

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

Appeal No. 145-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

GEORGE P. JUSTICE, Appellant,

Agency: DEPARTMENT OF PUBLIC WORKS, WASTEWATER
MANAGEMENT DIVISION and the CITY AND COUNTY OF DENVER,
a municipal corporation.

Hearing in this matter was held before Michael S. Gallegos, Hearing Officer, on December 12, 2003, in the Career Service Hearings Office, 201 West Colfax, 1st Floor, Denver, Colorado 80202. Appellant, George P. Justice, appeared in person and was represented by April Jones, Esq. The Agency was represented by Assistant City Attorney Linda Davison. The Agency's Director of Operations, Reza Kazemian was the Agency's advisory witness at hearing.

Within these Findings and Order, the Hearing Officer refers to George P. Justice as "Appellant"; to the Department of Public Works, Wastewater Management Division as the "Agency" and the Career Service Rules as "Career Service Rules" or "CSR". The Career Service Rules are cited by section number and are those currently in effect unless otherwise indicated.

For the reasons set for the below, the Agency's 30-day suspension of Appellant is **AFFIRMED**.

ISSUES FOR HEARING

Whether the act upon which discipline was based occurred. If so, whether such act is cause to discipline Appellant and whether the degree of discipline is reasonably related to the severity of the offense for which discipline was imposed.

BURDEN OF PROOF

The burden of proof is upon the Agency to show, by a preponderance of the evidence, the alleged acts occurred, there is cause to discipline Appellant and the degree of discipline is reasonably related to the severity of the offense for which discipline was imposed.

PRELIMINARY MATTERS

The parties stipulated to the acceptance into evidence of the Agency's Exhibits 1 through 3, 5 and 7 through 11. The Agency's Exhibits 4 and 6 were accepted into evidence at hearing, without objection. Appellant offered no Exhibits for hearing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Hearing Officer finds the following to be fact:

1. Appellant is an employee in career status. He was disciplined for his actions on July 14, 2003 and for discrepancies in reporting, failure to contact his supervisor to report a deviation in schedule and/or false reporting of locations on 14 other occasions between April 16 and July 16, 2003. By letter dated September 12, 2003, the Agency's Director of Operations, Reza Kazemian (Director) imposed a 30-day suspension. The disciplinary suspension was served by Appellant from September 13, 2003 through October 12, 2003.

2. The Agency has 4 crews that deal with manholes throughout the city. There are 2 crewmembers whose duty it is to raise or lower manhole covers in conjunction with paving of city streets. The 2 crewmembers who raise or lower manhole covers work individually. That is, they do not work with crew members from the same division. Rather, the 2 crewmembers who raise or lower manhole covers work in conjunction with a Street Maintenance crew from a different division.

3. Appellant is one of the 2 crewmembers who raise or lower manhole covers in conjunction with paving by Street Maintenance. At the beginning of his shift, Appellant gets his assigned location for the day from his supervisor, loads his truck with necessary supplies for the day and drives to the assigned location. If Street Maintenance is not at the location, Appellant can prep the manholes for paving. If Appellant is waiting for paving to finish or, if he is going to the next location, he must call his supervisor and advise his supervisor of his (Appellant's) location.

4. "Home Base" refers to a radio tracking system for Agency vehicles. In addition to calling Home Base to advise that one is waiting for paving to finish or going to the next location, drivers must call Home Base to advise that they are beginning or ending their lunch break or taking a bathroom break. Drivers must advise Home Base of each arrival, each departure (no matter what the reason) and anything out of the ordinary course of work.

5. Prior to July 14, 2003, Appellant's supervisor spoke to him 3 or 4 times about calling in to Home Base when leaving a location for any reason. It is important for Appellant to call in with any change in location because, for example, if Street Maintenance decides to go to a different location and Appellant isn't at that location several manholes could be paved over and buried. Appellant's supervisor advised that, if Appellant gets to a site and there is no paving crew, he should call in to find out where the paving crew is and where he should be.

6. If a paving crew is working on time, Appellant can prep 1 manhole at a time ahead of the paving crew. On occasion there is ½ hour to an hour "lag time" between paving and Appellant's ability to go back and raise the manholes in the paved areas. During that time Appellant can work forward prepping other manholes for paving. In the event of such lag time, Appellant should call Home Base so that if one of the other crews needs assistance or there are other locations that need to be prepped for paving, Appellant can be reassigned to a new location. Ordinarily Agency crewmembers, such as Appellant, are expected to stay at the paving location as long as the paving crew is there.

7. In the event Appellant's supervisor cannot contact Appellant by radio, Appellant can always be reached via his cell phone.

8. On July 14, 2003, Appellant arrived at work at 6:30 a.m. He spoke with the acting supervisor, John Sandoval (Sandoval), and went to his assigned location at West 12th and Irving Streets. Appellant spoke to the paving supervisor on site, Shane Savage (Savage) who advised that Appellant's work there was complete and directed Appellant to paving in the alley between 8th and 9th Avenue near Grant Street. Savage advised Appellant that a paving crew would be there within the hour.

9. Appellant called Home Base at 7:10 a.m. from 8th and Grant Streets. Because the alley between 8th and 9th near Grant Street was an area that had been skipped by a paving crew earlier, Appellant had already prepped the alley. The paving crew arrived and advised Appellant that they were waiting for the paving equipment. The alley between 8th and 9th near Grant Street is a busy alley and, at that time, there was construction in the area. Rather than sit in one area, Appellant drove around and changed his parking spot so he wouldn't block traffic or construction. He did not call Home Base when he changed parking spots.

10. Appellant kept checking with the paving crew to find out the status of the paving equipment. Throughout the morning the paving crew was advised, and in turn advised Appellant, that the paving equipment was "in transit". The paving equipment did not arrive until approximately 10:25 a.m. At that time, the paving crew advised Appellant that it would take awhile to "fire up" the paving equipment. Therefore, they wouldn't be ready to pave the alley until after lunch.

11. It was an unusual occurrence for paving equipment to arrive at a paving site so late in the morning. Ordinarily, if crews had to wait for paving equipment, the wait time was ½ an hour to 45 minutes.

12. If Appellant had radioed Sandoval directly, regarding Savage's direction to go to the alley between 8th and 9th near Grant Street, Sandoval would have sent Appellant to a different location.

13. On the morning of July 14, 2003, Sandoval had 3 crews to supervise. He went to the 12th and Irving Street location to check on Appellant but Appellant was no longer there. When Sandoval returned to "the shop", he inquired about Appellant's location and was told that Appellant called in "at lunch". Sandoval did not attempt to call or contact Appellant before he heard from Appellant

14. Sandoval did not hear directly from Appellant until approximately 11:30 a.m. on July 14, 2003. At that time, Appellant advised Sandoval that he cracked a tooth at lunch and required medical emergency leave in order to go to the dentist. Sandoval granted Appellant medical emergency leave. Appellant was "on the clock" for 5 hours on July 14, 2003.

15. One Agency staff person, B.G. Brem (Brem), is assigned to estimate the number of miles per day for each Agency vehicle/driver and determine if there are any discrepancies with the reported mileage/odometer on each vehicle. Brem uses Map quest, on the internet, to estimate the daily mileage per vehicle/driver and generally provides "a generous estimate".

16. If Brem determines there is a discrepancy, she advises the Construction Supervisor, Steve Bello (Bello). There is an average of 5 to 10 discrepancies per day. Bello attempts to determine the reasons for the discrepancies and reports back to the Director.

17. The Director monitors mileage discrepancies because unnecessary driving causes increased fuel usage and costs, depreciation of city vehicles, increased maintenance costs and results in the need for increased capital expenditures. For the same reasons, the Agency has a policy that Agency drivers cannot drive more than 6 blocks for a lunch break.

18. Appellant's reported mileage for July 14, 2003, based on odometer readings, was 32 miles. Brem reported that Appellant's mileage, based on his call-ins to Home Base, should have been 6.98 miles. Brem reported this discrepancy to Bello on July 15, 2004.

19. On July 16, 2003, Bello met with Appellant and asked Appellant about the discrepancy. Appellant told Bello that he drove around while he was waiting for the paving crew because he was afraid that he would be reported if he just sat in his truck and that he was afraid he might fall asleep if he just sat in his truck.

20. By letter dated August 19, 2003, Appellant was charged with failure to perform work for 5 hours on July 14, 2003, failure to contact his (Appellant's) supervisor to report his status and request alternate work assignment, falsely reporting his location information to Home Base and discrepancies as follows:

DATE	ODOMETER READING	JOB ASSIGNMENT REQUIRED
04-16-03	17 miles driven	8.2 miles
04-17-03	20 miles driven	10.1 miles
04-28-03	32 miles driven	8.7 miles
05-05-03	29 miles driven	11.2 miles
05-06-03	26 miles driven	11.4 miles
05-08-03	18 miles driven	7.4 miles
05-13-03	10 miles driven	4.7 miles
05-14-03	22 miles driven	4.2 miles
05-22-03	18 miles driven	7.1 miles
06-02-03	26 miles driven	15.5 miles
06-16-03	26 miles driven	9.1 miles
06-18-03	30 miles driven	9.8 miles
06-24-03	35 miles driven	9.3 miles
07-16-03	22 miles driven	8.6 miles

21. In determining whether discipline should be imposed for Appellant's actions, the Director considered Appellant's work history, including 2 annual reviews (evaluations) that were "meets expectations". The Director also considered Appellant's failure to report changes in his location on July 14, 2003 as false reporting/dishonestly, resulting in Appellant's failure to perform work for 5 hours/unauthorized absence from work. The Director considered Appellant's failure to contact his supervisor to report his status and request an alternate work assignment as failure to comply with the instructions of an authorized supervisor, failure to meet established standards of performance and violations of Executive Order 25 and departmental regulations regarding the use of City vehicles. The Director considered Appellant's lack of explanation for mileage discrepancies and determined that Appellant's continuing mileage discrepancies had to be corrected.

22. In determining the level of discipline to be imposed, the Director considered the severity of Appellant's actions including, the number of hours Appellant sat idle on July 14, 2003, the number of mileage discrepancies reported for Appellant and the amount of the discrepancy on each date. The Director also considered Appellant's explanation and mitigating statements. The Director felt that a 30-day suspension was reasonable for Appellant's actions on July 14, 2003 alone. The Director also considered Appellant's prior disciplinary history - one 30 day suspension for providing a urine sample for another employee who was required to take a Department of Transportation random drug/alcohol test. The Director reasoned that the prior discipline was for dishonestly and, therefore, discipline in this case should be no less than in the previous case.

DISCUSSION

1. **Authority of the Hearing Officer:** The City Charter and Career Service Rules require the Hearing Officer to determine the facts, by *de novo* hearing, in "[a]ny action of an appointing authority resulting in... suspension...which results in alleged violation of the Career Service Charter Provisions or Ordinance relating to the Career Service, or the Personnel Rules." (City Charter C5.25 (4) and CSR 19-10.) A *de novo* hearing is one in which the Hearing Officer makes independent findings of fact, credibility assessments and resolves factual disputes. (See *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. App.1975).)

2. **Cause for discipline:** Career Service Rules provide, in pertinent part: "The purpose of discipline is to correct inappropriate behavior or performance." (See CSR 16-10.) The Agency determined that unmitigated mileage discrepancies are inappropriate behavior for a number of reasons. (See Findings of Fact, paragraph 17.) Appellant, or someone on his behalf, offered mitigation for the mileage discrepancies on April 16, May 5, May 13, June 2 and July 14, 2003. (See Findings of Fact, paragraph 19 and Agency's Exhibit 5.) Appellant offered no explanation or mitigation for the remaining mileage discrepancies indicated by the Agency. (See Findings of Fact, paragraph 20 and Agency's Exhibit 2.) After reviewing Appellant's explanations for mileage discrepancies and considering the number and degree of discrepancies, the Director determined that Appellant's mileage discrepancies were the result of inappropriate behavior such as failure to report changes in location, failure to comply with the instructions of an authorized supervisor and failure to perform work. The Director further concluded that Appellant's inappropriate behavior needed to be corrected. Therefore, the undersigned Hearing Officer concludes that there is cause for discipline in this matter and that the Agency met its burden to so prove, by a preponderance of the evidence.

3. **Level of discipline:** "The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be *reasonably related* to the seriousness of the offense and take into consideration the employee's past record." (See CSR 16-10. Emphasis added.) In determining the level of discipline to be imposed, the Director considered the severity of Appellant's actions including, the number of hours Appellant sat idle on July 14, 2003, the number of mileage discrepancies reported for Appellant and the amount of the discrepancy on each date. The Director also considered Appellant's explanation and mitigating statements. The Director felt that a 30-day suspension was reasonable for Appellant's actions on July 14, 2003 alone. The Director also considered Appellant's prior disciplinary history - one 30 day suspension for providing a urine sample for another employee who was required to take a Department of Transportation random drug/alcohol test. The Director reasoned that the prior discipline was for dishonestly and, therefore, discipline in this case should be no less than in the previous case.

To be "reasonably related" to the seriousness of the offense, the discipline imposed must be "within the range of reasonable alternatives available to a reasonable, prudent agency administrator." *Adkins v. Div. of Youth Services*, 720 P.2d 626 (Colo. App. 1986). In this case, the Director had many valid reasons for wanting to correct or limit mileage discrepancies. Once the Director determined that Appellant's explanation of the events of July 14, 2003 did not sufficiently mitigate the mileage discrepancy, dismissal for dishonesty (violation of CSR 16-50 A. 3.) was within the range of discipline available to the Director *by Career Service Rule* for Appellant's actions on July 14, 2003 alone. Taking into consideration the mitigation offered by Appellant, or someone on his behalf, for the mileage discrepancies on April 16, May 5, May 13, June 2 and July 14, 2003, the Hearing Officer concludes that a 30-day suspension is not unreasonable for the unexplained mileage discrepancies and/or Appellant's actions on July 14, 2003.

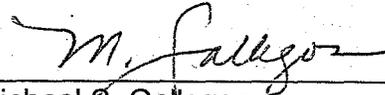
CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction to make and issue Findings, conclusions and Order in this matter.
2. The Agency has met its burden to show that the acts upon which discipline is based occurred, there is cause for discipline and that the level of discipline imposed is reasonably related to the severity of the offense.

ORDER

Therefore, for the reasons stated above, the undersigned Hearing Officer **AFFIRMS** the Agency's 30-day suspension of Appellant.

Dated this 26th day of March 2003



Michael S. Gallegos
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 AND ORDER** by depositing same in the United States Mail, postage prepaid, on the 26th day of March 2004, addressed to:

George P. Justice
4381 Bahama Street
Denver, CO 80249

April Jones, Esq.
8400 E. Prentice Suite 100
Greenwood Village, CO 80111

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in interoffice mail, on the 26th day of March 2004, addressed to:

Linda Davison
Assistant City Attorney

Bill Miles
Department of Public Works
Wastewater Division

