INTRODUCTION

This matter comes before the Career Service Board on appeal by Marvin F. Champion filed April 8, 2002. Appellant challenges the Denver Department of General Services, Public Office Buildings' decision to suspend him for four work-weeks without pay, for various alleged acts of misconduct and misuse of city property in violation of Career Service rules, a departmental regulation, and Executive Order 25 prohibiting personal use of city vehicles.

For purposes of this Decision, Mr. Champion shall hereinafter be referred to as "Appellant." Denver Department of General Services, Public Office Buildings shall be referred to as "POB" 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 July 16 and 23, 2002 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Mindi L Wright, with POB Director Dan Barbee present for the entirety of the proceedings as advisory representative for the Agency. Appellant was present and was represented by Glen Younger, Esq.

The Agency called the following witnesses: private investigator Richard Janowski, POB Human Resources Analyst Specialist Regina Garcia, and Mr. Barbee in its case-in-chief and on rebuttal.

Appellant testified on his own behalf and did not call additional witnesses.
The parties stipulated to the admission of Agency Exhibits 1 through 14. Exhibits 16 through 18 were offered and admitted without objection. Exhibits 15 and 19 were offered and admitted over Appellant's objections.

Appellant's Exhibit A was offered and admitted without objection.

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 suspension pursuant to CSR 19-10 b), as follows in relevant part:

   **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.

   ...b) **Actions of appointing authority**: Any action of an appointing authority resulting in... suspension... which results in an alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

   Jurisdiction over Appellant's suspension 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 the 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). 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).
3. Appellant's Motion to Continue

In addition to a Motion to Continue filed by Appellant on July 11, 2002 and already dispensed with by the hearing officer's Order Denying Motion to Continue entered July 12, 2002, Appellant filed an additional Motion to Continue on the morning the hearing commenced on July 16, 2002. The basis for this Motion was Appellant's request to amend his appeal to add the issue of racial discrimination, and add witnesses to testify to this issue to Appellant's prehearing statement. The hearing officer denied this Motion from the Bench as untimely, and now memorializes that Order in this Decision. It is well settled that new claims against an agency cannot be raised more than ten days after the action giving rise to the appeal. See, CSR 19-22 a) 2.


Agency offered testimony and exhibits regarding both alleged misuse of a City vehicle, and alleged performance problems on Appellant's part. Appellant did not object to the evidence alleging performance deficiencies. However, the Agency did not raise allegations of performance problems at any time during the predisciplinary process based on the documentation of that process. The hearing officer therefore finds that the Agency's allegations of poor performance are not ripe for consideration as part of this appeal. See, e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Such allegations thus cannot be given any weight in consideration of whether the Agency had just cause to discipline Appellant, and/or whether the severity of that discipline is reasonably related to the seriousness of the offense. This evidence has therefore been disregarded.

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.

FINDINGS OF FACT

Appellant is a thirty-nine year veteran in POB. He rose through the ranks and 15 years ago became a Facilities Manager, the position he occupied at all times relevant to this proceeding. Appellant is one of four Facilities Managers for the City and County of Denver. He is assigned approximately a dozen City and County facilities in addition to all the Denver fire stations. He is responsible to coordinate the services of POB staff and contract vendors in all necessary maintenance and improvement projects for those buildings (see, Exhibit 11).
Appellant's position is a management-level position and his gross salary is over $70,000.00 per year. He has never received a disciplinary action before the one challenged in this appeal.\(^1\)

Appellant's duties primarily involve driving a City van to his assigned City buildings to respond to maintenance calls and improvement requests, determine necessary work orders, and execute maintenance and improvement inspections. This is typically expected to comprise approximately 75% (six hours per workday) of Appellant's time. Appellant is expected to spend the balance of his day (approximately two hours) in his base office located in the City and County Building (which is not one of his assigned buildings) performing the necessary administrative duties associated with his responsibilities, such as responding to e-mails and phone calls requesting maintenance assistance. (See, Exhibit 11.) Appellant's scheduled hours are from 7:30 a.m. to 4:30 p.m. Monday through Friday.

Appellant's testimony and prior case law suggest that some agencies within the City and County of Denver have experienced a somewhat lax atmosphere with respect to employee usage of City vehicles and equipment, at times to the extent that the working environment leads employees to believe such activity is acceptable.\(^2\)

On July 22, 1992 former POB Director John Hall distributed a memorandum concerning the use of City vehicles (Exhibit 12). This memo indicates that due to "a recent incident in the division involving personal use of City vehicles," Mr. Hall determined that it was necessary to distribute copies of the POB Administrative Regulation #100-901 (Hereafter AR # 100-901; cited in relevant part below), governing the use of City vehicles. This memo was addressed to "All Employees of the Public Office Buildings Division." It indicates that a copy of AR #100-901 was attached thereto (see, Exhibit 12, pp. 3-4). The memo reiterates the essence of AR 100-901, stating that this regulation is "quite clear on the prohibition of the use of any city... vehicles... for any type of personal business." The memo further states in relevant part:

Division management personnel are not authorized to utilize Division vehicles for luncheon or dinner meetings unless such luncheons, dinners or meetings involve official City business. Consequently, the use of a City vehicle by management personnel for noon meals is prohibited by the Administrative Regulation unless official City business is involved in that meeting or meal. In no instance are City vehicles to be used for the conduct of personal business or personal errands.

Finally, the memo states that personal use of City vehicles is a CSR rules violation and is grounds for discipline.

For employees like Appellant who use City vehicles regularly in the course of their duties, department policy is for those employees to check out the vehicle and keep a POB

\(^1\) The Agency gave the absence of prior disciplinary actions as one of the reasons for not terminating Appellant. However, the documentation indicates he received a written reprimand for leave abuse in March of 2001. (See, Exhibits 2 and 3.)

\(^2\) See, e.g., In the Matter of the Appeal of Delores Gallegos, Appeal No. 27-01 (decision entered 5/21/01); In the Matter of the Appeal of Louis Vigil, Appeal No. 06-01 (Decision entered 8/14/01); In the Matter of the Appeal of Joyce Mendez, Appeal No. 311-01 (Decision entered 11/8/01).
Vehicle Usage Log (see, Exhibit 5). These logs require entries indicating the times the vehicle was checked out and back in, mileage on departure and return, and destinations during the check-out period.

Mr. Hall was succeeded by Dan Barbee, who was appointed to the position of POB Director on August 1, 2001. Mr. Barbee has been Appellant's direct supervisor at all times relevant to this appeal. Mr. Barbee testified at the hearing that the reason for the Vehicle Usage Log is to assure the vehicles are being used for business purposes only. He testified that one of the reasons for this is because after a City vehicle reaches a certain number of miles the City's fleet maintenance division considers the vehicle so devalued by standard depreciation schedules (which factor in the age of the vehicle plus its mileage) that it will be removed from the fleet. Mr. Barbee testified that City vehicles are typically retired from the City fleet after 75,000 miles.

On January 23, 2002 Mr. Barbee received an anonymous phone call from a City employee who told Mr. Barbee that she had observed Appellant picking up a woman in front of 17th and Welton daily for the past year and a half. Mr. Barbee testified the anonymous caller complained that Appellant was using the City vehicle as a "taxi service" and that this was unfair since other City employees could not use vehicles in this manner.

Mr. Barbee testified that in the afternoons of January 28th through the 31st, 2002 between approximately 3:30 and 3:45 p.m., he clandestinely went to 17th and Welton to see for himself what the anonymous caller had disclosed. He testified he witnessed Appellant picking up a woman in front of 17th and Welton in the City van he regularly uses (G-0-1-91), and take her in the general direction of the Denver Center for the Performing Arts ("DPAC") on all four days.

The Agency contracted with Richard Janowski of Kolb, Stewart and Associates, a private investigating firm, to follow Appellant for a period of five working days to monitor his actions. Mr. Janowski and an assistant subsequently followed Appellant from February 11 through 15, 2002. He made a videotape (Exhibit 14) and a detailed written record of Appellant's movements (Exhibit 15). In addition to these exhibits, the Agency provided Exhibit 17, which is a series of "Map Quest" computer software printouts. "Map Quest" is designed to calculate driving distances between locations in the Denver area. Finally, the Agency provided Exhibit 5 which is the Vehicle Use Log Appellant prepared with respect to his use of the City van, including the days of February 11 through 15, 2002.

The hearing officer has examined and compared Exhibits 5, 14, 15 and 17 in detail. The following is a series of narratives explaining the surveillance observations, with a chart at the end of each day's narrative to assist in establishing total distances traveled and the time taken on the excursions considered objectionable. A comparison of Appellant's Vehicle Use Log entries to his observed actions is provided. It should be noted that many of the various work-related duties Appellant was observed doing are not included in the charts below. The hearing officer excluded some of the non-objectionable activities as irrelevant to the disciplinary action under appeal. Appellant is presumed to have been working at all times he was not observed doing otherwise. Therefore, the below characterizations do not represent Appellant's full work-week.
Monday, February 11, 2002 (Exhibit 15, pp. 4-8):

At 7:22 a.m. Appellant left his home, near 17th and Jasmine Street in Denver. He was driving a Chevrolet Astrovan owned by the City and County of Denver and clearly marked as such with the ID number G-0-1-91 on the left rear bumper, bearing the license plate 437A47 (hereafter "the City van"). Appellant had his teenage son with him in the City van when he left home. Appellant then drove to Bishop Machebeuf High School at 458 Uintah Way and dropped off his son. At 7:54 a.m., approximately 24 minutes late, Appellant arrived at work at the City and County Building.

Appellant was seen leaving again at 9:55 a.m. and went to Fire Station 15 at 1375 Harrison Street. Appellant left Fire Station 15 at 10:12 a.m. and drove back to his house where he arrived at 10:18 a.m. He took two recycle bins from the curb and went inside. Appellant testified that he went back to retrieve his wallet because he had forgotten it that morning. Appellant then left his house at 10:30 and proceeded to Denver Permit Center on 22nd and Oneida, where he also stopped briefly at 10:33. This is not one of Appellant's assigned buildings. Appellant testified he picked up some New York Fire Department hats he personally ordered there. Appellant left there at 10:36 and proceeded thereafter to 5440 Roslyn Street, where one of Appellant's assigned buildings is located. He arrived at 10:47 a.m.

Appellant left Roslyn Street at 11:46 a.m., and drove though the parking lot of another City facility near Park Avenue West and Globeville before returning to the City and County Building at 12:00 p.m. He left again in the van at 12:31 and drove to the Animal Shelter, one of his assigned facilities. He arrived there at 12:38 p.m., left a few minutes later and drove to Sachs-Lawlor Print Shop located at 1717 South Acoma Street to make a City-related transaction concerning a sign. He arrived there at 1:06 p.m., made the transaction, and then left a few minutes later.

Appellant drove from Sachs-Lawlor to Sam's Club located at 505 South Broadway, where he arrived at 1:22 p.m. Appellant went inside and did some personal shopping. He left at 1:40 p.m. and returned to the City and County Building where he arrived at 1:51 p.m.

Appellant left the City and County Building at 3:48 p.m. and went to 17th and Welton where he arrived at 3:48 p.m. He then picked up the woman Appellant identified during his

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4 The investigators described Appellant's passenger as a "teenage male" and speculated that this was Appellant's son. Appellant verified this during his testimony.

5 The hearing officer finds that while Appellant made two personal stops on Agency time, the mileage of these stops was not unacceptable because they were both on a reasonable pathway between Fire Station 15 and the Roslyn Street facility. The hearing officer has therefore only counted the time Appellant was at the locations.

6 Apparently this is Denver Streets Department at 3383 Fox Street. (See, Exhibit 17, p. 19.)

7 The hearing officer finds that while Appellant made another personal stop on Agency time, the Sam's Club where he stopped was on the most direct route back to the City and County Building. She therefore has not counted the miles or travel time against Appellant, only the time in the store.
testimony as an old jogging buddy and fellow City employee who had been in a car accident within the last year or so and had injured her knee. Appellant testified that he was giving her rides to her parking garage located at the DPAC because of her injury. The woman was an employee of the Assessment Division, not POB. They were seen arriving in front of the DPAC at 3:56 p.m. Appellant then returned to the City and County Building at 4:02 p.m. where he stayed until 4:41 p.m. Appellant then left the building and returned home, still driving the City van.

### DEPARTURE / TIME

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<td>17 &amp; Welton</td>
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<td>City and County Bldg.</td>
<td>Appellant's home (after shift)</td>
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**TOTAL FOR FEBRUARY 11**

17.48 / 1.17

(Time adjustment for lunch hour)

(Appellant made a single Vehicle Use Log entry for February 11 and 12, 2002, the analysis of which is set forth below.)

**Tuesday, February 12, 2002** (Exhibit 15, pp. 9-12)

Appellant left his house in the City van at 7:20 and took his son to school. He arrived at work at 7:47 a.m., 17 minutes late. He left the City and County Building in the City van at 9:02 and went to various assigned facilities, returning to the City and County Building at 10:31 a.m.

Appellant again left the City and County Building at 11:45 a.m. and went to 17th and Welton, where he picked up his woman friend and another woman at 11:47, and took them to Mexico City Restaurant at 2113 Larimer Street where the women went in and picked up a carry-out meal. He then took them back to 17th and Welton at 12:02 and returned to the City and County Building at 12:09 p.m.

After going to various other work sites and returning to the City and County Building, Appellant again left in the City van at 2:15 p.m. with a co-worker and drove home where he arrived at 2:24 p.m. The co-worker drove away in the City van. Appellant testified he had a co-worker give him a ride home and that the co-worker then returned to work. Appellant returned

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8 Eleven minutes were deducted from the total since Appellant was at the office that long after the end of his shift.
to work in his own car (surveillance was temporarily severed but presumably this was about 10 minutes later). He remained at the City and County Building until the end of his shift.

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<td>Appellant's home (2:24)</td>
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TOTAL FOR FEBRUARY 12 18.77 / 1.00
(Time adjustment for lunch hour) (0.00)

Appellant made a single POB Vehicle Use Log entry for February 11 and 12, 2002 (Exhibit 5, p. 3). The entry indicates Appellant checked out the City van at 9:30 (presumably both days), that he visited 5440 Roslyn Street, Sachs-Lawlor, the Animal Shelter, Denver Streets Department (3383 Fox Street), and Fire Station 15, and that he checked the vehicle back in at 4:15 (presumably both days). Appellant was observed driving through the parking lot at Denver Streets Department on Monday, but he did not stop there or perform any work. The entry does not indicate any of the other destinations above. It does not indicate that Appellant took the City van home over the previous weekend and on Monday night.

Wednesday, February 13, 2002 (Exhibit 15, pp. 13-16)

Appellant left home in his own car at 7:29 a.m. He arrived at work at 7:47 a.m., 17 minutes late. He left again at 8:30 in his own car and took his son to the doctor, where they both entered at 8:41. Appellant then left alone at 9:12 and went home, arriving at 9:15. He left home at 9:24 a.m. and returned to pick his son up from the doctor's office at 9:28. They left the doctor's office at 10:06 and Appellant dropped the boy off at school at 10:15. Appellant returned briefly to his home at 10:28. Appellant then went to a truck stop called T&A Travel Center from 10:41 to 10:52, where he got gas and went inside for a few minutes. He then went to the airport where he arrived at 11:09, circling several times while evidently waiting for a flight. At 11:40 a.m. he picked up his wife and daughter, and took them home where they arrived at 12:11 p.m. At 12:20 Appellant had his wife give him a ride to work. She dropped him off at 12:37 p.m.

Appellant left the City and County Building at 1:31 in the City van and went to Denver Technologies, one of his assigned buildings at 10 Galapago. He left there at 2:14 p.m. and went to Viking Services at 792 Vallejo on apparent personal business since this is not one of Appellant's assigned buildings. He left that location and went to the Department of Public Works at 1390 Decatur, one of his assigned buildings, where he arrived at 2:25. He put gas in the City van and then proceeded to Denver Water on apparent personal business (since this is not

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9 This distance was not included in the Map Quest Printout (Exhibit 17) and has been excluded.
one of Appellant's assigned buildings). He arrived there at 2:35 p.m. He returned to the City and County Building at 2:45.

Appellant left the City and County Building at 3:33 in the City van to pick up the woman at 17th and Welton, where he arrived at 3:36. He dropped her off at DPAC at 3:47 and returned to the City and County Building at 3:52 p.m. Appellant left work at 4:40 p.m. in the City van.

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Appellant's Vehicle Use Log for February 13 (Exhibit 5, p. 3) indicates he checked the City van out at 9:00, and that he visited 5440 Roslyn Street and "950" even though Appellant visited neither of these facilities that day. It does not indicate a check-in time. The entry does not indicate any of the above destinations, and does not indicate that Appellant took the van home.

**Thursday, February 14, 2002** (Exhibit 15, pp. 16-19)

Appellant dropped his son off at school at 7:30 a.m. in the City van and arrived at work at 7:53, 23 minutes late. He left the City and County Building again at an uncertain time in the City van and went to Lamar Donuts located at 6th and Kalamath, where he arrived at 8:51 a.m. and bought donuts. He returned to the City and County Building at 9:04 a.m.

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10 Ten minutes were deducted since Appellant stayed at work that long after his shift.

11 Appellant did visit Denver Technologies at 10 Galapago and Public Works at 1390 Decatur that day. However, neither of these is in the entry.
Appellant left the City and County Building in the City van with a co-worker (not from his own team, but from janitorial) at 9:45 and arrived at the King Soopers on 13th and Speer at 10:09. Ten minutes later Appellant and the co-worker left King Soopers and returned to work at 10:23. At 10:46 Appellant and the co-worker left in the City van again and went to Walgreens at 120 Broadway, were they arrived at 10:55 a.m. They left there at 11:00 and returned to work at 11:07. Appellant testified that the trips to King Soopers and Walgreen’s were to buy Valentine treats for the staff which is an office tradition.

Appellant left work in the City van at 4:33 p.m. and went to King Soopers again before going home.

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TOTAL FOR FEBRUARY 14, 2002 21.65 / 1.40
(Time adjustment for lunch) (.40)

(Appellant made a single Vehicle Use Log entry for February 14 and 15, 2002, the analysis of which is set forth below.)

Friday, February 15, 2002 (Exhibit 15, pp. 20-23)

Appellant left home in the City van and arrived at work on time at 7:30 a.m. At 9:14 a.m. he drove the City van to Denver Streets Department at 3383 Fox Street where he arrived at 9:23. Appellant left there at 9:43 and drove to a church located at 4400 Lincoln, where he arrived at 9:47 a.m. He went inside for a few minutes, and then left that location to drive to a house at 1440 King Street where he arrived at 10:01 a.m. Appellant picked up a city employee (not of POB) who was off duty at the time to take her to breakfast. They then went to Swift Kitchen at 4300 West Colfax, arriving there at 10:05. They had breakfast and he took her back home at 10:54 before returning to the City and County Building at 11:05. Appellant testified that the fellow employee was seeking a reference from him for a transfer and this is why he took her to breakfast.

12 While Appellant’s departure time is not in the record, the hearing officer assumes it took about as much time to get there as to get back.

13 In Exhibit 17, the Map Quest computer calculation strangely chose a route to 6th and Kalamath that included the highway. The hearing officer finds this choice of route not likely the one Appellant took, since one can get there from the City and County Building by driving only nine blocks south and five blocks west. (See, Exhibit 17, p. 15.)
After several apparent work-related activities, at 12:28 p.m. Appellant left in the City van and went to 17th and Welton to pick up his injured friend. They then went to Chinese Kitchen at 12:46, went in to the restaurant, picked up an order and left at 12:52 p.m. He took her back to 17th and Welton, dropped her off there at 1:03 and returned to the Denver Streets Department where he arrived at 1:12 p.m.

After going to various work sites that afternoon, Appellant left the Denver Animal Shelter located at 678 South Platte River Drive at 2:44 p.m. and went to King Soopers where he arrived at 2:50 p.m. He then left there with flowers at 2:57 and returned to the City and County Building.

Appellant drove the City van to 17th and Welton at 3:31 p.m., picked up his injured friend at 3:37 and took her to DPAC where he dropped her off at 3:43. He then returned to the City and County Building at 3:48 p.m. He left for home driving the City van at 4:35 p.m.

<table>
<thead>
<tr>
<th>DEPARTURE / TIME</th>
<th>DESTINATION / TIME</th>
<th>MILES / HOURS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appellant's home</td>
<td>City and County Bldg.</td>
<td>7:30</td>
</tr>
<tr>
<td>9:43</td>
<td>Church</td>
<td>9:47</td>
</tr>
<tr>
<td>Church</td>
<td>Friend's house</td>
<td>10:01</td>
</tr>
<tr>
<td>9:50</td>
<td>Swift Kitchen</td>
<td>10:05</td>
</tr>
<tr>
<td>Friend's House</td>
<td>Friend's house</td>
<td>10:54</td>
</tr>
<tr>
<td>10:03</td>
<td>City and County Bldg.</td>
<td>11:05</td>
</tr>
<tr>
<td>City and County Bldg.</td>
<td>17th &amp; Welton</td>
<td>12:32</td>
</tr>
<tr>
<td>12:28</td>
<td>Chinese Kitchen</td>
<td>12:46</td>
</tr>
<tr>
<td>12:36</td>
<td>17th &amp; Welton</td>
<td>1:03</td>
</tr>
<tr>
<td>Chinese Kitchen</td>
<td>Denver Streets Dept.</td>
<td>1:12</td>
</tr>
<tr>
<td>12:52</td>
<td>King Soopers</td>
<td>2:50</td>
</tr>
<tr>
<td>1:04</td>
<td>City and County Bldg.</td>
<td>2:58</td>
</tr>
<tr>
<td>Animal Shelter</td>
<td>17th &amp; Welton</td>
<td>3:37</td>
</tr>
<tr>
<td>2:44</td>
<td>City and County Bldg.</td>
<td>3:43</td>
</tr>
<tr>
<td>King Soopers</td>
<td>City and County Bldg.</td>
<td>3:48</td>
</tr>
<tr>
<td>2:57</td>
<td>17th &amp; Welton</td>
<td>DPAC</td>
</tr>
<tr>
<td>3:31</td>
<td>3:37</td>
<td>3:44</td>
</tr>
<tr>
<td>17th &amp; Welton</td>
<td>3:44</td>
<td>Appellant's home</td>
</tr>
</tbody>
</table>

TOTAL FOR FEBRUARY 15, 2002: 35.88 / 2.47
(Time adjustment for lunch)

14 This distance was not included in the Map Quest Printout (Exhibit 17) and has been excluded.

15 While there is no record of Appellant making a visit to the Roslyn Street facility, surveillance was severed from 1:35 and 2:16 p.m. on Thursday, February 14. This could have been where Appellant went during that time. In addition, the entry does not indicate Appellant's stops at Sachs-Lawlor and the Animal Shelter.
check-in time. The entry does not indicate any of the other destinations listed above, and does not indicate that Appellant took the van home on Thursday night and over the weekend.

At the hearing in this case, Appellant testified that he usually filled out the Vehicle Use Log in the mornings and put the places he intended to visit that day, but that on occasion he did not actually get to all the locations until the following day.

The Vehicle Use Log for City van number G-0-1-91 (Exhibit 5) indicates Appellant used this van exclusively during the relevant times. Under "miles at departure" on Monday, February 11, 2002 Appellant entered 56,820. Under "miles at return" on Friday, February 15, 2002 Appellant entered 57,037. Appellant's mileage entries therefore indicate that from Monday to Friday, Appellant put 217 miles on the van. Based on the above figures, more than 103 of these miles -- almost half -- were for personal use. The entries for "miles at return" for each evening and "miles at departure" for the following morning are all the same, indicating Appellant did not account for taking the van home.¹⁶

Mr. Barbee testified that Appellant did not request time off for any of the personal excursions listed above. He testified that he did not know Appellant was using the City van to run personal errands during work hours and taking it home at night until the surveillance revealed these things. It is undisputed that Appellant has never checked out the van to take it home, and that the current administration did not know he was doing this. It is undisputed that Appellant has never reimbursed the Agency for personal use of the van and there is no evidence tending to suggest he ever intended to do so.

Appellant testified that it was his understanding that as a Facilities Manager and exempt employee, he had four hours of "exempt" or "flex" time per week during which it was considered acceptable under previous administrations to run personal errands. Mr. Barbee and POB's Human Resources Analyst Specialist, Regina Garcia, testified they had never heard of such a thing and that no such rule exists anywhere in writing to their knowledge.

Appellant testified that on at least three occasions during the several months prior to the hearing, he was called at home by clients and contractors on the weekends and responded to work sites on those occasions. This happened once at the Roslyn Facility, and twice at the Denver Streets Division. Appellant's descriptions of these calls indicates they involved minor complaints such as burned out lights and gates stuck open, and that his responses did not take very long.

The Agency sent Appellant a Contemplation of Disciplinary Action letter ("Contemplation letter") on March 18, 2002 (Exhibit 3). A pre-disciplinary meeting was held on March 27, 2002. Present were Appellant and his attorney,¹⁷ Mr. Barbee and Ms. Garcia.

¹⁶The hearing officer attributes an unexplained forty-mile discrepancy between the return entry for the evening of February 13 and the following morning's departure entry to an error. The discrepancy has therefore been disregarded.

¹⁷Appellant's attorney at the time of the pre-disciplinary meeting was John Mosby.
Appellant was provided the opportunity to respond to the charges in the Contemplation letter at that time.

On March 29, 2002 the Agency sent Appellant a letter notifying him of its decision to suspend him for four weeks without pay (Exhibit 2). Appellant then timely filed this appeal on April 8, 2002 (Exhibit 1).

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:

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.

1) Gross negligence or willful neglect of duty.

...3) Dishonesty, including but not limited to: ... falsifying records with respect to official duties, including work duties... using official position or authority for personal profit or advantage...or any other act of dishonesty not specifically listed in this paragraph.

...13) Unauthorized absence from work, including but not limited to:... leaving work before completion of scheduled shift without authorization; or taking unauthorized breaks.

...18) Conduct which violates an executive order which has been adopted by the Career Service Board (specifically, Executive Order 25, set forth below).

...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....
1) Reporting to work after the scheduled start time of the shift.

2) Failure to meet established standards of performance including either qualitative or quantitative standards.

... 5) Failure to observe departmental regulations (specifically AR # 100-901, set forth below).

... 7) Unauthorized operation or use of any vehicles, machines, or equipment of the City and County.

...10) Failure to comply with the instructions of an authorized supervisor.

* * *

b. Executive Order 25.

Executive Order 25, "City and County of Denver Policy on Vehicle Transportation" (issued September 1, 1993; see, Exhibit 13) sets forth as follows in pertinent part:

... III. The assignment and use of City vehicles shall be governed by the following:

...E. City vehicles are to be used only for City business. City personnel shall not use a City vehicle for personal purposes other than for driving City vehicles from home to work and from work to home when authorized.

...G. City personnel assigned a City vehicle during their work shift may be allowed to drive the vehicle home only if all of the following circumstances are met:

1. The driver must respond to emergencies or non-scheduled work program service requests that require the use of special equipment and the assigned City vehicle. The emergency or service response must necessitate immediate action to protect the health and safety of the City. At a minimum, it must be demonstrated that the employee's response is periodic, at least twelve occasions within a twelve (12) month period...

2. A supervisor has requested, in writing, and the appointing authority has approved, in writing, that such City personnel be allowed to drive a vehicle home because of specific job duties, more efficient use of staff time, or other demonstrated City need.

3. The driver's home is within the limits of the City and County of Denver...

4. The driver reimburses the City for commuting or meets the car-pool exception described herein. This does not apply to on-call police or fire department personnel, or others whose commuting or personal-use mileage need not be
valued and added to the gross income under the Internal Revenue Code 1986 ("IRC") and regulations promulgated thereunder for wage withholding purposes.

I. All assignments of vehicles to specific staff must be approved by the driver's immediate supervisor in writing and countersigned by the designated appointing authority. Such assignments shall be documented on the form titled "Assignment of City Vehicles" attached to this executive order. Assignments of City vehicles that may be used for commuting shall be reviewed at least twice annually by the appointing authority to determine the continued appropriateness of the assignment.

Annual reports shall be prepared by each City agency having the use of City vehicles, regardless of whether they are used for commuting, for review by the Finance Director. The Finance Director shall prepare an annual report to the Mayor regarding vehicle assignments. The Finance Director will notify the appointing authority and the Mayor when assignments do not conform with this executive order.

IV. The policy of the City regarding reimbursement and wage-withholding for use of City vehicles in commuting shall be governed by the following:

A. ...[D]rivers of City vehicles used in commuting shall reimburse the City for the value of the commute. The City shall use the "commuting valuation rule" promulgated under the [Internal Revenue Code] to determine the value of commuting in a City vehicle...

2. Daily mileage records (Form No. ADM 32-A, Mileage Summary Sheet/City-Owned Vehicles-Carpool, and Form No. ADM 32-B, Mileage Summary Sheet/City-Owned vehicles) must be maintained by City personnel using City vehicles identifying: the vehicle used, the mileage driven for City use, the City business done, the mileage driven for non-City, that is, personal, use (which except for commuting is not allowed under this executive order), and the number of one-way commuting trips. During the first pay period of the month, before the payroll clerk prepares payroll, the appointing authority or the appointing authority's designee shall certify the data kept by those individuals with assigned vehicles. The payroll clerk for each agency shall use the established rates for the commuting use of the City vehicle and prepare appropriate charges from the data provided to accompany the payroll to the Auditor's office so that the proper dollar amount can be deducted from the pay warrant of the City personnel involved for that pay period.

* * *

(Emphasis added.) The Executive Order continues in "Attachment 1" (Exhibit 13, pp. 7-9) by citing the City Charter excerpts which set forth the conditions of using vehicles to commute. The Attachment also cites the IRS schedules for determining rates of reimbursement by employees for commuting and various other uses of City vehicles.\textsuperscript{18}

\textsuperscript{18} While the IRS cites indicate that both Appellant and the City are responsible for reporting valuations of City vehicle use by employees, Attachment 1 indicates it is effective for the year 1993. The hearing officer only notes the reporting and reimbursement requirements in this Attachment reflect the seriousness of the use of City vehicles.
c. POB Administrative Regulation # 100-901

AR # 100-901, "PROHIBITION OF THE USE OF CITY EQUIPMENT, SPACE OR SUPPLIES FOR PERSONAL USE" (issued February 27, 1987; see, Exhibit 12, pp. 3-4) reads as follows in relevant part:

1.0 PURPOSE.

The purpose of this administrative regulation is to establish the requirement prohibiting the use of City equipment, shops, shop equipment or supplies for personal use.

2.0 PROHIBITION OF THE USE OF CITY SPACE OR EQUIPMENT FOR PERSONAL USE.

2.1 City Equipment.

...No City vehicle while under the control, operation, direction or use by an employee of the division shall be used for personal business of any type, nor shall such vehicles be used for the transport of persons other than employees of the City and County of Denver.

* * *

2. Analysis of the evidence.

Appellant does not dispute the use of the City van observed by the investigator during the week of February 11-15, 2002. He only disputes that such use was clearly unauthorized or inappropriate. He points out that many of the excursions were only minor detours taking only a few minutes, involved other City employees, or were lunch excursions which is generally considered an acceptable use of the City vehicles. Finally, Appellant asserts that on balance, he occasionally works off hours enough that he averages forty hours per week.

First, the hearing officer agrees with Appellant that the amount of time taken for the diversions complained of is not as egregious as it appears at first blush. Recalling that Appellant's regular forty-hour work-week contemplates an hour per day for lunch breaks, it turns out that a substantial portion of the time Appellant was taking could be considered his own. However, subtracting five hours for a week's worth of legitimate personal lunchtime still leaves a balance of over 6 hours Appellant used for personal errands. Even assuming Appellant was working every minute he was out of the view of the investigators, this still leaves him with a time deficit of over 15% owed to the Agency.

Appellant asserts that his overtime-exempt status allows him a certain degree of flexibility (Appellant specifically claimed four hours per week) with respect to running personal errands. While Appellant could cite no written rule permitting as much, the hearing officer understands Appellant's assertion to be referring to the notion that high-level employees, such as he, are entrusted with a certain amount of professional discretion respecting an occasional diversion during otherwise scheduled hours.
However, the extent of personal activity observed leads the hearing officer to conclude that Appellant's excursions are neither professional, nor discreet, nor occasional. Such allowance presumes the professional manages his work time in such a manner as to average forty hours per week (unless more time is needed to complete work). While Appellant presented some evidence of occasional work outside his regularly scheduled hours, the hearing officer is not persuaded that these occasional calls sufficiently compensate for the substantial deficit portrayed during the week he was observed.

In addition, Appellant's argument does not account for the fact that he was using a City van to run these errands. Appellant was driving from one personal excursion to another, not to mention home and back again, in a van with the City logo clearly emblazoned on its side for all to see. Appellant's abuse of the City van was so obvious that an individual noticed regular patterns of such behavior and complained anonymously to the Agency. And as the evidence indicates, while some of Appellant's excursions were minor detours, they nonetheless added up to over 100 miles -- nearly half the miles on the van -- during only one week. Further, it is irrelevant that Appellant's friends he shuttled around were also City employees since the purposes were still personal. Finally, use of the City van for Appellant's numerous breakfast and luncheon dates is clearly prohibited under Mr. Hall's memo date July 22, 1992. (See, Exhibit 12.)

Appellant argues that at times he goes straight to work sites in the mornings and that having to check in at the office first is a waste of time and gasoline, justifying taking the van home at night. The hearing officer is not persuaded by this argument either. Not once did he go anywhere in the City van before checking in at the office, other than to take his son to school.

Appellant further posits that other City employees do things similar to what he is being charged with on a regular basis. He argues that this work environment led him to believe such behavior is acceptable.

The hearing officer finds Appellant's claim that he did not know this was unacceptable to be lacking in credibility. Appellant did not deny seeing Mr. Hall's memo expressly prohibiting the very kinds of behavior Appellant is accused of as far back as 1992. Perhaps the most damning evidence of all is the Vehicle Use Log which reflects none of the dozens of personal excursions listed above. The hearing officer finds Appellant's explanation, that he filled out the log in the morning in anticipation of his plans for the day, non-responsive to this issue. Appellant knew what he had actually done with the City van by the end of the day, yet he perennially failed to reflect any of this questionable activity in the log. Nothing kept Appellant from correcting the entries at that time. The hearing officer concludes it is more likely than not that this was because he knew it was unacceptable activity, and deliberately concealed it by omitting the information from his records. She therefore finds that Appellant's failure to correct the Vehicle Use Log entries is nothing less than willful neglect and deliberate falsification of the Agency's vehicle use records.

Appellant's argument that "everyone else does it," if anything, makes it even more incumbent on Appellant as a high-level employee to set a better example by ceasing such habits. Appellant's use of the van goes beyond the issue of damaging the City's image in the eyes of its constituents, to actual cost to the taxpayers. In addition to the price of the gasoline, Appellant cost
the City in terms of mileage and wear and tear to a public-owned vehicle in addition to the hours of work lost but still paid for by the Agency. Appellant's use of the City van was clearly unacceptable under Mr. Hall's memo, AR 100-901, Executive Order 25, CSR 16-51 A 7), and most of all, common sense.


Appellant asserts that given the fact that he has no disciplinary history, his suspension of thirty days was excessive and was not proper under the progressive discipline scheme. He contends that all the Agency had to do was tell him what he was doing was unacceptable and he would have stopped doing it. Once again, the hearing officer is unpersuaded.

Appellant's perception of the seriousness of his violations does not take into consideration the far-reaching ramifications and cost to the general public of such behavior. Appellant is a high-level employee and representative of the government. Appellant's position is one of trust. He must be held to a higher standard of honesty and level of accountability because of this, and he must be punished commensurate with that heightened trust responsibility, particularly in light of his professional status. The Agency has a duty to see that its employees do not engage in acts that reflect negatively on the trustworthiness of the City, jeopardizing the trust of the public.

While progressive discipline is preferable, it is not required as suggested by the wording or CSR Rule 16-50, where several of Appellant's violations appear: "A lesser discipline other than dismissal may be imposed where circumstances warrant." (Emphasis added.) Similarly, CSR 16-20, Progressive Discipline, states in relevant part:

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 that progressive discipline must be taken before an employee may be dismissed.

(Emphasis added.)

The test is not whether the discipline is the next available step in the scheme of progressive discipline. The test is whether the degree of discipline is "reasonably related" to the seriousness of the offense. See, Leamon Taplan, above. It is a well-established principle of employment law that to be reasonably related, 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 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 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).

19See, Footnote 1, above.
By Appellant's own argument, other City employees persist in engaging in such clearly unacceptable, prohibited activities despite numerous Executive Orders, admonishments and disciplinary actions. The hearing officer concurs with the Agency's position that to allow Appellant off with nothing more than a warning sends the wrong message to other City employees: that they can continue in their old ways until getting caught without fear of tangible negative consequences. Since Appellant failed to set the proper example for City employees, his punishment must do so.

The hearing officer finds based on the evidence above that the Agency was well within its rights in leveling a substantial penalty in this case. The severity of punishment is therefore within the range of reasonable alternatives available to the Agency. She concludes that the four-week suspension was reasonably related to the severity of the offense, in light of the actual and potential cost of Appellant's actions to the Agency, and in turn, to the general public.

CONCLUSIONS OF LAW

1. The Agency has demonstrated by a preponderance of evidence that Appellant engaged in
   a) Gross negligence or willful neglect of duty in violation of CSR 16-50 A. 1);
   b) Dishonesty, including the falsification of the Vehicle Use Log with respect to both use of the van and duties not performed in violation of CSR 16-50 a. 3);
   c) Unauthorized absence from work, leaving work before completion of scheduled shift without authorization, and taking unauthorized breaks in violation of CSR 16-50 A. 13);
   d) Conduct which violates and executive order which has been adopted by the Career Service Board (specifically, Executive Order 25) in violation of CSR 16-50 A. 18);
   e) Reporting to work after the scheduled start time of the shift in violation of CSR 16-51 A. 1);
   f) Failure to meet established standards of performance in violation of CSR 16-51 A. 2);
   g) Failure to observe departmental regulations (specifically Public Office Buildings Administrative Regulation # 100-901) in violation of CSR 16-51 A. 5);
   h) Unauthorized use of a City vehicle in violation of CSR 16-51 A. 7);
   i) Failure to comply with the instructions of an authorized supervisor in violation of CSR 16-51 A. 10).

2. The Agency has demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
3. In light of the totality of evidence in this case, the Agency's four-week 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

Dated this 31st day of July, 2002.

Joanna Lee Kaye
Hearing Officer for the
Career Service Board