INTRODUCTION

This matter comes before the Career Service Board on appeal by Bernie Aragon filed July 11, 2002. Appellant challenges the Department of Public Works, Street Maintenance Division’s denial of Appellant’s grievance he filed, in response to a written reprimand the Agency issued for various alleged violations of Career Service rules.

For purposes of this Decision, Mr. Aragon shall hereinafter be referred to as "Appellant." The Department of Public Works, Street Maintenance Division shall be referred to as "Street Maintenance" or "the Agency." The rules of the Career Service shall be referenced as "CSR" with a corresponding numerical citation.

A hearing in this matter was held before Personnel Hearing Officer Joanna Lee Kaye ("hearing officer") on September 26, 2002 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Mindi L. Wright, with Street Maintenance Operations Supervisor, Wesley Cottrell, present for the entirety of the proceedings as advisory representative for the Agency. Appellant was present and was represented by N. Nora Nye, Esq. of the AFSCME.

The Agency called the following witnesses: Mr. Cottrell, Paver Operator Gerald A. Canzona, Operations Supervisor Lamarr Brant, and Field Superintendent Matthew Laumann.

Appellant testified on his own behalf and called On-Call Utility Worker Kenneth Naves.

The parties stipulated to the admission of Agency Exhibits 1 through 7, and Appellant’s Exhibit A. Appellant offered Exhibits B, C, and D during the hearing. Exhibit B was admitted without objection. Exhibit C, a note from Appellant’s physician, was admitted over the Agency’s objection that it was a reproduction generated at Appellant’s request. Exhibit D was
admitted over the Agency’s objection that it was a hearsay reference from Appellant’s tenure at Traffic Engineering Services. No additional exhibits were offered or admitted.

PRELIMINARY MATTERS

1. The Hearing Officer’s Jurisdiction

The hearing officer finds she has jurisdiction to hear this case as a grievance of a written reprimand pursuant to CSR 18-12 4. and 19-10 d), as follows in relevant part:

CSR Rule 18-12 Grievance procedure

...4. Filing with the Career Service Authority: If the employee still feels aggrieved after receipt of (the second-level grievance) decision... and the grievance concerns an alleged violation of the Charter provisions relating to the Career Service, ordinances relating to the Career Service, or the Career Service Rules, and the employee wants to pursue the grievance further, the employee must appeal to the Hearings Officer of the Career Service Board in accordance with the provisions of Rule 19 APPEALS. The period of time shall be computed in accordance with subparagraph 19-22 a) 2.

* * *

Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

...d) Grievances resulting in rules violations: Any grievance which results in an alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career Service, or the Career Service Rules... The appeal form must state with specificity which career service charter amendment, ordinance or career service rule(s) are alleged to have been violated. An appeal may be dismissed if the appellant fails to cite the alleged rule violation(s).

* * *

Jurisdiction over Appellant's written reprimand was not disputed by either party to this case.

2. Burden of proof

In civil administrative proceedings such as this one, the level of proof required for a party to prove its case is a preponderance of the evidence. In other words, to be meritorious, 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 an agency responsible for disciplining a Career Service employee affirmatively bears the initial burden of establishing, by a preponderance of the evidence, that it had just cause for the disciplinary action. See, In the Matter of the Appeal of Vernon Brunzetti, Appeal No. 160-00 (Hearing Officer Bruce A. Plotkin, 12/8/00). This includes grievances of written reprimands. See, In the Matter of the Appeal of Martha Douglas, Appeal No. 317-01 (Order entered 3/22/02). 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 (Hearing Officer Michael L. Bieda, 11/22/99).

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, giving the Agency just cause to discipline Appellant.

3. If so, whether Appellant's written reprimand is reasonably related to the seriousness of the offenses in question.

FINDINGS OF FACT

1. Street paving is a seasonal operation, depending on warmer weather. The work is done outdoors during the hotter months using hot substances, and involves loud machinery requiring workers to speak with their voices raised much of the time. It is physically demanding labor that must be completed primarily between March and October, requiring that operations be done under a tight schedule.

2. Appellant has been an employee of the Career Service for approximately two years. He began in approximately May of 2001 as an on-call utility worker for Street Maintenance. He was on a paving crew supervised by Operations Supervisor Wesley Cottrell during most of the summer of 2001. From November, 2001 to March, 2002, during Street Maintenance's off-season, Appellant was “loaned” to Traffic Engineering Services and served the bulk of his probationary period there. He was then transferred back to Street Maintenance. Appellant’s transfer was under protested because he felt singled out and picked on by the crew and supervisor. Appellant finished a probationary period and became permanent as a senior utility worker in April of 2002, prior to the disciplinary action at issue. Appellant’s attendance at work is consistent with the exception of the incident at issue.

3. Mr. Cottrell is supervised by Field Superintendent Matthew Laumann. Mr. Cottrell’s crew is responsible for re-paving city streets. The crew includes Paver Operator Gerald Canzona, a roller operator, and approximately five utility workers who spread asphalt in front of the paver using shovels. A primary duty of the utility workers is to hand-shovel asphalt into holes and depressions in the asphalt about to be rolled over by the paver. When Mr. Cottrell
is not present at the work site, Mr. Canzona acts as the crew leader. If Mr. Canzona is not present, a roller operator serves as the crew leader.

4. On May 3, 2002 Mr. Cottrell issued Appellant a verbal warning (Exhibit 3). The form in Exhibit 3 indicates this disciplinary action was given for “not following orders,” but otherwise contains no recitation of facts tending to establish the basis for the Agency’s decision to discipline Appellant.

5. Appellant testified that the Verbal Warning issued by Mr. Cottrell on May 3, 2002 involved Appellant’s alleged failure to rake over footprints left in soft pavement. Appellant testified that the orders he allegedly did not follow came from a roller operator the previous day. However, the roller operator did not testify to this incident. Appellant testified that he raked over his own prints, but was punished because he did not rake over prints left by other workers. Appellant testified that Mr. Cottrell misunderstood that all the prints were Appellant’s. Mr. Cottrell did not testify to the specifics of this incident.

6. The “paver” is a vehicle that rolls out freshly-lain asphalt. It has extenders on the sides that establish the edges of the area to be paved. As the paver approaches areas which are not to be paved, the extender is pulled in, leaving a diagonal hole that needs filled with asphalt by hand-shoveling.

7. A “catch basin” is a conduit with a grid cover that allows water to flow under a street. Catch basins are to be covered with mud flaps, paved around and left open to permit proper drainage. This happens frequently in old neighborhoods, where there are many catch basins.

8. Mr. Cottrell testified to the events the morning of Tuesday, May 28, 2002 as follows. The crew was paving in an old neighborhood on Holly Street in Denver. Appellant was on a bathroom break when he arrived at the site, but did not go again after that and said nothing to Mr. Cottrell when he returned about being sick. The crew started moving the paver forward and approached a catch basin, requiring the extender to be retracted, leaving a large diagonal hole in the asphalt as the paver approached and passed the catch basin. Mr. Cottrell told the paver operator to stop because of the hole in the asphalt. Mr. Cottrell said something to the effect that “I need shovels here.” Appellant was at the front of the paver and began mumbling something Mr. Cottrell couldn’t hear. Appellant then approached the hole with a shovel full of asphalt. Mr. Cottrell testified that the hole needing filled was large and obvious, that it took approximately 25 shovels full of asphalt to fill it, and that any utility worker who had paved in the past should know where the asphalt needed to be put. He testified that Appellant approached him and said with an angry, sarcastic demeanor something to the effect of, “Where do you want it?” Mr. Cottrell became angry and responded, “Where do you think it goes?” Appellant put the asphalt in the hole. The other four workers were standing around. Mr. Cottrell then addressed the entire crew, saying something to the effect that “I’ve got four shovels and I can’t get a hole filled.” Appellant responded something to the effect of, “Yeah, yeah, yeah, yeah.” Mr. Cottrell said, “I’m talking to everybody, not just you.” Appellant then responded something to the effect that “You know I don’t feel good.” Mr. Cottrell responded something to the effect that “We all don’t feel good but we’ve got a job to do.” Appellant then said with an angry demeanor,
“I’m just leaving.” Mr. Cottrell then said, “Maybe you should.” Appellant then threw down his empty shovel and began to walk away. Mr. Cottrell yelled after Appellant to come back and put the shovel away. Appellant returned, put the shovel away, and then left the worksite for the day.

9. Mr. Cottrell testified it was his impression that the only reason Appellant left was because he was mad at Mr. Cottrell. Mr. Cottrell testified that paving crews are typically comprised of on-call workers and he has to maintain order among the crew. He testified that compared to other utility workers, Appellant tends to be argumentative, and that reactions like the one Appellant had on May 28, 2002 tend to be “disruptive” to his supervision.

10. Mr. Canzona was present on the morning of May 28, 2002 during the incident and testified to it as follows. As the paver arrived at the catch hole, Mr. Cottrell said, “We need shovels over here.” Each man put a shovel full of asphalt in the hole, and then stopped. Appellant also put a shovel full of asphalt in the hole. Mr. Cottrell said something to the effect of, “I said I need shovels here.” Appellant came around the paver, saying “Yea, yeah, yeah.” Mr. Cottrell said something like, “I wasn’t talking to you.” Appellant said something to the effect of, “I wasn’t feeling good anyway.” Mr. Cottrell said something to the effect of, “If you’re not feeling good then you should go home.” Appellant threw down his shovel and “stormed off.” Mr. Cottrell yelled after him to come back and put the shovel away. Appellant returned, put the shovel away and then left the site.

11. Mr. Canzona testified that employees within the Agency are expected to do what their supervisors tell them to. He was surprised that Appellant “mouthed off” to his supervisor and threw down the shovel. Mr. Canzona testified that Appellant’s demeanor was agitated and argumentative during this incident. He testified that Appellant’s actions were atypical of utility workers. He testified that neither Appellant nor Mr. Cottrell used any profanity during the incident.

12. Operations Supervisor Lamarr Brant oversees the maintenance and use of all heavy equipment used to haul the vehicles in Street Maintenance, including Mr. Cottrell’s crew and three other crews. One of his primary duties is visiting work sites and checking the heavy equipment. On May 28, 2002 he was at the work site on Holly Street checking equipment when the incident at issue occurred. Mr. Brant witnessed the following. There was a hole in the asphalt. Mr. Cottrell, speaking to the entire crew, said something to the effect of “Why should I have to tell you what to do?” Appellant started saying something back to Mr. Cottrell giving the impression that Appellant had thought Mr. Cottrell’s comment was directed at Appellant. Mr. Brant testified that Appellant was “acting mad about something,” was apparently mad at Mr. Cottrell and was “talking crazy” to him. Appellant then said something about not feeling good, and walked away. Mr. Cottrell then said something to Appellant which Mr. Brant did not hear. When the paver stopped at a driveway, Mr. Brant asked Mr. Cottrell where Appellant went, and Mr. Cottrell said, “I don’t know.”

13. Mr. Brant described Appellant’s actions during the incident as “talking back,” and stated that a reaction of this sort is not tolerated in the Agency. He testified that as a supervisor, he
would not have allowed it either. Mr. Brant testified he heard no profanity during the interchange.

14. Mr. Cottrell, Mr. Brant and Mr. Canzona all testified that filling holes such as the one at issue is a basic duty of utility workers, and that a utility worker in his second season on the paving crew should not need to ask what to do when the supervisor calls for a hole to be filled.

15. Appellant testified that because he joined the crew after the beginning of the season in 2001, he was the "low man on the totem pole." The other workers tended to torment him and give him conflicting orders. Appellant felt that for whatever reason, this became a habit of the crew and continued up to the incident at issue, and that he never felt sure of what he was doing as a result. He testified that whenever he asked Mr. Cottrell a question in an attempt to clarify his duties, Mr. Cottrell interpreted this as Appellant "being argumentative."

16. On-Call Utility Worker Kenneth Naves testified that he has worked on Mr. Cottrell’s crew with Appellant for about four months. He observed Appellant to do about the same amount of work as all the other workers. He testified that the workers receive a lot of instructions and frequently ask questions in the course of the work. He testified he has not observed that Mr. Cottrell treats Appellant any differently than other employees, and has not observed Appellant “talking back” to Mr. Cottrell.

17. Mr. Naves testified as follows to the incident. He testified that May 28, 2002 was his first day at work. Appellant had mentioned to him and another worker during the course of the morning that he was feeling sick. He also heard Appellant telling Mr. Canzona he was ill. Mr. Cottrell asked Appellant why he didn’t do something a certain way or why didn’t he fix the street where they were working. Mr. Naves recalls Mr. Cottrell directing this question specifically to Appellant. Appellant walked around the paver and said to Mr. Cottrell that he wasn’t feeling well. Mr. Cottrell responded that if Appellant were not feeling well he shouldn’t be there, and should have stayed home. Appellant responded something to the effect that he would take a sick day off. Mr. Naves did not recall this as an “argument.”

18. Appellant testified to the morning of May 28, 2002 as follows. He awoke that morning feeling ill but decided to go to work anyway. He believed that if he got to work and began working he would feel better, but this did not happen. He became ill to his stomach and asked Mr. Canzona (who was acting as crew leader at the time) to leave and go to a bathroom. Mr. Canzona gave him leave to do this and Appellant vomited during the break. He returned to the work site, where Mr. Cottrell had arrived. Appellant told Mr. Cottrell he was feeling ill and had just been to the bathroom but needed to go again. Mr. Cottrell told him “Yeah, yeah, yeah.” Appellant went again and returned, but continued to feel ill and dizzy. Approximately half an hour passed between these events and the incident involving the hole.

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1 Mr. Canzona did not testify to the issue of giving Appellant leave to go to the bathroom on the morning of May 28, 2002 or otherwise being aware that Appellant was sick before the incident at issue.
19. Appellant testified to the incident as follows. Mr. Cottrell yelled for shovels of asphalt, and Appellant brought a shovel over to the location. Appellant asked Mr. Cottrell something to the effect of “where do you want it, boss?” Appellant testified he asked the question appropriately, because he wasn’t sure whether Mr. Cottrell wanted the asphalt on the mud flap covering the catch basin. Mr. Cottrell then started yelling at Appellant using profanity, telling him he should know where it went. Appellant then threw the shovel full of asphalt in the hole. Appellant reminded Mr. Cottrell that he didn’t feel good. Mr. Cottrell said something to the effect that “I don’t give a shit. If you don’t feel good then you should go home.” Appellant then became agitated, threw the empty shovel down, and said, “Yeah, yeah, yeah,” and started to leave. Mr. Cottrell told Appellant to pick up the shovel and put it away, and Appellant did so. He then left the worksite and went home because Mr. Cottrell told him to.

20. Appellant admits that throwing the empty shovel down and saying, “Yeah, yeah, yeah,” were inappropriate actions. He argues this behavior was provoked when Mr. Cottrell swore at him and spoke inappropriately to him.

21. Mr. Cottrell credibly testified he never swears at his employees, and that he did not do so on the day in question.

22. It is undisputed that Appellant left the work site approximately 4 ½ hours prior to the end of the work shift on May 28, 2002.

23. Appellant testified that he went straight to the doctor’s office when he left work. He was diagnosed with a “minute ulcer” that day. He was given medication to treat the ulcer, was told to take off the next three working days (Wednesday through Friday), and was given a doctor’s note to this effect. This meant Appellant would not return to work until the following Monday.

24. Appellant called in sick the mornings of May 29 through 31, and these absences were excused. Appellant testified he brought the original doctor’s note with him when he returned the following Monday, and gave it to the Agency. The Agency did not dispute that Appellant returned to work with a doctor’s note.

25. Appellant testified he did not know he could retrieve the doctor’s note from his personnel file, so he asked the doctor to provide him with a duplicate on August 15, 2002 (Exhibit C) in preparation for the hearing in this matter. The duplicate indicates that Appellant was to remain off work from May 29 through May 31, 2002. It does not indicate anything about May 28, 2002, the day Appellant left the work site. The note contains boxes providing several options as to the manner in which the patient’s complaint came to be addressed. One of the options is that the above-named person “has received treatment at this office on the following dates:” This option was not checked. The note also contains the option of “has been given telephone advice on (date):” That box was not checked either.

26. Following the incident, Mr. Cottrell determined to take disciplinary action against Appellant for the incident of May 28, 2002. Mr. Cottrell testified that the Written Reprimand dated
June 10, 2002 (Exhibit 2) was prepared using hand notes prepared by Mr. Cottrell, but was typed by another individual. \(^2\) The Written Reprimand alleges that Appellant stated something to the effect that he “didn’t see a problem” when asked to bring asphalt to the hole. The rest of the recitation is similar to the testimony of the witnesses.

27. The Written Reprimand does not allege that Appellant violated any rules respecting attendance. However, the Agency determined to dock Appellant’s pay for the 4 1/2-hour period comprising the remainder of the workday on May 28, 2002 (see, Exhibit A).

28. Appellant testified that Field Superintendent Matthew Laumann delivered the Written Reprimand to Appellant, and that Mr. Laumann said something to the effect that Appellant “should not take this any further.” When Mr. Laumann was asked on the stand if he had said any such thing to Appellant, he testified, "Absolutely not,” and that the Agency supervisors are under “very strict guidance” not to give advice on something that might be considered a legal matter.

29. Appellant filed a Grievance of the Written Reprimand on June 17, 2002 (Exhibit 4). Mr. Cottrell denied the Grievance on June 19, 2002 (Exhibit 5). Appellant forwarded the Grievance to Street Maintenance Director Steve Garcia (Exhibit 6), who referred it to Mr. Laumann.

30. Mr. Laumann testified that he reviewed the Written Reprimand and the Grievance, and that he spoke with Mr. Canzona, Mr. Brant and Mr. Cottrell. They told him Appellant “essentially wasn’t doing his job.” He testified that he was not aware Appellant had brought a shovel of asphalt over at the beginning of the incident. He testified further that leaving the work site after a confrontation with the supervisor was not a legitimate excuse for being absent, and that therefore the 4 1/2 -hour period for which Appellant was docked was appropriate. Mr. Laumann was unaware that Appellant had mentioned he was sick that morning during the confrontation, or that Mr. Cottrell told him he should leave if this were the case. He testified that none of the individuals with whom he spoke ever mentioned this to him. He testified that depending on the circumstances this might be considered adequate notice, but that “suddenly becoming ill on the heels of a confrontation” was suspect.

31. Mr. Laumann testified that he had spoken with Appellant prior to the incident at issue about Appellant feeling picked on and not getting a “fair shake” while on Mr. Cottrell’s crew. Mr. Laumann testified that when the time neared for Appellant to return to Street Maintenance from Traffic (around February of 2002), Appellant protested and requested a transfer. Mr. Laumann testified he told Appellant that while Mr. Cottrell can come across as “loud at times,” he is a fair supervisor and is not singling out Appellant or other individuals. He told Appellant that part of his job was to learn to get along with the crew and the supervisor.

32. Mr. Brant, Mr. Cottrell and Mr. Laumann all testified that they have had discussions with Appellant in the past about not following instructions and not talking back to Mr. Cottrell. Mr. Cottrell gave the specific example of Appellant’s prior Verbal Warning. None of these witnesses offered any additional specific examples of such discussions. Mr. Laumann

\(^2\) The charges set forth in the Written Reprimand are set forth below in the “Discussion” section.
testified that he was aware of prior concerns about Appellant’s behavior through conversations with Mr. Cottrell. He stated that on a few occasions when visiting the work site, he had observed Appellant not working until he noticed he was being observed.

33. Based on his investigation, Mr. Laumann determined that the Written Reprimand was justified, and denied Appellant’s Grievance on July 2, 2002 (Exhibit 7). He was not sure about speaking with Appellant about the Grievance. He thinks he did this, but it is not clear whether this happened before or after he rendered a decision to deny it.

34. Mr. Laumann testified that assuming the sick-leave portion of the disciplinary action were excluded, the Written Reprimand would still be an appropriate level of discipline based on the remaining allegations.

35. Appellant timely filed an appeal of the denial of his Grievance on July 11, 2002.

DISCUSSION

1. Rules the Agency alleges Appellant violated.

   a. Alleged CSR violations.

   The Agency posits that Appellant's conduct constitutes violations of the following CSR rules (see, Written Reprimand; Exhibit 2):

   Section 16-50 Discipline and Termination

   A. Causes for Dismissal:

   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.

   …7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work, which the employee is capable of doing.

   …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 relationships with co-workers, other City and County employees or the public.
...10) Failure to comply with the instructions of an authorized supervisor.

...11) Conduct not specifically identified herein may also be cause for progressive discipline.

* * *

2. Analysis of the evidence.

a. Appellant's sick leave

The Written Reprimand does not mention abuse of sick leave. However, the Agency docked Appellant for the afternoon of May 28, 2002 for reasons clearly related to the recitation of facts in the Written Reprimand. The Agency argues that it has shown by a preponderance of the evidence that Appellant’s absence on the afternoon of May 28 was not legitimate. The hearing officer disagrees for several reasons.

First, the Agency apparently based its judgment that Appellant’s absence constituted an abuse of sick leave on the assumption that Appellant really wasn’t sick that day, he was just mad at Mr. Cottrell and this was the reason he left work. The preponderance of evidence suggests that to the contrary, Appellant was suffering from a medical condition serious enough to warrant a doctor’s recommendation of several days off. While the hearing officer is unpersuaded that Appellant told Mr. Cottrell he was ill before the conflagration between the two men occurred, Appellant has shown that he did mention feeling ill to at least one other employee, Mr. Naves. Mr. Cottrell further testified that Appellant was, in fact, on a bathroom break when Mr. Cottrell arrived at the work site, further corroborating that Appellant was already ill when the incident happened approximately half an hour later. Appellant then reiterated that he was ill during the argument with Mr. Cottrell.

Further, three witnesses, uninvolved in the dispute, Mr. Canzona, Mr. Brant and Mr. Naves, all testified that Mr. Cottrell told Appellant if he was sick then he should go home. Mr. Cottrell himself testified that Appellant said he was sick, and that Mr. Cottrell told him, “Maybe you should (leave).” That Appellant agreed and then left while the two men were having a disagreement does not undo the fact that Appellant did report not feeling well, that Mr. Cottrell told him he should go home, and that Appellant then agreed and left. Mr. Laumann was not aware of this part of the exchange. While the hearing officer agrees that in isolation, a report of illness “on the heels of a confrontation” is suspect, when additional evidence is considered it is clear that Appellant was, in fact, already sick that day before the conflagration ever took place.

Appellant testified he went straight to the doctor’s office when he left work. The Agency disputes this because the doctor’s note Appellant provided did not release him from work for the afternoon of May 28. The hearing officer is again unpersuaded by this argument. Appellant’s

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3 Mr. Cottrell credibly testified that Appellant did not approach him and tell him he was ill before the argument between them occurred. Mr. Cottrell testified if Appellant had done that, Mr. Cottrell would likely have told him to take the day off at that time.
testimony that he suffered from an ulcer is corroborated by the fact that the doctor placed him on work leave for three days, evidencing that whatever Appellant was suffering from that morning was serious enough to warrant a five-day break from work (including the weekend). Whether Appellant went in right when he left work or the next day, the fact is that an ulcer simply does not appear overnight. If Appellant was suffering from an ulcer the next morning, then he was suffering from it the day before when he left work. And while this does not excuse Appellant’s inappropriate behavior toward his boss, that inappropriate behavior does not undo the fact that Appellant was legitimately ill.

The Agency objected to the admission of the duplicate doctor’s note (Exhibit C) offered by Appellant in lieu of the original. It argues that this duplicate note does not specifically release Appellant for the afternoon of May 28, 2002, only for the subsequent three days, which are not in dispute. The Agency further points to the fact that the note does not indicate Appellant was seen in the office on the day in question.

The hearing officer found these arguments unpersuasive for several reasons. First, while clearly Appellant sought this copy in preparation of this hearing, it nonetheless is on Kaiser stationary. While it does not indicate that Appellant came in the afternoon of May 28 or that the doctor released him for that afternoon, there is nothing to suggest the note is not what it purports to be – a doctor’s note from Kaiser, signed by one R. Thomas, M.D. This is clearly a business document regardless of who asked for it or when. The hearing officer is inclined to trust that Kaiser would not hand out such a note with a doctor’s signature on it unless the note were a genuine reflection of the information it contains.

Further, the note excludes reference not only to Appellant being treated in the office on the day in question, but also to receiving telephone advice or other manner of treatment. In fact, the note is completely silent about how the doctor came to advise Appellant he should not return to work for the time period indicated. Once again, though, that the note is not completely filled out does not destroy the value of the information it does contain. The hearing officer simply finds it unlikely that a doctor would place Appellant on leave for three full days without having seen him and found a medical condition serious enough to warrant leave for the remainder of the week, and probably did not even think one way or the other about the remainder of the day in question. The hearing officer is further persuaded that Appellant did see a doctor at some point, and that the doctor diagnosed a “minute ulcer.” This sort of diagnostic phrase is not likely to be something one would fabricate.

The Agency bears the burden of proving its case, and of rebutting any reasonable assertion proven in turn by Appellant. The hearing officer finds Appellant’s replacement note sufficient in lieu of the original. The Agency does not dispute that Appellant gave his supervisor a doctor’s note when he returned to work the following Monday. The Agency knew Appellant intended to offer this note in lieu of the original. It too had access to the original. If the Agency wished to rebut the assertion that Appellant sought doctor’s treatment, or wanted to prove this note was inaccurate in some way, or that the original note also did not mention the afternoon of May 28, 2002, it could just as easily have offered the original to prove such things. Yet it too failed to offer the original.
Based on the totality of evidence, the hearing officer concludes by a preponderance of the evidence that Appellant was already ill that morning, and therefore was not merely making an excuse to leave because he was upset. Appellant further told Mr. Cottrell he was ill, and Mr. Cottrell told him to leave. Further, Mr. Laumann was not sufficiently apprised that this part of the discussion occurred during the confrontation. The hearing officer concurs with Mr. Laumann's statement that depending on the circumstances, these considerations would have been material to a determination of whether Appellant's dock in pay was justified. Given the conclusion that Appellant was actually sick, Appellant's dock in pay should therefore be reversed.

b. Appellant's alleged failure to maintain satisfactory relationships with his co-workers.

Appellant argues that he responded to orders and was appropriate until Mr. Cottrell swore at him for asking a legitimate question. The hearing officer is unpersuaded.

All the witnesses to the incident, except the one called by Appellant, describe Appellant's demeanor as angry and agitated from the very start of the incident. Mr. Cottrell testified that the hole needing filled was large and obvious, that it took approximately 25 shovels full of asphalt to fill it, and that any utility worker who had paved in the past should know where the asphalt needed to be put. He testified that Appellant began "mumbling" as soon as Mr. Cottrell needed help. Appellant then approached him and said with an angry, sarcastic demeanor something to the effect of, "Where do you want it?" Appellant further angrily said "Yeah, yeah, yeah," during the dispute, and threw down the shovel before walking off.

Mr. Cottrell's version of these events is corroborated by two other eyewitnesses. Mr. Canzona testified that Appellant came around the paver, saying "Yeah, yeah, yeah," in response to Mr. Cottrell's request for help. Appellant threw down his shovel and "stormed off" during various points on the incident. Mr. Canzona was surprised that Appellant would "mouth off" to his supervisor and throw down the shovel like that. He testified that Appellant's demeanor was agitated and argumentative during this incident, and that this behavior was both atypical and unacceptable of utility workers.

Similarly, Mr. Brant testified that Appellant was "acting mad about something," was apparently mad at Mr. Cottrell and was "talking crazy" to him. Appellant then said something about not feeling good, and walked away. Mr. Brant described Appellant's actions as "talking back." He too stated that a reaction of this sort is not tolerated in the Agency, and that as a supervisor he would not have allowed it either.

In addition, Mr. Canzona and Mr. Brant testified that neither Appellant nor Mr. Cottrell used any profanity during the incident. Mr. Cottrell flatly denied using any profanity during the incident. Appellant's allegations of profanity stand alone, uncorroborated and directly contradicted by credible testimony from multiple witnesses. This not only brings Appellant's credibility to question; it further militates against Appellant's reliance on such profanity to justify his becoming angry, throwing the shovel down, saying "yeah, yeah, yeah," and storms off.
Simply put, the hearing officer finds Appellant’s version of events, and thus the proffered explanation for his admittedly unacceptable behavior, lacking in credibility. The hearing officer further finds that Appellant’s question, “Where do you want it?” was not a legitimate solicitation for information, but instead was a resistive, argumentative expression of sarcasm made without regard to its disrespectful, disruptive impact on the supervisor. The hearing officer therefore concludes that the Agency has shown by a preponderance of the evidence that Appellant’s behavior was in violation of CSR 16-51 A. 4), requiring employees to maintain satisfactory working relationships with co-workers.

c. Appellant’s alleged refusal and/or failure to comply with the instructions of his supervisor.

The Agency charges that Appellant’s actions constitute violations of both CSR 16-50 A. 7), prohibiting an employee’s refusal to comply with orders, and CSR 16-51 A. 10) proscribing an employee’s failure to do so. In light of the fact that the Agency’s charges arise from a single incident, one or the other of these charges is sufficient, whereas to charge Appellant with both is redundant. Further, the latter rule can be seen as somewhat of a “lesser included offense” of the former. That Appellant actually did put the shovel in the hole only partially mitigates this resistive, disruptive behavior. The hearing officer concludes that while Appellant’s action does not rise to the order of refusing to comply with the supervisor’s orders, since he did respond albeit begrudgingly, it clearly warrants a charge of the “lesser included offense” of failing to comply with the supervisor’s orders. The hearing officer therefore concludes that Appellant’s actions constitute a violation of CSR 16-51 A. 10), not CSR 16-50 A. 7).


a. Appellant’s verbal warning as a factor in determining appropriate progressive discipline.

Typically, prior disciplinary actions are taken as fact if they are not appealed, or if they are appealed and upheld. In either event, the employee was at least provided an opportunity to challenge the basis for such disciplinary action(s). When such prior disciplinary actions are then considered by the Agency in determining the severity of subsequent discipline, the employee has already been afforded the protections of due process with respect to those prior disciplinary actions.

Such an opportunity is not provided in the case of verbal warnings. It is true that verbal warnings may not be grieved or appealed under CSR 16-40 C. However, this rule merely means that an employee cannot seek the reversal of a verbal warning by the Hearings Office. The rule cannot be used as a means to circumvent the requirement of showing a factual basis for the

4 There is a reason these two offenses are separate and appear in separate portions of the statue. The present case is a good example of why that is the case. An employee may be resistive and either knowingly or negligently fail to comply with orders, without actually depriving the agency of the work requested. On the other hand, an employee may outright refuse direct orders. There is a difference in the magnitude of impact to an agency between these different types of offense. Determining the appropriate offense should be based on an assessment of the merits on a case-by-case basis. Here, the hearing officer has found that Appellant did not walk off the job without permission; rather, he told the supervisor he was sick, and the supervisor told him to go home. Once Appellant was released for the day, he should not have been held accountable for any duties he did not do thereafter.
severity of discipline in a subsequent case. To allow the rule to be used in such a way would deprive an employee of due process in the subsequent disciplinary action.

Thus, while a full-blown hearing on the prior verbal warning is neither permitted nor necessary, and while the Hearings Office will not reverse or modify the existence of the verbal warning, if an agency wants the Hearings Office to consider the verbal warning in support of the appropriate severity of subsequent discipline during a de novo hearing, and an employee successfully raises a colorable dispute concerning the underlying factual basis for the verbal warning, the agency must provide some evidence in support of that factual basis.

The Verbal Warning issued May 3, 2002 (Exhibit 3) states only that it was given for “not following orders.” The documentation of the Verbal Warning (Exhibit 3) sets forth no recitation of facts which presumably form the basis of the allegations therein. In addition, Mr. Cottrell signed the Verbal Warning. Yet it was not clear that Mr. Cottrell was present when the action giving rise to the Verbal Warning took place. Instead, the orders at issue were given by a different acting foreman (apparently a roller operator). Mr. Cottrell was therefore apparently acting on second-hand accounts of an incident between Appellant and the acting foreman. However, the acting foreman never testified to the incident.

The only clear description of the events in question came from Appellant himself. Appellant claims the discipline arose from a misunderstanding of whose footprints Appellant was supposed to rake over, basically raising a colorable claim as to its validity.

The Agency has not shown a factual basis for the verbal warning and it will not be considered in the hearing officer’s determination of the appropriateness of the severity of the discipline.

b. Appropriateness of the discipline.

Mr. Laumann’s testimony suggested that he felt the severity of the discipline was predeterminded by the existence of a prior verbal warning in the progressive discipline scheme. This is not the appropriate method of determining the severity of the discipline. Rule 16 states as follows in relevant part:

16-10 Purpose

The purpose of discipline is to correct inappropriate behavior or performance. 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 shall take into consideration the employee’s past record. The appointing authority or designee shall impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance...
Section 16-20 Progressive Discipline

... 2) Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean the progressive discipline must be taken...

(Emphasis added.) Thus, while the Career Service Authority operates under the scheme of a progressive discipline system, there is a greater degree of latitude afforded to agencies than Mr. Laumann’s presumptions suggest. The test is whether the degree of discipline is "reasonably related" to the seriousness of the offense. See, Leamon Taplan, above. An employee’s past record, whether it be for better or worse, is only one factor to be considered in a determination of the appropriate level of discipline.

It is a well-established principle of employment law that to be “reasonably related” to the seriousness of the offense, the discipline need only 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 whether the discipline is within the range of reasonable alternatives, the hearing officer will not substitute her judgment for that of an agency unless the discipline is clearly excessive, or is based on considerations that are not supported by a preponderance of the evidence. See, e.g., Armbruster, above; In the Matter of the Appeal of Dolores Gallegos, Appeal No. 27-01 (entered 3/21/01).

Most of the allegations supporting the Agency’s determination to issue the Written Reprimand have been sustained by a preponderance of the evidence. Appellant has tried to soft-pedal his role in the confrontation with Mr. Cottrell, claiming his tone was normal when he asked where to put the shovel of asphalt and that he asked because the did not know. For the reasons set forth above, the hearing officer is unpersuaded by these arguments. And while Mr. Laumann testified that he was not aware at the time he reviewed the Grievance that Appellant’s illness came up during the confrontation, he nonetheless testified that even removing the issue of Appellant’s alleged inappropriate leave entirely from consideration, he still felt the Written Reprimand was appropriate under the remaining allegations of Appellant’s inappropriate behavior.

The hearing officer is inclined to agree. While certain elements of the Written Reprimand were inaccurate, the essence of the confrontation is reflected therein. Appellant has been shown to exhibit insubordinate behavior toward his supervisor in a high-stress, demanding work environment with a short season, where efficiency depends on cooperation teamwork. Given the incident as it has been shown to occur by a preponderance of the evidence, Mr. Cottrell’s decision to issue a Written Reprimand, and Mr. Laumann’s decision to uphold it, are not outside the realm of reasonable alternatives available to them as agency administrators. The hearing officer must therefore uphold the decision to issue Appellant the Written Reprimand.
CONCLUSIONS OF LAW

1. The Agency has demonstrated by a preponderance of evidence that Appellant engaged in
   a) Failure to maintain satisfactory relationships with co-workers, other City and County
      employees or the public in violation of CSR 16-51 A. 4);
   b) Failure to comply with the instructions of an authorized supervisor in violation of 16-51 A.
      10).

2. The Agency has failed to demonstrate by a preponderance of the evidence that Appellant
   engaged in:
   a) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned
      work, which the employee is capable of doing, in violation of CSR 16-50 A. 7);
   b) Conduct not otherwise specifically identified in violation of 16-50 A. 20 and 16-51 A. 11).
   c) Actions warranting 4 ½ hours of leave without pay on the afternoon of May 28, 2002.

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, the Agency’s decision to issue Appellant the
   Written Reprimand 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 issue
Appellant the Written Reprimand is AFFIRMED and MODIFIED as follows:

The Written Reprimand should be removed from all files and replaced with an amended
version, in which the following items have been redacted:

   a) all references to the CSR violations that have not been shown by a preponderance of the
      evidence, as set forth above under paragraph 2 of the “Conclusions” section;
   b) Appellant stating he “didn’t see a problem.”

Appellant’s leave without pay of 4 ½ hours the afternoon of May 28, 2002 shall be restored
to Appellant as soon as is practicable for the entities responsible for generating Appellant’s payroll.

This case is hereby DISMISSED.

Dated this 24th day of October, 2002.

Joanha Lee Kaye
Hearing Officer for the
Career Service Board