

**HEARING OFFICER, CAREER SERVICE BOARD  
CITY AND COUNTY OF DENVER, COLORADO**  
Appeal No. 59-07

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**RICHARD DESSUREAU**, Appellant,

vs.

**DEPARTMENT OF PUBLIC WORKS, STREET MAINTENANCE DIVISION**,  
and the City and County of Denver, a municipal corporation, Agency.

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The hearing in this appeal was held on Dec. 12, 2007 before Hearing Officer Valerie McNaughton. Appellant Richard Dessureau was present and represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Joseph Rivera. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following order:

**I. STATEMENT OF THE CASE**

Appellant Richard Dessureau appeals his suspension of seven calendar days (five working days) dated Aug. 23, 2007 by the Denver Department of Public Works (DDPW). Appellant filed a timely appeal of the action on Sept. 6, 2007 pursuant to the jurisdiction provided in the Career Service Rules (CSR) § 19-10 A. 1. b.

The parties stipulated to the admissibility of Exhibits 1 - 14. No other exhibits were offered by either party.

**II. ISSUES**

The following issues are raised in this appeal:

1. Did the Agency prove by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules, and
2. Was a suspension of five working days within the range of discipline that could be imposed by a reasonable administrator?

### III. FINDINGS OF FACT

Appellant Richard Dessureau has been employed by the City and County of Denver for eleven years, most currently in the Street Maintenance Paving Section as a Semi-Tractor Trailer Operator for the Department of Public Works.

At the 7 a.m. start of Appellant's shift on Monday, July 16, 2007, Paving Supervisor Wesley Cottrell had a Toolbox meeting with the Paving Section crew to discuss three performance topics: reporting to work on time, being in the right place during the work day to do the job, and returning to the parking lot no earlier than 15 minutes before the end of the shift. [Exh. 8, record of Toolbox meeting.] The second rule prohibited employees from being what was called "out of pocket": away from the location of their assignment. Those topics were emphasized because on the past Friday Mr. Cottrell saw an investigative reporter and cameraman from Channel 7 News in the parking lot interviewing employees. Mr. Cottrell knew from his thirty years as a supervisor with Public Works that reporters including Paula Woodward have filmed city workers who were not doing their jobs, and thereby generated negative publicity about Denver city workers.

At 1 p.m. that day, Appellant left the Roslyn plant in his assigned semi-tractor trailer with a full load of asphalt and debris on his way to the city landfill. A semi carrying a full load weighs 30,000 pounds. Shortly thereafter, Manager I Matthew Laumann observed a Public Works vehicle parked in the loading zone just south of the Target store located at 7930 East 49<sup>th</sup> Avenue in the Northfield Shopping Center. Mr. Laumann called Mr. Cottrell and asked him the name of the employee assigned to that vehicle. Mr. Cottrell informed him that Appellant was driving the semi. Six to eight minutes later, Mr. Cottrell reached Appellant on his cell phone. He asked Appellant where he was. Appellant hesitated for a second. Mr. Cottrell then added, "You're at Target. What are you doing there?" Appellant answered, "I had to go to the bathroom." Mr. Cottrell replied, "Bull. Get out of there and go back to work. I'll talk to you in the morning." [Testimony of Mr. Laumann; Mr. Cottrell.]

Appellant was off work on sick leave for the next two days. When he returned on July 19<sup>th</sup>, Mr. Cottrell asked him what he was doing at Target. Appellant answered, "I messed up." Mr. Cottrell told him, "We just had this conversation." Appellant looked down and said, "I know." Mr. Cottrell testified that he believed Appellant was thereby admitting that he was shopping at Target and got caught. If Appellant had called him for permission to stop at Target to go to the bathroom, Mr. Cottrell testified he would have told him no unless it was an emergency. Employees are instructed that they need to call their supervisor if they need to stop anywhere while driving their vehicle. As a result of this conversation, Mr. Cottrell gave Appellant one half hour of unauthorized leave for July 16, 2007. [Testimony of Mr. Cottrell; Exh. 4-3.]

Appellant was served with a predisciplinary letter on Aug. 14, 2007. [Exh. 3.] At the predisciplinary meeting, Appellant explained that he had a medical condition, and that he could not make it back to the Roslyn complex in time, because "when you gotta go, you gotta go." [Exh. 4-4.] Since Mr. Cottrell had already given him one half hour unauthorized leave based on his stop at Target, Appellant believed he had already been found guilty. Thereafter, the Agency issued the five working day suspension based on the July 16<sup>th</sup> incident, considering also two previous three-day suspensions for accidents in 2002 and 2004. [Exh. 4.]

Appellant testified that shortly before one p.m. he pulled out of the Roslyn asphalt plant with a full load of waste, and headed south on Spruce Street on his way to the landfill. Just before he was to make a left turn onto 49<sup>th</sup> Street, he felt an urgent need to use the bathroom. Appellant stated he has used various medication for his acid reflux disease for the past ten years. On this date, Appellant was taking Nexium, which sometimes causes him to have diarrhea. He decided to continue south and pull in to Target's loading zone for large trucks, since the passenger car lots on the north and east sides were not big enough to accommodate his semi-tractor trailer. Appellant parked the truck, ran into the customer door on the southeast side of Target, and located the bathrooms halfway down the east side of the store. Three or four minutes later, Appellant got a call from Mr. Cottrell, who asked him where he was. When Appellant told him he had to go to the bathroom, Mr. Cottrell told him, "I'm not buying that. Get back on your route. We'll talk later."

Appellant continued on his route, but was interrupted three more times that day by an urgent need to use a bathroom. Appellant was off work the next two days because of the diarrhea. When Mr. Cottrell asked him on his return what he was doing at Target, he told him, "I messed up. I told you the other day." Mr. Cottrell told him he was going to have to write him up. Appellant did not argue, since "I've known [Mr. Cottrell] eleven years. I've never won an argument with him." Appellant admitted at hearing that he did not call his supervisor before pulling into the Target, as he is required to do if he is making a stop. Appellant explained he was "on a run", and that getting permission would have taken him an extra few minutes he did not have, since Mr. Cottrell is not always available directly by phone. Appellant stated he did not return to the plant because that would have required him to turn the loaded truck around, and would have taken an extra two minutes. Appellant testified that he drove that route to the landfill four times a day for the last six or seven years, and needed to know the quickest access to a bathroom because of his occasional reaction to medication. He believed the Target store provided the quickest access to a public restroom given the size of his semi-tractor trailer.

#### IV. ANALYSIS

##### 1. Discipline under the Career Service Rules

In an appeal of a disciplinary action, the Agency has the burden to prove the action was taken in conformity with Rule 16 of the Career Service Rules, and that the degree of discipline was reasonably related to the seriousness of the offense, taking into consideration the employee's past record. CSR § 16-20.

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

Neglect of duty is proven by evidence that: 1) appellant had an important work duty; 2) appellant was heedless or unmindful of that duty; 3) no external cause prevented the appellant's performance of that duty; and 4) appellant's failure to execute his duty resulted in significant potential or actual harm. In re Martinez, CSA 30-06, 4-5 (10/3/06).

The Agency asserts that Appellant neglected his duty to proceed directly to the landfill and empty the contents of the semi. Appellant argues that he pulled off the route for less than ten minutes to handle a personal emergency caused by the sudden onset of diarrhea.

Appellant presented convincing and uncontradicted evidence that he experienced a real emergency while a few minutes from an accessible public restroom, and was prevented from getting his supervisor's permission to make the stop by the need to maneuver his semi-tractor trailer to a parking spot at the loading dock, and get to the restroom as quickly as possible.

In contrast, the Agency supported this allegation by its conclusion that it would have been quicker to return to the plant. That conclusion was not borne out by the evidence. The Agency's own exhibit shows that the plant was at least two minutes' drive for a much lighter Ford Escape from 50<sup>th</sup> and Trenton, the location where Appellant first realized he needed to find a bathroom. [Exh. 13.] Mr. Laumann, who created Exh. 13 based on his drive time in the Ford Escape, testified that he assumed the semi was already headed toward the plant from the Target location. Therefore, that two minutes must be increased by the time it would take the 30,000-pound semi to make a legal and safe u-turn.

Appellant clarified that he was headed away from the plant, and the road configurations restricted his ability to make a left or u-turn. In fact, Appellant never considered returning to the plant based on his knowledge of the surrounding roads and available public restrooms. Appellant's testimony is the most convincing based on his years of experience driving the semi on that route.

As to the amount of time Appellant spent at Target, the Agency's only direct witness on this issue was Mr. Laumann, who stated he stayed at the semi

only long enough to get the identification number and call Mr. Cottrell to report the incident. That evidence is not inconsistent with Appellant's testimony that he was in the Target store less than ten minutes

At hearing, Agency Director of Street Maintenance Kelly Duffy testified that she did not press Appellant for details of his claimed medical condition at the pre-disciplinary meeting because she believed she could not legally do so under the Federal Medical Leave Act (FMLA). Without that further inquiry, the Agency concluded that Appellant neglected his duties by stopping at Target.

The federal Family and Medical Leave Act (FMLA) prohibits an employer from interfering with an employee's right to apply for leave under the Act, or retaliating against an employer for the exercise of those rights. 29 U.S.C.S. § 2615(a). The Act requires an employer to examine the certification of a health care provider in order to determine whether the leave should be granted. FMLA, § 2613. In any event, Appellant did not file an FMLA request, but merely raised a medical issue as the justification for his detour to a public restroom during work hours. Whether the Agency's belief that it was restricted from further medical inquiry was reasonable or unreasonable, it does not support its finding of neglect when the evidence in the de novo hearing supports a different finding.

The evidence indicates that the Agency took the disciplinary action because an investigative reporter had been seen interviewing employees in the parking lot three days earlier. Mr. Laumann and Mr. Cottrell emphasized that the sight of a city vehicle parked at a Target let them to believe the employee driver must have been shopping. Those witnesses believed that the Agency would suffer adverse media publicity if a reporter spotted the semi in the store parking lot. The Agency also suspected that Appellant chose the south loading zone instead of the other lots in order to avoid detection from Agency vehicles coming from the north.

Appellant testified credibly about the circumstances he faced in making the unauthorized stop. He admitted he did not call his supervisor to get permission, as required by policy, and said Mr. Cottrell would have granted that permission if he had. Appellant stated that Mr. Cottrell is a good supervisor, but that he "never wins an argument" with him, and so he did not make another attempt to convince him he was telling the truth. Appellant said he chose both the Target restroom and the loading dock based on his location at the time of the emergency, and the ease and speed of access. There was no more detailed evidence rebutting Appellant's choice of options to handle his personal emergency.

Mr. Cottrell's forcible demeanor on the stand was consistent with Appellant's evidence. Mr. Cottrell testified he would have refused Appellant permission to use the Target restroom unless Appellant also told him it was an

emergency. This illustrates an excessively rigid control of his employees' work hours, without evidence that Appellant had abused restroom breaks in the past.

The Agency failed to establish by a preponderance of the evidence that Appellant's stop at Target to use the restroom was heedless of his work duties, or that Appellant's actions resulted in any harm to the Agency. As a result, it is found that Appellant did not neglect his duties in violation of CSR § 16-60 A.

## 2. CSR § 16-60 D. Unauthorized operation of a city vehicle

In order to establish a violation of this rule, the Agency is required to prove that Appellant used a city vehicle for a purpose not intended by his assignment to that vehicle. See In re Oliver, CSA 28-02, 21 (10/17/02).

The Agency presented evidence that Appellant parked his semi-tractor trailer at a Target store during his work hours, and that it did not believe Appellant's explanation that he was using the store's restroom. The Agency failed to present any evidence that it is an abuse of a vehicle for an employee who drives for the City and County of Denver to use that vehicle during the work day to stop for a restroom break. Appellant presented convincing evidence that his explanation was true. Therefore, the Agency failed to establish that Appellant misused his vehicle in violation of this rule.

## 3. CSR § 16-60 E. Dishonesty

Dishonesty is a knowing communication by an employee of a false statement within the employment relationship. In re Davis, CSA 46-06, 7 (6/8/07); In re Roberts, CSA 179-04, 4 (6/29/05).

The Agency asserts that Appellant admitted he lied to his supervisor about needing to go to the bathroom. In support, it offered the testimony of Mr. Cottrell that Appellant told him he "messed up." Mr. Cottrell stated he believed that Appellant was thereby admitting that he was "out of pocket" at Target, in violation of the rule stated at that morning's Toolbox meeting.

Appellant testified that he meant by that only that he failed to call his supervisor before pulling off the road. In mitigation of that failure, he testified that he was facing an emergency and did not have the extra few minutes he would have needed to reach his supervisor and get permission. Appellant also stated that he usually complied with that policy, and was never disciplined for a violation of the policy.

Further, Appellant testified that his many years of working with Mr. Cottrell have taught him that he is not responsive to explanations if he has already decided the matter. Mr. Cottrell's abrupt comment, "Bull", to his original statement, and his later comment, "I'm not buying that", convinced Appellant that

Mr. Cottrell would not be swayed to now accept his explanation. Under the circumstances, Appellant's decision to admit "messaging up" and remain otherwise quiet was not unreasonable, and did not prove he admitted lying about having to use the restroom. Appellant's actions in looking down and not further arguing the matter could just as easily have been embarrassment about his diarrhea, rather than an acknowledgement of deception.

The Agency concluded that Appellant was not telling the truth after it decided not to ask for details about the medical emergency Appellant mentioned at the pre-disciplinary meeting. The Agency presented no proof that Appellant left the Target store with purchases, or that his actions were otherwise inconsistent with his credible explanation. The evidence indicates rather that the Agency's actions against Appellant were taken based upon its managers' concern of possible adverse media coverage by an investigative reporter. Therefore, I find that the Agency failed to prove Appellant was dishonest in violation of CSR § 16-60 E.

4. CSR § 16-60 J. Failure to comply with an order of supervisor

A violation of this rule is established by proof that the Agency communicated a reasonable rule to appellant, and that he continued to violate it under circumstances demonstrating willfulness. In re Diaz, CSA 13-06, 4 (5/31/06); In re Conway, CSA 40-05, 3 (8/17/05).

Here, the Agency claims that Appellant was ordered not to make unauthorized stops from his route the very morning of the violation. The rule prohibiting stops is only reasonable if it includes an exception for emergency situations, including the type of symptoms suffered by Appellant. I find that Appellant's stop was a legitimate emergency for which Appellant had no opportunity to request permission. Thus, the Agency failed to establish that Appellant intentionally failed to comply with his supervisor's order in violation of the rule.

5. CSR § 16-60 K. Failure to meet established standards of performance

This rule requires proof that Appellant failed to meet a performance standard connected to his job. In re Owweye, CSA 11-05, 5 (6/10/05). Such standards may be set forth in a performance evaluation, classification description, or in an agency or division's policy and procedures. In re Routa, CSA 123-04, 3 (1/27/05).

The Agency cites the Agency's leave policy and three standards from Appellant's performance evaluation: 1) contributes to maintaining the integrity of the organization, 2) reports absences, and 3) maintains work hours. [Exh. 4, pp. 1-2.] The Agency proved that Appellant made a stop while on duty on July 16, 2007. The evidence established that the stop consumed about ten minutes, and

was made for the purpose of using a public facility because of the sudden onset of diarrhea.

The Agency failed to present any evidence that Appellant's conduct affected the integrity of the organization. Likewise, the Agency did not prove it requires its drivers to report an absence or request leave for the time needed out of vehicle to use a public bathroom facility. Finally, the Agency presented no evidence that Appellant failed to maintain his work hours on that day. Therefore, the Agency did not establish that Appellant failed to meet the identified standards of performance.

#### 6. CSR § 16-60 S. Unauthorized absence

This rule is violated by an absence that is unauthorized under either departmental or Career Service Rule. In re Garcia, CSA 123-05, 4 (2/27/06).

Here, the Agency charged Appellant with a half hour unauthorized leave based on Appellant's stop at Target. The Agency presented no evidence that Appellant was at Target for a half hour. Further, Mr. Cottrell based that action on his belief that Appellant parked at Target to shop rather than use the restroom. The totality of the evidence does not support that belief, and I have found that Appellant stopped at Target for ten minutes out of personal necessity. Moreover, the Agency imposed the unauthorized leave as punishment for the time at Target. A rules violation must be based directly on the voluntary actions of the employee, and not on a management decision of the Agency. Therefore, the fact that the Agency imposed unauthorized leave does not settle the matter.

The issue then becomes whether Appellant's stop at Target violated a departmental or Career Service Rule. The Agency has not cited any portion of Rule 11 in support of its contention that the ten-minute absence was unauthorized. In addition, the rule announced at the Toolbox meeting was "being in right place, doing your job." [Exh. 8.] There is no evidence from which I could conclude that the rule prohibits employees from responding to a personal emergency arising from a medical condition, or that Appellant did not otherwise perform his job on that date.

Therefore, the Agency has failed to establish that Appellant's actions constituted an unauthorized absence under CSR § 16-60 S.

#### 7. CSR § 16-60 Y. Conduct violating Career Service Rule 15-5

Finally, the Agency asserts that Appellant's conduct failed to reflect credit on Career Service and the City and County of Denver, in violation of CSR § 15-5. The Agency argues that if the presence of Appellant's city truck in a Target parking lot was publicly reported, it would harm the City's reputation, give increased ammunition to those seeking to privatize the Agency's asphalt repairs,

and raise concerns about the productivity of employees.

Other decisions of the Career Service Hearing Office under the predecessor rule to § 15-5 have concluded that it is a statement of broad policy rather than a disciplinary rule. In re Stockton, CSA 159-02, 14 (12/03/02), cited with approval in In re Martinez, CSA 69-05, 9 (1/4/06) (decided under former of the §15-10). In any event, the Agency presented no evidence that Appellant's stop at Target was noted by any member of the public, or resulted in any harm to the reputation of the City or the Agency. Therefore, the Agency failed to prove that Appellant violated CSR § 15-5.

## 2. Penalty

The Agency failed to establish that Appellant violated any Career Service disciplinary rule as a result of the actions alleged in the disciplinary letter. Therefore, the five working day suspension imposed on Aug. 23, 2007 must be reversed.

In addition, the Agency imposed a half hour of unauthorized leave for July 16, 2007. Mr. Cottrell testified that he took this action in addition to the disciplinary letter.

Mr. O'Malley: Has he received any discipline for these so-called out of pockets in the past?

Mr. Cottrell: He received a letter, and he was docked an hour and a half.

Q: He was docked this time, too, right?

A: Yeah.

Q: Who docked him, you did?

A: Yeah.

Q: Was that before or after he received any other discipline?

A: That was before.

Q: When you docked him, did you talk to Ms. Duffy?

A: No, I didn't.

[Record of hearing, Dec. 12, 2007, 12:59 p.m.]

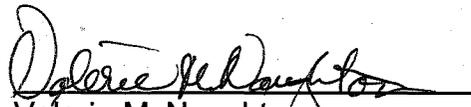
I conclude that the half hour of unauthorized leave arose from this incident, and was intended to and did deprive Appellant of pay as additional discipline. Since the Agency failed to establish that Appellant's actions violated any Career Service Rule, that action too must be reversed.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Hearing Officer orders as follows:

1. The Agency's five working day suspension dated Aug. 23, 2007 is reversed.
2. The Agency is ordered to restore to Appellant the appropriate amount of pay necessary to reverse the effect of the half hour of unauthorized pay imposed for July 16, 2007.

Dated this 16<sup>th</sup> day of January, 2008.

  
Valerie McNaughton  
Career Service Hearing Officer

I hereby certify that a copy of this decision was sent to the following on this 16<sup>th</sup> day of January, 2008:

Michael O'Malley, Esq., [MichaelO'Malleylaw@hotmail.com](mailto:MichaelO'Malleylaw@hotmail.com)  
Appellant Richard Dessureau, 21159 E. 42<sup>nd</sup> Ave., Denver CO 80249  
Denver City Attorney's Office, via [dlefilng.litigation@denvergov.org](mailto:dlefilng.litigation@denvergov.org)  
Department of Public works, Bill Miles, [Bill.Miles@denvergov.org](mailto:Bill.Miles@denvergov.org)  
Street Maintenance Division, Jan Meese, [Jan.Meese@denvergov.org](mailto:Jan.Meese@denvergov.org)

