DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

AURELIANO IBARRA, Appellant,

vs.

DEPARTMENT OF PARKS AND RECREATION,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on January 30, 2012 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Andrea Kerschner, and Facilities Superintendent Harry Hill served as the Agency's advisory witness. By agreement, the parties submitted written closing statements on February 24, 2012, and the record was closed on that date. Having considered the evidence and arguments, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the below order.

I. STATEMENT OF THE APPEAL

Appellant Aureliano Ibarra appeals his termination on November 29, 2011 from the position of Cement Finisher with the Denver Department of Parks and Recreation (Agency). Agency Exhibits 4 – 14 were admitted by stipulation, and Appellant's Exhibits A and B were admitted during the hearing. The Agency representative withdrew the allegation that Appellant had made personal calls from his city cell phone. [Appeal, Atch. 1-3; transcript, 9:39 am.]

II. ISSUES

The issues in this appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR), and

2) Did the Agency establish that dismissal was within the range of penalties that could be imposed by a reasonable administrator for the proven misconduct?
III. FINDINGS OF FACT

Appellant Aureliano Ibarra has been employed by the Agency since 1999 as a Cement Finisher. In addition to his general duties on concrete projects, Appellant was assigned to drive the Show Wagon and Performance Stage to special events for the past seven years. On November 29, 2011, the Agency dismissed Appellant for excessive absences and a number of performance issues.

1. Unauthorized and excessive absences

The Agency contends that Appellant took time off in conjunction with days off on eleven occasions between October 2010 and August 2011. [Appeal. Atch. 1.] Appellant admits that the absences listed in the disciplinary letter all preceded or followed days off. [Appellant, 10:06 am.]

The absences were of two varieties: 68 hours were taken as sick leave, and another 25 hours were deemed unauthorized leave without pay. Appellant contends that he had vacation leave to cover the times taken for unauthorized leave, but that his supervisor Harry Hill unreasonably denied him permission to use it. Mr. Hill testified that he denied Appellant vacation leave because he had not asked for it in advance, as required by Agency policy. He did not grant an exception to the policy because Appellant had a pattern of absences that caused project delays and disciplinary action. [Hill, 3:07, 3:27, 3:49 pm; Exhs. 8, 10 – 13.] Appellant did not dispute this evidence.

Appellant also argues that he was unreasonably denied FMLA leave for some of the absences, which were caused by his April surgery to remove a lung tumor. However, Appellant admitted at hearing that he was never denied FMLA leave, and that the Agency granted his two FMLA requests related to the April 23rd surgery. [Appellant, 10:06 – 11:00 am.] Appellant’s time records show FMLA leave on April 6 and 7, April 25 to May 19, and June 13 to 16, 2011. [Exh. 4-3 to 4-5.]

Finally, Appellant claimed Mr. Hill refused to give him comp time in August for his brother’s medical issues. In reviewing his time records at hearing, Appellant conceded that his brother’s emergency surgery was on August 22, and that he was granted comp time for that day. [Appellant, 10:21, 11:48 am; Exh. 4-5.] On Sunday, August 28, Appellant left a message for Mr. Hill that he wished to use comp time for the next day. Mr. Hill denied that request because it had not been pre-approved. “He has been told on many occasions that this has to be pre-approved.” [Exh. 5-3.] Appellant testified that he took his brother to the doctor on August 29th, and took him out to eat the morning of August 30th, two of the days for which he incurred unauthorized absences cited in the disciplinary letter. [Appellant, 11:42 am.] Appellant did not testify specifically as to the 32 hours of sick leave taken in October and November 2010, or the 36 hours of sick leave in 2011, but did not deny that he had been off on the days listed in the disciplinary letter and as shown on his time records. [Appeal, Atch. 1; Exh. 4.]
2. Improper fueling of city vehicle

Agency employees who drive city vehicles as part of their job must fuel them from city gas pumps using their assigned fuel code. That code is used by the city's new computerized fueling system to schedule preventive maintenance based on mileage and fuel consumption. After a certain amount of fuel is used, the pumps "lock down" - i.e., restrict that vehicle from getting gas - if preventive maintenance has not been completed. The driver is then required to contact to schedule preventive maintenance for the vehicle. A driver's failure to use the assigned fuel code will render inaccurate the mileage and fuel information for that vehicle, and as a result, notifications to schedule preventive maintenance will not be issued.

Appellant regularly drove SM 34, the vehicle known as the Show Wagon, to transport the portable Performance Stage when it was rented for special events at city parks. SM 34 is a 26,000-lb. commercial truck that was due for preventive maintenance on an annual basis and after being driven 6,000 miles. [Watson, 1:51, 2:09 pm.] In the summer of 2011, Appellant informed Supervisor Scott Watson that the pump was blocking fuel for vehicle SM 34. Mr. Watson consulted his fuel records, which showed that SM 34 had not been fueled in the system since July 29, 2009. When Mr. Watson asked Appellant how this had occurred, Appellant said he did not know. Mr. Watson then checked his mileage and maintenance records, which did not show an annual maintenance checkup for the truck. He later learned that Appellant had used the generator code to obtain fuel. [Watson, 2:05 pm.]

Because of the importance of regular maintenance for both safety and budgetary reasons, Mr. Watson's Fleet supervisor Gary Bales called Parks Director Doug Woods to report the matter. On July 13, Mr. Woods informed Mr. Hill that there was a problem with the odometer reading on SM 34, and asked him to follow up. In researching the issue, Mr. Hill learned from Herb Ramsey, the other Show Wagon driver, that Appellant had told him to "[j]ust use the generator number." On July 21, Appellant told Mr. Hill that he used the generator or odometer to get gas because preventive maintenance was late. [Appellant, 11:18 am.] When asked why he had not reported the problem, Appellant responded that he "always got fuel". [Hill, 2:40 pm; Exhs. 5, 6.]

At the time Appellant made the above admissions to Mr. Hill, he had been operating SM 34 for seven years. [Appellant, 9:04 - 9:12 am; Appeal, Atch. 1-2.] He knew that using the fuel code allowed the fuel system to keep track of vehicle mileage and preventive maintenance. He also knew that using the generator code instead of the fuel code would not record his mileage, and would therefore bypass the system used to schedule preventive maintenance. Appellant admitted that he used the generator code, and told Mr. Ramsey to do the same, because preventive maintenance work was long overdue. [Appellant, 9:08, 11:11 am; Exhs. 5, 6.]

Appellant argues that he was not responsible for scheduling maintenance because his supervisor had always told him when to take the trucks to the shop for maintenance. However, that claim lacks credibility. Appellant knew Mr. Hill sent him the maintenance reminders only if they were generated by the fuel system, but that Mr. Hill would not get these reminders unless Appellant used the correct fuel code. Appellant admitted at hearing that maintenance was listed in his PEPR as one of his responsibilities, and he had
received training in the performance of that duty. [Appellant, 9:11 am.] Appellant also claims he should not be disciplined for not using his fuel code because the other driver, Herb Ramsey, used the same procedure. Appellant admitted that Mr. Ramsey was following his instructions in doing so. [Appellant, 9:09 am.]

Appellant testified that he was prevented from complying because on at least ten occasions he had to retrieve the truck from the shop before maintenance could be completed. [Appellant, 9:04, 11:11 - 11:22 am.] Mr. Watson conceded that the maintenance shop sometimes gives drivers five gallons of gas if it is unable to complete preventive maintenance work before the vehicle is needed. [Watson, 2:13 pm.] However, Appellant continued to use the wrong fuel code for two years, and informed no one of the problem until July 2011. When Mr. Hill asked him why he had not told anyone about the lockout, his response - "because we always got fuel" - ignored the fact that his method deprived the vehicle of its regular maintenance for two years. [Exh. 5-1.]

Mr. Woods considered Appellant’s failure to properly obtain fuel for the wagon a serious matter, since he relied on the information from odometer readings to make fleet budgetary decisions. He added that neglecting preventive maintenance for two years is "almost unbelievable", given the importance of preventing accidents and injuries involving equipment rented by the public. [Woods, 4:04 pm.] Mr. Watson added that preventive maintenance is the cornerstone of all fleet management, which is itself a large part of the agency’s budget. [Watson, 2:02 pm.]

3. Failure to place permit in vehicle for July 7, 2011 event

As a result of Appellant’s complaints to Mr. Hill for the past two years that he was "burning out" on driving the Show Wagon, Mr. Hill assigned Mr. Ramsey to share the driving responsibilities. During a conversation with Mr. Hill in the summer of 2011, Appellant again expressed reluctance to continue driving the wagon and stated he was not going to renew his commercial driver’s license (CDL), a requirement to drive SM 34. After Mr. Hill pointed out that driving the wagon was a part of his job, Appellant agreed to continue to share the work with Mr. Ramsey and to apply for renewal of his license. Appellant then went to the inbox, removed permits issued for July 6 and 7, 2011, and made copies of them. On July 7, Mr. Ramsey, the driver for that day, could not find the permit that had been issued. When asked by Mr. Hill about the copies he had made, Appellant told him he only made one copy. "This had not been an issue until this season." [Exh. 6-2.] Appellant conceded that he was the last person to have the permits, but stated that it was the driver’s job to take the permit from the inbox and put them on the clipboard. [Appellant, 9:17 am.] The problem was easily and quickly solved by reprinting another copy of the permit from Mr. Hill’s email. [Hill, 3:34 pm.]


The Agency next contends that Appellant failed to report problems in operating the lift of vehicle SM 46, and told Eric Gomez that he had "jumped" on it to make it work. [Appeal, Atch. 1-3.] Appellant admits he did not take the vehicle in for service, but states that the lift was not in fact broken. He was not trained in its operation when SM 46 was put into service, but discovered through trial and error that the lift would not move unless he
used a combination of two buttons. The Agency did not present any evidence that the lift was in fact having mechanical problems. [Hill, 2:50 pm.]

5. **Failure to obtain permit change for August 8th event**

The Agency alleges that Appellant allowed permit holder Gary Ensley of the Denver Municipal Band to exceed the times listed in the permit for the August 8th school play at Washington Park. Appellant admitted that he knew permit changes need to be approved by the permit office, and that he did not add the early setup request to this permit, as requested by Mr. Ensley. He stated however that he and his crew had been arriving an hour early to set up for this show for many years at Mr. Ensley's request. [Appellant, 9:40 am.] It is undisputed that the city derives revenue from park permits based on the number of hours listed on the permit, and that Appellant failed to add an hour of time to the permit request.

The Agency also claims Appellant improperly listed 8.5 hours for transport and setup of the performance stage for a three-hour show. However, Mr. Hill testified that setup and breakdown of the stage can take a total of four hours, and travel was 45 minutes each way. When added to the three-hour length of the show, that accounts for the 8.5 hours listed on Appellant’s time sheet for that day. The permit was not in evidence. Mr. Hill admitted that he authorized pay for the entire period claimed. [Hill, 3:36 pm.]

6. **Failure to be at work assignment on August 16, 2011**

The Agency claims that Appellant was not at his work location in Washington Park at 8 am on August 16, 2011 to finish a sidewalk, as expected by his supervisor. When Mr. Hill called him, Appellant reported that he and his two-man crew were planning on going to Cherry Creek to work on another ongoing project. They went to the Fleet Management shop to see if the Bobcat was ready, but discovered there was a problem with the trailer they needed to use. Mr. Hill told him he should have called or sent one of the crew ahead to Cherry Creek to break up the concrete. Appellant responded that someone needed to drive the trailer. When Mr. Hill pointed out that either he or Mr. Madrid could drive the trailer, Appellant stated they had to go to the Four Mile House to grind. [Appeal, Atch. 1.]

Appellant testified that he did not recall the incident in detail, but stated that he takes crew members with him in case he gets hurt or if he otherwise needs their help. [Appellant, 9:53, 11:29 am.] Mr. Hill countered that as lead worker he should have called fleet to check on the availability of the Bobcat, or sent one of his crew. He conceded that two men would be needed for grinding at Four Mile House because it is a noisy operation, and one crew member is needed to listen. [Hill, 3:00 pm.] Mr. Hill did not mention this incident in his August 29, 2011 performance notes. [Exh. 5.]

7. **Solicitation of other employees to file a grievance**

The Agency alleged that two employees approached Mr. Hill on September 9, 2011 and told him that Appellant had asked them repeatedly to file grievances against him. The Agency presented no testimony about this allegation, and Appellant denied that he made such statements. [Appellant, 10:04 am.]
8. Level of discipline

Parks Director Doug Woods made the decision to terminate Appellant because he considered his behavior a part of a pattern, as shown by eight previous disciplinary actions over an eleven-year period, including three suspensions and a reduction in pay. [Exhs. 7 - 14.] He determined that the most serious of the offenses were the neglect of duty and falsification of records committed when Appellant misused the fuel and preventive maintenance systems, and instructed another employee to do the same. In addition, Appellant continued a pattern of unauthorized and excessive absences shown by five post disciplinary actions for attendance issues. Mr. Woods concluded that Appellant's failure to perform his vehicle maintenance duties and failure to do as instructed on several occasions adversely affected Mr. Woods' ability to trust Appellant to perform a job requiring a great deal of independent activity. [Hill, 4:07.]

IV. ANALYSIS

In appeals of discipline brought under CSR § 19-10, the agency bears the burden to prove by a preponderance of the evidence that the conduct alleged in the disciplinary letter violated the Career Service Rules, and that the penalty is within the range of discipline that can be imposed by a reasonable administrator under the circumstances. See Adkins v. Division of Youth Services, Dept. of Institutions, 720 P.2d 626, 628 (Colo.App. 1986).

1. Neglect of duty under § 16-60 A.

An employee neglects his duty within the meaning of this rule when he fails to perform a job duty he knows he is supposed to perform. In re Compos et al., CSA 56-08, 2 (CSB 5/21/09).

Mr. Woods found that Appellant neglected his duty to properly operate and maintain SM 34 when he used the generator code to fuel his vehicle over a long period of time, told the other driver to follow the same improper procedure, and failed to report the problem for two years. Appellant admits that SM 34 was locked out of the fuel system because its preventive maintenance was overdue. He responded by ignoring the lockout, using the wrong code to fuel his vehicle, and instructing his relief driver to do the same. He also admits that he did not report this situation or the fuel lockout to his supervisor or Fleet Management until July 2011, and that as a result the fuel and mileage information for the truck was inaccurate and preventive maintenance was substantially delayed. Appellant knew he had a duty to maintain the vehicles he drove for the city. In fueling SM 34 with the generator code and bypassing maintenance, Appellant failed to perform that duty.

Mr. Woods also found Appellant neglected his duty to report mechanical problems with the lift. Mr. Hill testified that Mr. Gomez told him Appellant said he had to jump on the lift to get it to work. Appellant convincingly denied that, testifying in detail that he learned by experience that the lift worked by first pressing the "on" button, then using the toggle to direct the lift up or down. The Agency did not rebut this evidence by proof that the lift was in fact having mechanical problems, and therefore this allegation was not proven.
In addition, the Agency argues that Appellant neglected his duty to prepare an accurate permit for the school play on August 8, resulting in the city's loss of an hour's revenue for that permit. Appellant conceded that he was asked to have his crew arrive an hour early to set up the stage, but that he forgot to add the time to the permit, which was one of his duties. I find that the Agency did prove Appellant neglected his duty to communicate with the permitting staff to obtain an accurate permit on this occasion.

2. Carelessness in the performance of duties under § 16-60 B.

An employee is careless in the performance of his duties when he is heedless of an important work duty, resulting in potential or actual significant harm. In re Mounjim, CSA 87-07, 5 (7/10/08), rev'd on other grounds.

Mr. Woods found Appellant careless in the manner in which he performed his duty to fuel the vehicle. Appellant readily admitted that he routinely used the generator code so he could obtain fuel without delay, and that he knew the fuel system required him to use his assigned fuel code. As a result, preventive maintenance was not performed on SM 34. In addition, the fuel and mileage information used for budgetary decisions was inaccurate. As a result, a large agency vehicle was not given needed regular servicing, which could have caused accidents or injury to its users or the public. The evidence proved that Appellant carelessly performed his duty to fuel SM 34 in accordance with its procedures.

The Parks Director also found that Appellant was careless on August 16th by taking two crew members with him to Fleet Management to check on the Bobcat, and planning to work at Cherry Creek instead of finishing a sidewalk at Washington Park. The Agency did not prove Appellant had a duty to choose one ongoing project over another, or that it was careless to assign two crew members to the Cherry Creek job.

3. Neglect in the use of City vehicles, machines or equipment under CSR § 16-60 C.1.

An employee acts with neglect in the use of City property if he misuses City equipment, causing an accident or property damage. In re Lewis, CSA 37-11, 4 (9/22/11). The Agency found Appellant's use of an improper fuel code constituted neglect in the use of the Agency's vehicle, resulting in a substantial delay in preventive maintenance and inaccurate fuel and mileage records needed for budgetary decisions. Since the Agency did not prove these actions caused an accident or damage to the City's property, a necessary element of this rule, the Agency did not establish a violation.

Mr. Woods also stated that he relied on Appellant's failure to report the inoperable lift as support for this rule violation. However, as determined above, the Agency presented no evidence that the lift was actually broken, and did not rebut Appellant's detailed account about how the lift operated.

Finally as to this rule, the Agency claims that losing the July 7th permit constituted neglect in the use of City property. The evidence indicates only that Appellant misplaced a piece of paper containing a permit for use of the park, which was quickly remedied by reprinting it. It is doubtful that the rule was intended to permit the loss of a single sheet of paper under these circumstances as proof of neglect in the use of City equipment.
4. **Unauthorized operation or use of City vehicle or equipment under CSR § 16-60 D.**

This rule prohibits use of City property for a purpose not intended by his job assignment. In re Dessureau, CSA 59-07, 6 (1/16/08). Mr. Woods determined that Appellant’s misuse of the generator code to obtain fuel outside the computerized fuel system violated this rule. The Agency proved that Appellant was trained and experienced in driving and fueling the Show Wagon in accordance with the fuel system, but that he repeatedly used the generator code to obtain fuel, a misuse of that code intended to avoid the delay of reporting a lockout to Fleet Management. In addition, Appellant instructed the other driver to use the generator code to fuel the wagon. That action was contrary to his job assignment as operator of SM 34, and negatively affected the accuracy of Agency data used to maintain the vehicle and plan the Agency’s capital budget. Appellant did not dispute the Agency’s evidence. I find the Agency proved Appellant used City property in a manner not intended by his job assignment, in violation of this rule.

5. **Dishonesty, lying to supervisors and false reporting of work hours, CSR § 16-60 E.1.; 3.**

An employee violates this rule by any act of dishonesty within the employment context. In re Moujin, CSA 87-07, 5-6 (CSB 1/08/09). Mr. Woods found that Appellant violated this rule by fueling outside the fuel system, setting up the stage an hour early on August 8, and lying to his supervisor on August 16.

As to Appellant’s use of an improper fuel code, the Agency proved that Appellant obtained fuel using the wrong code in order to evade the preventive maintenance system, and did so over a lengthy period of time. Appellant admitted he knew his use of the generator code was incorrect and would misstate the vehicle records, but he chose not to report it. As a result, the Agency was unaware that its fuel and mileage records were inaccurate, SM 34 had been denied maintenance, and budget numbers were unreliable. The Agency therefore established that Appellant engaged in dishonesty in violation of this rule.

The evidence did not show that Appellant misstated his actual work hours on either August 8 or 16. The Agency paid the hours claimed on both days. [Exh. 4-5.] I find that the Agency did not establish a violation of this rule.

6. **Failure to comply with lawful orders under CSR § 16-60 J.**

An employee violates this rule by willfully failing to obey a reasonable order. In re Sawyer and Sprout, CSA 33-08, 9 (1/27/09). The Agency claims that Appellant disobeyed his supervisor’s order and failed to do assigned work by his use of the wrong fuel code. Appellant admits his actions were contrary to his training in the new fuel system, and that he was assigned to operate and maintain the Show Wagon, including fueling that vehicle. The Agency proved Appellant violated this rule by his routine use of the generator code and his failure to report the matter to his supervisor or for preventive maintenance.

Mr. Woods also claimed Appellant violated his supervisor’s order or failed to do assigned work on August 16 by taking his crew to Cherry Creek instead of Washington Park. The evidence shows only that Mr. Hill called Appellant after the shift started and questioned him about his choice of work and crew. That is insufficient to establish that Appellant was given an
order, and acted contrary to it.

7. **Failing to meet established standards of performance under § 16-60 K.**

   An employee violates this rule when an agency clearly communicates a specific standard of performance, and the employee fails to meet that standard. *In re Bernal*, CSA 54-10, 11 (3/11/11); *In re Mestas et al.*, CSA 64-07, 19 (5/30/08). Mr. Woods claims that Appellant's use of the generator code to fuel SM 34 failed to meet Outcome #2 of his PEPR in that he failed to operate and maintain the vehicle in accordance with Agency rules and report problems for repair. [Appeal, Atch. 1-2.] Appellant admits that he used the incorrect code, and did not refer the vehicle to for a long period after the fuel lockout occurred. He conceded that these actions were contrary to his performance standards. Therefore, the Agency proved Appellant violated this rule.

   Mr. Woods also based his finding under this rule on Appellant's failure to communicate with permitting staff to produce an accurate permit for the August 8 event. Appellant conceded that he failed to get an amendment to the permit reflecting the times requested by the permittee, including the one-hour early set-up needed to construct the large stage. This proves that Appellant did not meet his established standard of performance with regard to permitting. [Appeal, Atch. 1-2.]

8. **Unauthorized absence from work under CSR § 16-60 S.**

   This rule is violated when an employee is absent from work without authorization under either departmental or Career Service Rule. *In re Dessureau*, CSA 59-07, 8 (1/16/08). As found above, Appellant did not contest the eleven absences listed in the disciplinary letter. His claims that they should have been covered by FMLA, vacation or comp time were not supported by the evidence. Therefore, the Agency proved that Appellant violated this rule based on the identified absences.

9. **Appropriateness of dismissal**

   In evaluating the appropriate degree of discipline, an agency must consider the severity of the misconduct, an employee's past employment and disciplinary history, and the penalty most likely to achieve compliance with the rules. CSR § 16-20. An agency's determination of penalty must not be disturbed unless it is clearly excessive or based substantially on considerations not supported by the evidence. *In re Owens*, CSA 69-08, 8 (2/6/09); *Adkins v. Div. of Youth Services*, 720 P.2d 626 (Colo.App. 1986).

   Mr. Woods considered the seriousness of the violations he considered proven, as well as the information presented by Appellant. He determined that the most problematic behavior was Appellant's continued use of the wrong fuel code to circumvent the fuel system intended to automate preventive maintenance, and his direction to his relief driver to use the same incorrect procedure. Mr. Woods also found Appellant's pattern of absences, including continued absences without permission, a serious matter that could not be corrected by additional progressive discipline. Mr. Woods reasoned that after Appellant's history of discipline including two lengthy suspensions, additional chances to achieve compliance would be futile. The evidence established that Appellant violated six disciplinary rules based
on several incidents over almost two years of time, despite clear performance standards and numerous warnings. I find that the Agency reasonably considered the seriousness of the misconduct in the entire context of the employment relationship, including Appellant’s past employment and disciplinary history, and appropriately imposed termination, consistent with the principles of progressive discipline.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered that the Agency’s dismissal action dated November 29, 2011 is AFFIRMED.

Dated this 10th day of April, 2012.

Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 et seq., within fifteen calendar days after the date of mailing of the Hearing Officer’s decision, as stated in the decision’s certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the following:

Career Service Board
C/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.