signaling they were home. The use of a city vehicle to conduct private business, without prior authorization, is a violation of CSR 16-60 D., and F. These violations are 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 contains two discrete violations, failure to comply with an order and failure to perform assigned work, whether or not under direct order. Kazemian claimed Valdez violated this rule when he protested Soufiani's order to make an emergency underground repair. Valdez replied he was objecting only on the basis of safety concerns. Kazemian's claim implicates the first clause, failure to comply with an order.

It is not apparent Valdez failed to comply. His response, "in this weather?" cannot reasonably be considered a refusal to comply³, particularly where, as soon as Soufiani

³ A subordinate's refusal to comply with a supervisor's order, when the refusal is based upon a good-faith claim that carrying out the order would unreasonably endanger the subordinate, constitutes an affirmative defense to the order. Valdez' questioning response inferred he believed the rainy conditions made it dangerous to dig and work in an open hole. [Valdez testimony]. Soufiani replied rain was a normal working condition for emergency repairs and told Valdez to take

reaffirmed his order, Valdez immediately left to carry out Soufiani's order. The Agency failed to prove, by a preponderance of the evidence, that Valdez failed to comply with Soufiani's order on June 2 to effect an emergency repair.

The second clause, failure to do assigned work, is also implicated by the evidence. Valdez did not dispute his assigned work include supervising his crew and meeting with them at the end of the day. The detours from job sites to his rental properties and to his house precluded fulfilling those duties during the time he was absent. Consequently the Agency proved Valdez violated the second cause of CSR 16-60 J.

6. CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards...

This rule covers performance deficiencies that can be measured either by qualitative or quantitative standards, such as those one would find in a performance evaluation. In re Castaneda, CSA 79-03, 12 (12/18/02). Kazemian testified Valdez breached this rule by failing to meet the following work review (PEPR) standard:

Accountability and Ethics... Baseline Duty... Employee accepts personal responsibility for their [sic.] actions, and behaviors; ensuring performance contributes to the standards and goals of the City and County of Denver, Mayor, Public Works, Organization and work section as a whole.

[Exhibit 2-2; Kazemian testimony].

The Agency cited more specific rule violations than the broad aspirations of this standard. Broad policy statements, such as the accountability and ethics standard cited by the Agency, are generally unenforceable as disciplinary rules because they fail to provide notice what measures are used to enforce compliance. No violation is found, therefore, based upon the standard cited by the Agency.

7. CSR 16-60 S. Unauthorized absence from work...

Valdez' admitted frolics⁴ to check on tenants during his work hours constitutes a violation of this rule.

8. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.

Kazemian did not specify in his testimony which rules, other than those specified above, charter provision, executive order, or law was violated by Valdez.

while he went home and to one of his rental properties. Merely uttering words that a supervisor's order is unreasonably dangerous is insufficient to establish a good-faith refusal to perform.

⁴ Circumstances in which the employee pursued a personal interest during the hours of employment. WEBSTER'S_NEW WORLD LAW DICTIONARY (2006).

Since the Agency presented evidence with respect to other, specific rules, the Agency's claim under this rule is superfluous.

9. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

To sustain this violation, the agency must prove an employee's conduct hindered an agency mission, or negatively affected the structure or means by which the agency achieves its mission. In re Simpleman, CSA 31-06, 10 (10/20/06). Kazemian testified Valdez violated this rule by conducting personal business on work time, deeming such activity ineffective supervision. While such conduct violated other Career Service Rules, the Agency failed to prove Valdez' conduct hindered an Agency mission or negatively affected the structure or means to achieve the Agency's mission. This allegation was not proven.

The Agency proved Valdez violated Career Service Rules 16-60 A., D., E., F., J., and S. What remains is to determine whether the degree of discipline chosen by the Agency, a five-day suspension, was appropriate under the Career Service disciplinary rules.

V. DEGREE OF DISCIPLINE

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

A. Severity of proven offenses.

The frequency of Valdez' frolics during work hours to conduct personal business were serious violations. His dishonesty about conducting personal business during work was an aggravating factor. Also, as a supervisor, Valdez is held to a higher standard of conduct. His example sets the standard of conduct for his subordinates. Combined, the violations could have resulted in dismissal.

B. Past Record.

That Valdez had no prior disciplinary history undoubtedly protected him from a more substantial punishment. [See Kazemian testimony].

C. Penalty most likely to achieve compliance.

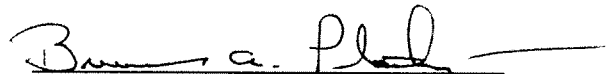
Valdez' lack of contrition for wrongdoing, and his failure even to acknowledge wrongdoing, indicate a lesser degree of discipline would not have resulted in his compliance.

Based upon the discussion above, the Agency's election to suspend Valdez for five days was neither clearly excessive nor based upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), *citing In re Delmonico*, CSA 53-06, 8 (10/26/06).

VI. ORDER

The Agency's decision to suspend Valdez for five working days, beginning Appellant's employment on October 26, 2009, is **AFFIRMED**.

DONE March 1, 2010.

A handwritten signature in black ink, appearing to read "Bruce A. Plotkin", with a horizontal line extending to the right.

Bruce A. Plotkin
Career Service Hearing Officer

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, as stated in the certificate of mailing below. 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

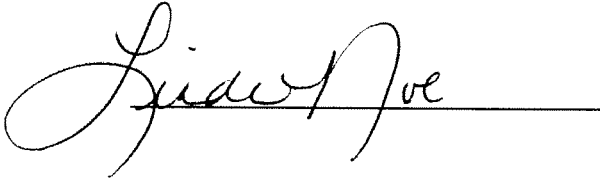
BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.

I certify that on March 1, 2010, I delivered a correct copy of this Decision to the following in the manner indicated:

Mr. Edward Valdez, 3092 S. Saulsbury St., Denver, CO 80227	(via U.S. mail);
City Attorney's Office, Dlefilng.litigation@denvergov.org	(via email);
Bill Miles, Director, BillMiles@denvergov.org	(via email);
Mr. Reza Kazemian, Director, RezaKazamian@denvergov.org	(via email).

A handwritten signature in cursive script, reading "Lidia Noe", is written over a horizontal line.