INTRODUCTION

This matter comes before the Career Service Board on appeal by Eric Ortega filed May 10, 2002. Appellant challenges the denial of a grievance he filed in response to a written reprimand he received for various alleged violations of Career Service rules.

For purposes of this Decision, Mr. Ortega 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 September 5, 2002 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Robert D. Nespor, with POB Director Dan Barbee present for the entirety of the proceedings as the advisory representative for the Agency. Appellant was present and was represented by Cheryl Hutchinson of the AFSCME.

The Agency called the following witnesses: Mr. Barbee, POB Utility Worker Ricky Stockton, and former POB Contract Custodial Administrator Giorgio De Shaun Ra'Shadd.

Appellant testified on his own behalf and called POB Utility Worker Vincent Torres.

The parties stipulated to the admission of Agency Exhibits 1 through 7, and Appellant's Exhibit A-4. Appellant offered Exhibit B during the hearing and it was 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 grievance of a written reprimand pursuant to CSR 18-12 4. and 19-10 d), as follows in relevant part:

CSR Rule 18-12 Grievance procedure

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

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Section 19-10 Actions Subject to Appeal

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

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

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Jurisdiction over this appeal 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). This includes grievances of written reprimands. See, In the Matter of the Appeal of Martha Douglas, Appeal No. 317-01 (Order entered 3/22/02). The Agency must also demonstrate that the severity of discipline is reasonably related to the nature of the offense in question. See, In the Matter of Leamon Taplan, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99).

**ISSUES**

1. Whether the Agency has shown by a preponderance of the evidence that Appellant engaged in the alleged acts.

2. If so, whether the acts constitute violations of CSR rules, giving the Agency just cause to discipline Appellant.

3. If so, whether Appellant's Written Reprimand is reasonably related to the seriousness of the proven offenses in question.

**FINDINGS OF FACT**

1. Appellant has been an employee of the Career Service for approximately ten years. He was a utility worker for POB's Day Utilities Shop at all relevant times. His regular shift at the relevant times was from 7:30 a.m. to 4:30 p.m. Monday through Friday.

2. There was no evidence that Appellant has received prior disciplinary actions. Based on the testimony of Appellant and the POB director, his most recent personnel evaluations have been either "meets expectations" or "exceeds expectations."

3. At all times relevant to this case, the Day Utilities Shop was managed by Contract Custodial Administrator Georgio De Shaun Ra'Shadd.

4. In approximately February of 2002, Mr. Ra'Shadd appointed Utility Worker Ricky Stockton as Acting Supervisor for the Day Utilities Shop. Mr. Stockton was Appellant's direct supervisor at all times relevant to this case.

5. POB Director Dan Barbee testified that Mr. Stockton received a lot of negative feedback from the staff upon his appointment as an acting supervisor. Mr. Barbee testified that he had witnessed Appellant in the hallway debating work assignments with Mr. Stockton in the past, but did not offer any details of such incidents.

6. Utility workers frequently volunteer for overtime work on weekends when set-ups for government functions are required. Utility Workers Vincent Torres, Chris Angel and Appellant all volunteered for overtime on Saturday, April 20, 2002. Appellant appeared and worked overtime that day. Mr. Torres called in and did not appear for the overtime for which he had volunteered. Mr. Angel did not appear.
7. Mr. Stockton counseled Mr. Torres and Mr. Angel in the presence of Mr. Ra'Shadd for their failure to work the agreed overtime that Saturday. This meeting took place on Monday, April 22, 2002. Appellant was not present at this meeting.

8. At some uncertain time around the middle of April, 2002, the Agency decided to set up a computer room in the basement of the City and County Building for the POB staff, using some surplus computers available at a City and County facility located at 333 West Colfax. The computers were to be set up in a room that was occupied at the time by approximately six 8-foot locker units and a 9-foot wrought-iron picnic table. The room was used as a break room by security staff.

9. Appellant is accused of failing to comply with Mr. Stockton's instructions in preparing the computer room on the day in question. Appellant is further accused of insubordination toward Mr. Stockton when questioned about the failure to comply, and insubordination toward both Mr. Stockton and Mr. Ra'Shadd at a subsequent meeting in Mr. Ra'Shadd's office.

10. Mr. Stockton's version of events on the morning in question is as follows. Mr. Stockton asserted that these events occurred on Friday, April 26, 2002. He assigned a co-worker, John Terry, to work with Appellant. He gave Appellant and Mr. Terry a set of written instructions that morning, which included retrieving the computers among other duties (Exhibit 7), and told Appellant these tasks needed to be completed by the end of the day. Mr. Stockton asked Appellant to clean the floor, set up six tables in the locker room, get the computers located at 333 West Colfax and set them up on the tables. As the lockers were removed from the computer room they were stacked against the wall outside the room so that they would not obstruct the passageways. At some point during the day Mr. Terry was called to another worksite and Mr. Torres was assigned to assist Appellant.

11. Mr. Stockton's testimony concerning the afternoon in question is as follows. He left the men working on their own at the site. He returned at around 3:00 p.m. to check their progress. He found that the workers had left the worksite at an uncertain time that afternoon. Mr. Stockton observed that the floor had been mopped in the computer room, but the tables and computers were not there. He does not know what time Appellant left because Appellant failed to tell him when he was leaving and where he was going. Mr. Stockton did not know Appellant was going to the dump because Mr. Stockton did not tell Appellant to take the lockers to the dump. When Appellant returned, Mr. Stockton confronted him and asked him where he had been and why the job was still not done. Appellant told him he'd taken the lockers to the dump. Mr. Stockton counseled Appellant that he should not have gone to the

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1 Initially, Mr. Stockton testified that he had not put instructions in writing to Appellant until this time. He then corrected himself, stating that he was mistaken when he said he had not done so until this incident. Mr. Stockton testified that about one week prior to the events in question, Mr. Ra'Shadd provided copies of his day planner to him and his staff in order to put assignments in writing and avoid confusion. Mr. Ra'Shadd later testified to the same. Appellant and Mr. Torres testified that Mr. Ra'Shadd provided copies of his day planner to the staff following the events in question. Appellant believed this was done in part because of those events, and recalls the planner copies beginning with May of 2002. Neither party tendered a copy of any planner pages containing duties or otherwise. Exhibit 7 does not appear to be a page from a planner, but instead appears to be from a regular spiral notepad.
dump when the project Mr. Stockton had assigned was not yet complete. Appellant responded he decided to do it differently, and suggested that Mr. Stockton "write me up" if he didn't like the way Appellant was doing it. Mr. Stockton then reported to Mr. Ra'Shadd, who called the men into his office.

12. Mr. Stockton testified that by the end of the day Appellant had finished all the items on the list (Exhibit 7) except retrieving the computers and the Child Care work order. He testified the reason the Child Care caper was not complete was because when Appellant arrived there, they told him it had already been taken care of.

13. Appellant's version of events of the morning in question (taken from both his testimony and the Grievance, Exhibit 3) is as follows. Appellant asserts the following events occurred on Thursday, April 25, 2002. He first did the building exterior as Mr. Stockton asked. When he returned from cleaning the external grounds, Mr. Stockton asked him to go to 333 West Colfax to retrieve the computers to be used in the new computer room. As Appellant was on his way out the door, a City and County employee stopped him and asked him if anyone was available to help set up for a luncheon. Appellant reported the request to Mr. Stockton, and Mr. Stockton assigned Appellant to assist in the set-up. Appellant testified that this particular room is set up in many different configurations and usually required being dismantled first, as was the case this day. He testified that this task took him until about 10:00 a.m. Appellant then went on break for fifteen minutes, then reported to Mr. Stockton that he was on his way to retrieve the computers. He was on his way out the door again when Mr. Stockton stopped him and said they needed to clean the room out before retrieving the computers. They then proceeded to the computer room where they (Appellant and Mr. Stockton) worked together. Appellant began cleaning off the top of the lockers while Mr. Stockton went to secure a pair of bolt cutters and a security guard to remove remaining personal possessions from the lockers. They then emptied all the personal items from the lockers, placing them into recycle bins and labeling the bins. This took until about 11:00 or 11:15 a.m., at which time Mr. Stockton got Geronimo Vasquez and Vince Torres to help remove the emptied lockers from the room. This continued until about 12:00 p.m. At that time Appellant went to lunch.

14. Appellant's version of events that afternoon is as follows. When Appellant returned from lunch, Mr. Stockton told him he would need to continue without Mr. Stockton, who had to attend a meeting. Appellant testified that Mr. Stockton instructed him to sweep and mop the floors, wipe down the walls, take the lockers and picnic table to the dump, set up the tables, retrieve the computers and set them on the tables. As he and Mr. Torres continued to work, on two occasions Appellant was paged and called away from the worksite by administrative assistant Terry Waters (who evidently was manning the phones at that time). The first call was to relay a request for help from Child Care in moving some furniture. Appellant in turn paged John Terry and Geronimo Vasquez to respond to that call and returned to the computer room. Appellant was then again paged by Ms. Waters, relaying a complaint from one of the courtrooms that there were spiders falling from the ceiling. Appellant paged another worker, Tony Veasley, to respond to this call. Appellant testified that when he asked Ms. Waters

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2 Appellant asserts he did not receive the list of tasks in Exhibit 7 until the following morning.
why she was referring these calls to him, she told him that Mr. Stockton told her to. In his Grievance, Appellant further complains that Mr. Stockton did not inform him of this additional responsibility that he was expected to attend while also tending preparation of the computer room. Appellant then returned to the computer room, where the men finished removing large debris. It was at that time Appellant determined the passageways were obstructed by the debris. He decided they needed to remove it from the area, because this was the Emergency Preparedness area to which all city officials were to report in the event of a crisis. He and Mr. Torres took the lockers and table to the dump, returning at approximately 4:10 or 4:15. Mr. Stockton "got right into our faces" when they returned, asking Appellant and Mr. Torres why they did not do what he had asked them to do. Appellant told him they took the lockers to the dump. Mr. Stockton said something to the effect that the dump "could have waited for tomorrow" (see, Exhibit 3, p. 2). He was very upset that the project was not completed. Appellant advised Mr. Stockton to "calm down," and stated there was probably still time to set up the tables. Mr. Stockton then said something to the effect that Appellant "deliberately" did not do what he had asked, and Appellant suggested Mr. Stockton give him a "verbal warning or "whatever," but that Mr. Stockton "needed to calm down." Mr. Stockton then said something to the effect that this was not the end of it, and they would be talking to Mr. Ra'Shadd "tomorrow" (see, Exhibit 3, p. 2). Appellant and Mr. Torres then went to the hallway where the tables were located, put them on a dolly and took the dolly to the room. Mr. Stockton returned and called them to Mr. Ra'Shadd's office. Appellant told Mr. Stockton something to the effect that the men were "about to punch out" just then (see, Exhibit 3, p. 3).

15. Mr. Torres' version of events of the day in question up to the time of the meeting with Mr. Ra'Shadd is as follows. Mr. Torres asserted that the following events took place on Thursday, April 25, 2002. He did not work with Appellant during the earlier part of that day. He was then told to go work with Appellant at around 1:00 p.m., but was not given any other specific instructions. He understood the task generally to be cleaning down the room so that it could be used as a computer room. He worked with Appellant in the computer room from approximately 1:00 to 3:00 that afternoon. During that time, he observed that Appellant left the work site to respond to his pager on one or two occasions, but does not know any details of those calls. At around 3:00 p.m. he and Appellant went on their regular break. Sometime after the break, they took the lockers and picnic table to the dump, returning to the City and County Building at around 4:00 or 4:15. At that time they ran into Mr. Stockton, who became somewhat upset because the computers were not set up in the room yet. Mr. Stockton asked them what was taking so long. Appellant responded saying something to the effect of, "Just write me up or do whatever you have to do." After speaking with Mr. Stockton, having a few minutes left in the day, he and Appellant went to retrieve the tables to

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3 The hearing officer is mindful that Mr. Barbee testified Ms. Waters does not page utility workers and does not have their pager numbers, and that Mr. Stockton testified that he never assigned Appellant to respond to calls in his stead. However, the hearing officer finds Appellant's assertion that he was paged on these two occasions that day credible. First, the call to Child Care, and Appellant's arranging for another worker's response, are corroborated by subsequent events (as set forth below). Second, Appellant's account of a report of "spiders falling from the ceiling" is so bizarre that it is unlikely that Appellant fabricated it. It is possible that Mr. Stockton gave Ms. Waters Appellant's pager number that afternoon when he was called to the meeting, and does not now recall doing so.

4 Appellant stated in his Grievance that in the past Mr. Stockton had complained of such complications with his workers aggravating his high blood pressure.
be set up in the computer room. Then Mr. Stockton came and got them to go meet with Mr. Ra'Shadd.

16. Mr. Stockton's version of events at the meeting in Mr. Ra'Shadd's office is as follows. The meeting occurred at some point after 3:15 p.m. but he was not sure when. The three men entered Mr. Ra'Shadd's office. Mr. Stockton began explaining to Appellant and Mr. Torres that he was their supervisor, and they were to follow his instructions. Appellant began to say that he was doing it differently, and Mr. Ra'Shadd said something to the effect of, "What do you mean? He's your supervisor." Appellant then grew quiet. Mr. Ra'Shadd asked Appellant several times, "Do you understand?" Appellant responded several times, "Yeah, I understand." Mr. Ra'Shadd then told Appellant to stand up to be counseled, but Appellant refused. Mr. Ra'Shadd then told him to leave and adjourned the meeting. Mr. Ra'Shadd told Mr. Stockton at the end of the meeting something to the effect that from then on everything to Appellant was to be put in writing. Mr. Ra'Shadd then asked Mr. Stockton to provide a written summary of the meeting.

17. Appellant asserts that when the three men arrived at Mr. Ra'Shadd's office, Mr. Torres began to sit and Mr. Ra'Shadd said "don't sit; don't even think of sitting down." Mr. Torres then remained standing, as did Appellant, through the entire discussion. Mr. Ra'Shadd also said "Don't make any statements; don't ask any questions." Mr. Ra'Shadd then explained that he gives Mr. Stockton orders and Mr. Stockton is expected to execute those orders through his assignments to the staff. He stated that by not getting the tables set up and not retrieving the computers for the room, Appellant and Mr. Torres disobeyed Mr. Stockton's instructions. Mr. Stockton broke in at that time and said that the only reason they were meeting was Appellant's statement to "write up" Appellant so that he could get out of there. Appellant broke in at that point and said, "that's a lie." It is clear from Appellant's Grievance that he admits interrupting Mr. Stockton, but alleges the reason was that Mr. Stockton misrepresented his statement. Mr. Ra'Shadd then yelled, "Cease and desist" several times (see, Exhibit 3, p. 3). He instructed Appellant not to disrespect his supervisor in front of co-workers and the manager. Mr. Ra'Shadd then "got in Appellant's face," and sternly said several times, "You do not want to try me young man!" Appellant responded each time "Or what?" Mr. Ra'Shadd then instructed Appellant that his disrespectful behavior would never happen again. Mr. Ra'Shadd then asked him approximately eight to ten times, "Do you understand?" to which Appellant responded "I hear you," each time. Mr. Ra'Shadd then added something to the effect that from that point on, if there were any confusion about instructions they should be written down. The meeting then adjourned, and as the men walked out into the commons, Mr. Ra'Shadd told to Mr. Stockton something to the effect that he wanted "a write-up on this one tomorrow" (gesturing toward Appellant) (see, Exhibit 3, p. 3). Mr. Ra'Shadd did not refer to either Appellant or Mr. Torres by name during the meeting.

18. Mr. Torres' version of the meeting in Mr. Ra'Shadd's office is as follows. It was almost 4:30 p.m. when he and Appellant were called into the meeting. As soon as they walked into the office, Mr. Ra'Shadd said something to the effect of, "You two again." He told them not to sit down and not to talk. No one, including Appellant, sat down at the meeting. Basically he

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<sup>5</sup> Appellant had met in person with Mr. Ra'Shadd only once before the events of the day in question, during a staff meeting when they watched a safety training video together.
and Appellant were not allowed to say anything. Mr. Torres testified he finally "got a word
in edgewise" in response to what Mr. Ra'Shadd was saying. He said something to the effect
of, "So the supervisor is always right, no matter what?" Mr. Ra'Shadd responded saying
something to the effect of, "I'll back my supervisor right or wrong." Mr. Ra'Shadd asked
several times, "Do you understand?" Mr. Torres responded each time, "I understand." Appellant responded each time, "I hear you." As they were leaving the office Mr. Ra'Shadd
said to Appellant, "You don't want to try me." Appellant responded, "Or what?" Mr.
Ra'Shadd then asked Mr. Stockton to write Appellant up, and suggested that from then on
everything would be in writing. Mr. Torres testified that he did not punch out until after the
meeting. He recalls receiving credit for 1/2 hour overtime, which means he had to punch out
after 4:45.

19. Mr. Ra'Shadd's version of events is as follows. He asserts that the following events occurred
on Friday, April 26, 2002. He recalls receiving a phone call from Mr. Stockton earlier in the
day, during which Mr. Stockton complained that he was having trouble getting Appellant to
do what he had asked. Then between 2:00 p.m. and 5:00 p.m. he received another call from
Mr. Stockton complaining of some trouble with the two employees, but Mr. Ra'Shadd does
not recall the substance of the conversation. He agreed to let Mr. Stockton bring the men in.
When the men came in, the others remained standing while Appellant plopped into a chair
and slid down a few inches. Mr. Ra'Shadd asked Appellant to stand up and Appellant
refused. Mr. Ra'Shadd told the men that Mr. Stockton was their supervisor and his
instructions were to be carried out, and that he would stand behind Mr. Stockton as the
supervisor. Mr. Ra'Shadd recalled that Mr. Torres "was receptive" to what Mr. Ra'Shadd
was saying, but Appellant "was not." Appellant stated something to the effect that he was
not happy with Mr. Stockton's supervision, specifically instructions not given by Mr.
Stockton. Mr. Ra'Shadd had Mr. Stockton repeat the verbal instructions he allegedly gave
Appellant earlier, and said he did not find anything unclear about them. He told Appellant
his duty was to carry out Mr. Stockton's instructions, and said "Do you understand?" Mr.
Ra'Shadd repeated this question three times and Appellant did not respond. He reiterated
Appellant's duty to follow instructions and said "Do you understand?" several times, each
time Appellant responding "Or what?" Mr. Ra'Shadd then asked Mr. Stockton to prepare a
written statement of what occurred during the meeting. Mr. Ra'Shadd testified that there was
a prior meeting with the same men at the end of which he told them to put everything in
writing, then corrected himself that there was only one meeting and he gave this directive at
the end of this meeting. Mr. Ra'Shadd was certain the meeting was over before 4:00 p.m.
He did not recall seeing Exhibit 7 at the time of the meeting.

20. Mr. Ra'Shadd testified he felt a written reprimand against Appellant was justified by
Appellant's refusal to stand, refusal to respond to Mr. Ra'Shadd's repeated questions with
anything but "or what?" and for "continually" speaking over Mr. Stockton. Therefore,
Appellant displayed disrespect toward both supervisors in front of one another and in front of
Mr. Torres.

21. Mr. Torres testified that he did not feel Appellant's behavior during the meeting was rude, but
did feel that he and Appellant were treated "pretty rude."
22. Mr. Barbee testified that his office is two doors down from Mr. Ra'Shadd's office. He testified that on the evening of April 26, 2002 he was strolling by Mr. Ra'Shadd's office and observed Appellant, Mr. Torres and Mr. Stockton in the office. He testified that he did not hear any of the conversation, but observed that the men appeared "tense." He testified that when he passed by all the men were standing. He testified he learned of the incidents at issue a few minutes later that evening, when Mr. Ra'Shadd came to his office and gave him a "blow-by-blow" description of the events in question. He testified that he thought this was some time after 3:00 p.m. but was not sure what time.

23. Mr. Stockton's version of the preparation of the Written Reprimand is as follows. Recalling that Mr. Stockton believed these events to be happening on Friday, April 26, Mr. Stockton provided the written summary Mr. Ra'Shadd had requested that night before he left. (This written summary was not offered into evidence.) Mr. Ra'Shadd then prepared the Written Reprimand which Mr. Stockton himself delivered to Appellant that evening before either of them left the building, at around 5:00 p.m. 6

24. Mr. Ra'Shadd's version of the preparation of the Written Reprimand is as follows. He stayed at work the night of the meeting to complete the disciplinary action because with all personnel actions he stayed "until they were done." Before Mr. Stockton left for the night, he prepared a written summary of the incident as Mr. Ra'Shadd had requested. Then Mr. Ra'Shadd prepared the Written Reprimand before 5:00 p.m. that evening. He testified it took him about 20 to 25 minutes to prepare the Written Reprimand.

25. The Written Reprimand (Exhibit 2) is dated April 26, 2002. Mr. Ra'Shadd asserted during testimony that the appearance of the date April 25, 2002 in the narrative of events (see, Exhibit 2, p. 3) is a typographical error, because he believes the events actually occurred on April 26. The Certificate of Service attached to the Written Reprimand indicates it was both mailed and hand-delivered on April 26, 2002. The Certificate is signed by Mr. Ra'Shadd himself. However, Mr. Ra'Shadd testified that he handed a copy to Mr. Stockton to hand-deliver to Appellant the same night the meeting took place, and that he gave the mail copy to his administrative assistant, Terry Waters, to mail that same night. Therefore, Mr. Ra'Shadd neither hand-delivered nor mailed the Written Reprimand as the Certificate indicates.

26. Appellant testified that he did not receive a copy of the Written Reprimand the night of the meeting. He testified he went home following the meeting and hand-wrote notes of the events of the day, with the intent of filing a grievance for the manner in which he had been treated. He testified that the date of April 25 which appears in the narrative of the Grievance (Exhibit 3, p. 2) was taken from his penned notes and not from the narrative in the Written Reprimand (Exhibit 2, p. 3).

27. The person who actually placed the mail copy of the Written Reprimand in the mail (presumably Ms. Waters) did not testify. It was not established when the envelope was actually placed in the mail, but the register stamp on the envelope indicates it was processed at around 7:30 p.m. on April 26, 2002 (Exhibit B).

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6 Mr. Stockton originally testified that he did not see the Written Reprimand until the day after the incident. He then later changed his testimony.
28. Mr. Barbee testified that the post office in the City and County Building closes earlier in the afternoon, before the building closes at 5:00 p.m. However, the main post office is a few blocks down the street.

29. Mr. Torres testified that the reason he recalls the events in question happening on a Thursday instead of a Friday is because he came to work the day following the meeting with Mr. Ra'Shadd. He testified he does not recall what he did the following day, but did not recall working with Appellant, and did not work in the computer room that day.

30. Appellant testified that the morning following the meeting in Mr. Ra'Shadd's office, he received the list of tasks (Exhibit 7) and was assigned to work with John Terry. Appellant testified that he worked all day with Mr. Terry. He testified they completed the entire list of tasks in Exhibit 7, including the computer retrieval and set-up, except for the Child Care caper. He testified that they did respond to that location, but were told when they arrived there that the matter had already been taken care of.

31. The list of tasks in Exhibit 7 is dated 4/26/02. It is addressed to both Appellant and Mr. Terry. It does not mention emptying the computer room of the lockers, sweeping or mopping the floor and walls, setting up tables, or setting the computers on the tables. Nor does it include taking the lockers to the dump. The list does include retrieval of the computers from 333 West Colfax to the City and County Building basement, in addition to a series of duties apparently unrelated to this case.

32. Appellant testified he first saw the Written Reprimand on Saturday, April 27 when he received the mailed copy. Appellant testified the reason he recalls this is because his family typically retrieves the mail during the week while he is at work, and that he typically retrieves the mail on Saturdays. He testified that he recalled retrieving the envelope containing his Written Reprimand from the mailbox himself.

33. In addition to the incidents with Mr. Stockton and Mr. Ra'Shadd described above, the Written Reprimand contains allegations that Appellant failed to appear for scheduled overtime work on April 20, 2002 and was counseled for this alleged failure on April 22, 2002.

34. Appellant's Grievance was filed April 29, 2002 (Exhibit 3). Because Appellant felt he would not get a fair review by Mr. Stockton or Mr. Ra'Shadd, he initially filed his Grievance with Mr. Barbee, who accepted the Grievance for review.

35. Mr. Barbee investigated Appellant's complaint. He spoke with Mr. Stockton, Mr. Ra'Shadd and Appellant, and read Appellant's Grievance. He testified that Appellant seemed "very proud" of the way he responded to Mr. Ra'Shadd during the meeting. Mr. Barbee testified that while speaking with Appellant, he had to ask Appellant several times if Appellant worked the overtime on the day that he was supposed to (i.e., Saturday, April 20) and that each time Appellant merely responded that he "worked the overtime." Mr. Barbee found Appellant's apparent refusal to include the words "that day" non-responsive, and considered this evidence consistent with Mr. Ra'Shadd's assertion that Appellant was non-responsive to
him during the meeting. Mr. Barbee testified that Appellant told him he did not have to respond to Mr. Ra'Shadd and that he had consulted with a CSA employee by the name of Vivian Adkins who told him as much. Appellant told Mr. Barbee that Ms. Adkins had said something to the effect that "any response" is sufficient.

36. Mr. Barbee did not interview Mr. Torres because he did not see the need based on Appellant's statements. He did not see the written summary prepared by Mr. Stockton.

37. Mr. Barbee testified that the reason he denied Appellant's Grievance was because of Appellant's "proud admission" to the acts considered insubordinate, and because all three men's stories matched up. However, Mr. Barbee acknowledged that Appellant's Grievance indicated he did respond to each of Mr. Ra'Shadd's questions, despite Mr. Ra'Shadd's claim that he did not. Mr. Barbee further admitted that Mr. Ra'Shadd denied saying "You don't want to try me" to Appellant, that Appellant adamantly denied failing to work overtime, and that Appellant probably showed Mr. Barbee his timecard during the discussion (Exhibit A-4). The timecard indicates Appellant worked the entire day on Saturday, April 20, 2002.

38. Mr. Barbee determined that Appellant practiced "malicious compliance" with respect to assignments from Mr. Stockton (see, Exhibit 4). He denied Appellant's Grievance, and Appellant forwarded the Grievance to the Manager of General Services, Tom Migaki (Exhibit 5), who denied Appellant's second-level Grievance (Exhibit 6). This appeal followed (Exhibit 1).

39. As of the date of the hearing in this case, the computer room was still not functional.

40. The hearing officer had the opportunity to observe Appellant's demeanor throughout the day of the hearing. Appellant consistently appeared to be smiling throughout the entire day, despite the nature of the discussion or how serious the topic at the moment, including while he was on the stand, admitting to errors in his own documentation under cross-examination. The hearing officer observes that this appears to be Appellant's natural facial expression.

**DISCUSSION**

1. Rules the Agency alleges Appellant violated.

The Agency posits that Appellant's conduct constitutes violations of the following CSR rules:

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7 Mr. Barbee testified that it was well into the appeal process before he learned that Appellant had actually worked overtime on the day in question. However, he did not seek to modify the Written Reprimand at that time. The hearing officer finds the Agency's decision not to amend the Written Reprimand reasonable due to the advanced state of the appeal, and the attendant possibility of an order further modifying the Written Reprimand. However, the appropriate course of action would have been to notify the opposing party upon such a discovery and to affirmatively withdraw the issue at the beginning of the hearing to avoid its needless treatment, neither of which the Agency did.
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.

...18) Conduct which violates an executive order which has been adopted by the Career Service Board (specifically, Executive Order 112).

...20) Conduct not specifically identified herein may also be cause for dismissal.

Section 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline....

...4) Failure to maintain satisfactory relationships with co-workers, other City and County employees or the public.

...5) Failure to observe departmental regulations (specifically Custodial/Utility Administrative Policies addressing workplace violence).

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

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

* * *

2. Excluded issues.

   a. Executive Order 112 and related POB Administrative Regulations.

   The Written Reprimand references violations of Executive Order 112, "Violence in the Workplace," as well as a Section of the POB Administrative Regulations entitled "Behavior and Violence in the Workplace" (no citation provided).

   Executive Order 112 sets forth as follows in relevant part:

   EXECUTIVE ORDER NO. 112

   ...II. General Policy
Violence, or the threat of violence, by or against any employee of the City and County of Denver is unacceptable and contrary to city policy, and will subject the perpetrator to serious disciplinary action...

The Agency did not submit copies of either the Executive Order or the Administrative Regulation it cited. While familiar with Executive Order 112, the hearing officer is not readily familiar with the corresponding POB Administrative Regulation referenced here. She might safely assume from the title that the behavior it proscribes is similar to that proscribed by Executive Order 112. However, in the absence of the text itself, she can only speculate as to the content and purpose of the administrative regulation. Either way, the Agency has presented no evidence or arguments tending to demonstrate Appellant engaged in any activities amounting to violence or threats thereof, or otherwise illustrate how either regulation has been violated. Therefore, the hearing officer considers these allegations to be dismissed as abandoned. The corresponding allegations of violations of CSR 16-50 A. 18), proscribing the violation of an executive order, and CSR 16-51 A. 5), proscribing the failure to observe departmental regulations, have likewise been dismissed as abandoned. These issues have therefore been excluded from consideration in this case.

b. Allegations of Appellant's failure to work scheduled overtime.

The Written Reprimand includes allegations that Appellant failed to work overtime he agreed to the Saturday before the week the incidents at issue occurred (April 20, 2002). During the hearing it became apparent that these allegations against Appellant resulted from confusion on Mr. Ra'Shadd's part between Appellant and another utility worker who had been counseled earlier in the week for failing to work overtime. It was established that Appellant in fact punched in that Saturday, and worked the entire day. (See, Exhibit A-4). The Agency subsequently conceded that including these allegations in the Written Reprimand was in error, and withdrew this issue. It has therefore been excluded from consideration here.

3. Analysis of the evidence.

a. When the incidents occurred.

During the hearing it became evident that there were two distinct versions of when the events in question took place. Appellant and Mr. Torres are virtually certain the incidents at issue happened on April 25. On the other hand, witnesses for the Agency testified they were virtually certain that the series of events at issue occurred on April 26. The Agency initially argued in its Opening Statement that Appellant did certain things in contravention to specific written instructions, which presumably appear in Exhibit 7. As the confusion concerning the date emerged, the Agency alternatively argued that because the real focus of the Written Reprimand was Appellant's alleged insubordination in response to being counseled, the issue of when the incidents actually occurred is not critical to the hearing officer's deliberations.

The hearing officer finds that a determination of when the events occurred is important. The Agency's contention that Appellant failed to complete a prioritized list of tasks is what allegedly set the whole series of events in this case into motion. If the list in Exhibit 7 were
given to Appellant on the day in question, then it is largely inconsistent with the Agency's assertion of what Appellant's duties were that day. The Agency argued in support of the Written Reprimand that going to the dump was not on the list. However, neither are the duties of removing the lockers, cleaning and mopping the floor, and setting up the tables. Alternatively, if this list were generated the day following the events in question, then the hearing officer must look elsewhere to determine Appellant's duties on the date in question.

The hearing officer found the testimony of all witnesses on the issue of the date to be equally credible. Therefore, she must look to other evidence to tip the scale. The hearing officer has exhaustively reviewed the testimony and documents in search of any circumstantial clues to resolve the question of the date. In so doing, she has come across the following bits of evidence, all of which tend to support a conclusion that the incidents took place on Thursday, April 25, 2002.

First, the Grievance indicates that during Mr. Stockton's verbal reprimand of Appellant and Mr. Torres, Mr. Stockton told them that they would be talking to Mr. Ra'Shadd about the incident "tomorrow," and that the trip to the dump "could have waited for tomorrow." Similarly, the end of Appellant's Grievance quotes Mr. Ra'Shadd as instructing Mr. Stockton at the end of the meeting: "I want a write-up on this one tomorrow..." (Emphasis added.) This language implies that tomorrow was a workday; i.e., Friday, the 26th, not Saturday, the 27th. 

Appellant testified that this document was generated immediately after the events it describes. Therefore, these incidents would still have been fresh in his recollection. The hearing officer finds it highly unlikely that Appellant, or anyone else, foresaw that the date of this incident would become a topic of debate during a hearing on the matter. Therefore, it is unlikely that Appellant would include this language for any reason other than that it was an accurate rendition of Mr. Ra'Shadd's and Mr. Stockton's actual statements about the timeframe of expectations. The hearing officer therefore finds these portions of Appellant's account mutually corroborative and credible.

Similarly, when the hearing officer asked Mr. Torres why he was so sure this happened on the 25th and not the 26th, he testified it was because he remembered coming to work on the morning following the meeting, and he did not believe he worked that Saturday. Finally, Mr. Stockton himself testified he had someone else set the tables up in the computer room "the next day" after the incident.

In addition, when examining Appellant's time card (Exhibit a-4), the two complete weeks of recorded time suggest that Appellant makes a regular habit of punching in just a few minutes before 7:30 a.m. every morning, and of punching out just a few minutes before 4:30 p.m. every night. The only exception to this regular habit is on Thursday, April 25, when Appellant punched out nearly a half an hour late. No explanation for this break in the pattern (except that it was the night of the meeting) was ever offered. Appellant contends in his Grievance that he and Mr. Torres were "on the verge of clocking out for the day" when Mr. Stockton called them into the meeting with Mr. Ra'Shadd. Again, Mr. Torres corroborated this assertion when he similarly

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8 This language also implies that Mr. Ra'Shadd's order was that the write-up be completed the following day, not that night as Mr. Ra'Shadd and Mr. Stockton recollect.
testified that he was paid an extra 1/2 hour on Thursday, April 25, because the men were required to stay late for the meeting.

Both Appellant's Grievance (Exhibit 3, p. 2) and the Written Reprimand (Exhibit 2, p. 3) set forth that the incident and the subsequent meeting happened on the 25th. The Agency contends reference to the 25th in the text of the Written Reprimand was a typographical error, and submits that this document was the source of the date in Appellant's Grievance. Yet Appellant credibly testified that he used the notes he penned the night of the incidents, not the Written Reprimand, as the source of the typed narrative which appears in his Grievance.9

Furthermore, the language of the Grievance is not inconsistent with Appellant's proposition that it was taken from notes penned before Appellant knew of the Written Reprimand. With the exception of the Grievance Form, which does mention parts 1 and 2 of the Written Reprimand, nowhere do the words "Written Reprimand" appear. Instead, the body of the writing, and particularly the "Action Complained of," focuses on the allegations of wrongdoing by Mr. Ra'Shadd as the aggressor. The mood of this document is consistent with the proposition that it was taken largely from notes penned at a time when Appellant intended to affirmatively grieve Mr. Ra'Shadd's actions toward him, not defend himself against a written reprimand.

The Agency witnesses were vague and less consistent than Appellant's as to when the events in question took place, but generally describe all this as happening earlier in the day than does Appellant and his witness. Mr. Stockton testified sequence of events took place when he noted the men missing and he confronted them "some time after three" or perhaps 3:15 that afternoon. Mr. Barbee saw the men in Mr. Ra'Shadd's office some time after 3:00 p.m., but he was not sure when. Mr. Ra'Shadd testified that the events took place sometime between 2:00 p.m. and 5:00 p.m. on the day in question. He later clarified that he was certain the meeting in his office was done by 4:00 p.m., that he had completed the Written Reprimand and had given it to Stockton to deliver before Mr. Stockton left for the day, and that this all occurred by about 4:45 but no later than 5:00.

Alternatively, the testimony of Appellant and his witness, and the narrative in the Grievance, consistently represent that the meeting happened much later than the Agency's time frame would permit. Both Appellant and Mr. Torres were clear in their recollection that they returned from the dump at around 4:15 and that Mr. Stockton returned to take them to Mr. Ra'Shadd's office at about 4:30, just as they were about to punch out (see also, Exhibit 3, p. 2).

Once again, the hearing officer finds that the circumstances favor Appellant's version of events. Based on Mr. Stockton's reactions alone, it is clear this incident happened very near the end of Appellant's and Mr. Torres' shift, since it is doubtful that Mr. Stockton would have

9 The hearing officer notes that under "Date of Action" on Appellant's Grievance Form, the date of April 26, 2002 appears. However, Appellant had already received the Written Reprimand by the time he prepared the Grievance Form on April 29. Appellant's posture had therefore changed from the offensive in response to his negative treatment, to a defensive posture in response to the Written Reprimand. Since the date of the Written Reprimand is April 26, the appearance of that date under "Date of Action" on the Grievance Form is not inconsistent with this conclusion, if it was taken from the date of the Written Reprimand.
concluded that the two had failed to complete their project if they had time to continue working on it. The later in the day this meeting occurred, the more likely Mr. Stockton's reaction becomes, but less likely the Agency's version of subsequent events becomes in the hearing officer's mind. All parties generally concur that the whenever the meeting started, it took, at the very least, ten minutes. The Agency alleges that Mr. Stockton then prepared his write-up. Mr. Ra'Shadd subsequently prepared the Written Reprimand, which he testified took him between 20 and 25 minutes. The copy was then presumably given to Appellant, who was told to wait despite that (as the Agency asserts) he had already punched out. All of this presumably happened before 5:00 p.m. The mail copy was presumably then placed in the mail, despite that the post office in the City and County Building closes earlier in the afternoon. That envelope then subsequently had to have been collected from its point of deposit, taken inside the Main Post Office, processed and postmarked, all by 7:36 p.m. all that same night.

Furthermore, if the meeting happened on April 26 instead of April 25, then Mr. Stockton would already have written the note that appears in Exhibit 7, dated 4/26/02, which he contends he wrote and gave to Appellant on the day of the incidents. Yet this note was apparently never brought up during the meeting in Mr. Ra'Shadd's office. Several parties, including Mr. Stockton, testified that at the end of the meeting, Mr. Ra'Shadd gave him a directive that "from now on" everything would be put into writing, as though that hadn't happened yet. One would think Mr. Stockton would have shown Mr. Ra'Shadd the written instructions in response to this request if they had existed at the time. Yet Mr. Ra'Shadd did not recall seeing the note at the time of the meeting, and there is no evidence tending to suggest the note was ever brought up. All these considerations tend to suggest it is more likely than not that the note did not yet exist at the time of the meeting, but instead was generated the morning following the meeting, in response to Mr. Ra'Shadd's directive the night before to put everything to Appellant in writing.

This explains why Exhibit 7 contains a list of duties which, with one exception, appear entirely separate from the duties presumed to be at issue. Furthermore, items that do appear on the list, along with Agency testimony, corroborate Appellant's assertions concerning the sequence of events. All parties concur that Appellant had not yet gotten the computers from 333 West Colfax by the end of the day in question (whether it was the 25th or the 26th). The appearance of that one duty (retrieving the computers) is consistent with the fact that it was the one duty Appellant had failed to complete the previous day. This is why it is the only remaining relevant duty to appear on the list created the 26th. Appellant recollects being instructed to "finish the task" the next morning. He testified he did set the tables up first thing, that later that morning he went to 333 West Colfax and got the computers, and that he recollected taking them into the building and setting them directly on the tables.

Moreover, reporting to Child Care turns up on the list of duties in Exhibit 7. This further corroborates Appellant's version of events. Both Mr. Stockton and Appellant testified that then Appellant arrived there on the 26th, the employees there told him someone else had already taken care of the request. One of the pages Appellant asserts he received during the previous afternoon was from Child Care, to help move or remove some furniture. Appellant contacted another Utility Worker and had him respond to this request for assistance. He then responded to it again the following day, apparently because the work order was never deleted and was therefore put on the list.
Based on the totality of evidence set forth above, the hearing officer concludes as follows. The incidents at issue occurred on Thursday, April 25th, 2002. The meeting in Mr. Ra'Shadd's office took place after 4:30 p.m. that day, and the Written Reprimand was not hand-delivered to Appellant that night. The list of duties in Exhibit 7 did not exist at the relevant times, but was generated the following morning, in response to a directive by Mr. Ra' Shadd during the meeting the previous night. Therefore, it is not dispositive in a determination of whether Appellant's duties at the relevant times. Furthermore, this conclusion raises some question about the reliability of recollections by Agency witnesses.

b. Appellant's alleged failure to comply with the instructions of his supervisor.

The Agency alleges that even in the absence of the written instructions, it has shown that Appellant failed to comply with the instructions of his supervisor by going to the dump when he still had not completed the tasks assigned by Mr. Stockton.

The remaining sources of information concerning Appellant's assignment that day are the testimony and reactions of Appellant and Mr. Stockton. While containing considerably more detail, Appellant's testimony of the general sequence of events that day is fairly consistent with that of Mr. Stockton. The only significant divergence is whether or not Mr. Stockton told Appellant to go to the dump as one of the tasks related to cleaning out the computer room. Appellant contends that Mr. Stockton included this in the list of duties for the day. Mr. Stockton contends he did not.

The hearing officer finds that Mr. Stockton did not include this instruction in the day's tasks for two main reasons. First, Mr. Stockton's testimony about finding Appellant missing, and not knowing where he had gone, was very credible. The primary cause of Mr. Stockton's negative reaction to Appellant in the first place was Appellant's mysterious absence despite that the assigned project was not complete. The hearing officer finds it doubtful that Mr. Stockton would tell Appellant to go to the dump, then pretend not to know where Appellant had gone and simply fabricate this whole allegation for no perceivable reason. In the absence of such a stimulus, Mr. Stockton's reaction would therefore be inexplicable and unlikely.

In addition, while Appellant has claimed all along that Mr. Stockton told him to take the computers to the dump, he apparently felt it was necessary during his testimony to justify this decision. He testified he believed taking the lockers to the dump was a priority because the lockers were stacked in the hallway of the Emergency Preparedness area where all local government officials were to report in the event of an attack or natural disaster. This explanation tends to suggest that Appellant felt the need to justify the fact that he had exercised independent judgment, rather than doing what he was told.

For these reasons, the hearing officer concludes that Mr. Stockton did not tell Appellant to go to the dump, and that Appellant therefore left work premises without telling Mr. Stockton where he was going and without permission. Appellant therefore failed to complete the instructions of his supervisor because of this independent decision, in violation of CSR 16-51 A.
10. Appellant has not shown he has the authority to re-prioritize tasks, whether or not he agrees they are important or feels they are arbitrary.\(^{10}\)

**c. Appellant's alleged insubordination.**

Appellant admitted telling Mr. Stockton to calm down, and that he suggested that Mr. Stockton should give Appellant a verbal warning if he had to in order to do so. Appellant contends that these statements were made in Mr. Stockton's interest, out of concern for his blood pressure.

The hearing officer is not persuaded. It is clear from the evidence that Mr. Stockton was having difficulties with his utility workers resenting his appointment as Acting Supervisor and continuing to treat him as a peer. Appellant's reaction is that of a peer, not a subordinate, and contributed to the culture of disrespect with which Mr. Stockton was struggling. Whether motivated out of concern for Mr. Stockton, or intended to patronize him, antagonize him, or get him off Appellant's back, Appellant's comments were inappropriate. Such an action can reasonably be interpreted to rise to the level requiring some correction to protect the authority of the supervisor. The hearing officer therefore finds Appellant's action to be a violation of CSR 16-51 A. 4, proscribing failure to maintain satisfactory relationships with co-workers.

The remaining allegations of insubordination in the Written Reprimand are based primarily on Mr. Ra'Shadd's recollection of Appellant's behavior during the meeting, in addition to a written summary reportedly prepared by Mr. Stockton. The Agency bears the burden of proving the allegations supporting in the Written Reprimand by a preponderance of the evidence. However, Mr. Stockton's notes were not offered into evidence, and Mr. Ra'Shadd's recollection of many of the events appears inaccurate, tending to cast doubt on the reliability of his memory. Finally, Appellant argues that Mr. Ra'Shadd had him confused with another employee, and the evidence tends to support this assertion.

On one occasion during his testimony, Mr. Ra'Shadd began to describe two meetings with these same three men, one in Mr. Stockton's office (as implied in numbered paragraph 2 of the Written Reprimand), in addition to the one in his own office. Then later he corrected himself, admitting he became confused, and testified that the only meeting involving Appellant was the one in his office on the day in question. He further alleged having trouble with Appellant following orders two days in a row, and that Mr. Stockton called him the day before about this. Mr. Ra'Shadd then changed his testimony to state that the first call about Appellant came earlier on the day in question. Yet no such prior phone call and no such report of trouble earlier in the day turns up in Mr. Stockton's testimony of the events that day, and there is no other clear evidence tending to support these assertions.

\(^{10}\) The fact that Appellant's action was related to the objective mitigates the offense somewhat. However, while the Agency failed to tender a copy of Appellant's classification specifications to support the implicit assumption that Appellant did not have the latitude to exercise independent judgement, the hearing officer is not prepared to require a City agency to prove in the affirmative that a non-supervisory employee can re-prioritize tasks requiring him to leave the work site without at least reporting as much to the supervisor. Appellant received sufficient notice that the Agency contended he did not have such latitude, yet he provided no documentation or arguments tending to affirmatively demonstrate to the contrary.
The Written Reprimand, which was authored by Mr. Ra'Shadd, also contains several errors. First, numbered paragraph 1 again relays the mistaken allegations that Appellant was among certain employees counseled for failing to show up for the scheduled overtime work. Assuming that numbered paragraph 2 is about the only meeting Mr. Ra'Shadd finally settled upon having with these men, that paragraph indicates the meeting occurred in Mr. Stockton's office when in fact it happened in Mr. Ra'Shadd's own office. In addition, numbered paragraph 2 alleges that the parties addressed Appellant's alleged failure to work scheduled overtime as well as questioning Mr. Stockton's authority. Yet there is no evidence corroborating that this was a topic of conversation that day. If it had been, it is likely that Mr. Stockton would have corrected Mr. Ra'Shadd at that time, which apparently did not happen.

Furthermore, even though Mr. Ra'Shadd testified that there was in fact only one meeting, the Written Reprimand is worded as though the meeting it describes in numbered paragraph 2 were a separate meeting from the one described in numbered paragraphs 3 through 5. Numbered paragraph 3 opens, "Then on 25 April 2002..." (Emphasis added.)

The totality of this evidence tends to suggest that Mr. Ra'Shadd confused Appellant with another worker who had failed to report for overtime duty the previous weekend, both during the meeting and subsequently when he wrote the Written Reprimand. This is further suggested by Mr. Ra'Shadd's statement, "You two again?" when Appellant and Mr. Torres arrived in his office.

Therefore, the letter apparently includes a number of inaccurate assertions concerning events Mr. Ra'Shadd himself had witnessed, even though Mr. Ra'Shadd composed it shortly after those events. The hearing officer thus finds the Written Reprimand itself to be sufficiently afflicted with errors as to be unreliable as a source of historical documentation.

At the focus of the Written Reprimand are Mr. Ra'Shadd's allegations that Appellant refused to stand, "continually" interrupted Mr. Stockton while he was talking, refused to respond at all to Mr. Ra'Shadd's questions, and then refused to respond with anything but "Or what?" However, there are questions as to the accuracy of any of these allegations.

First, Mr. Ra'Shadd testified that Appellant came into the office, plopped down in a chair (while everyone else remained standing) and slid down a few inches. Mr. Ra'Shadd testified that then he asked Appellant to stand, Appellant refused. However, Mr. Ra'Shadd is in the minority in his account of this issue. While Mr. Stockton testified that Appellant refused to stand at the end of the meeting (implying that Appellant had sat down although Mr. Stockton never testified as much), Appellant and Mr. Torres both testified that neither Appellant nor anyone else sat down to begin with in response to direct orders by Mr. Ra'Shadd at the outset of the meeting. Mr. Barbee tipped the scale when he testified that all the men in the room were standing when he walked by Mr. Ra'Shadd's office. This is inconsistent with Mr. Stockton's testimony that Mr. Ra'Shadd ended the meeting after Appellant refused to stand. Finally, the Written Reprimand makes no mention either way of anyone sitting or standing, or anyone refusing to do so.

The hearing officer is further unpersuaded that Appellant "continually" interrupted Mr. Stockton. The collective testimony of Mr. Stockton, Mr. Torres and Appellant suggests that Mr. Torres and Appellant did very little talking. To the man, these witnesses all testified that
Appellant made one or two comments. It is apparent that he and Mr. Torres were provided little or no opportunity to present their version of events, or to explain the reasons they had failed to comply with Mr. Stockton's instructions. When Appellant tried to challenge Mr. Stockton's allegations, Mr. Ra'Shadd prevented him from doing so. The rest of the meeting almost exclusively comprised Mr. Ra'Shadd repeating questions directed at Appellant, not vice versa. Appellant acknowledges interrupting Mr. Stockton once, but argues he was reacting to what he felt was a misleading statement about what had happened. In short, the evidence does not tend to support Mr. Ra'Shadd's version of this issue.

The hearing officer is further somewhat disturbed that all accounts of this meeting relay apparently needless, excessive, repetitious badgering by Mr. Ra'Shadd, resembling treatment by a Drill Sergeant. It appears likely that this may have been Mr. Ra'Shadd's former occupation. If so, he responded to the situation as he has been trained to do. However, this type of treatment is likely neither appropriate nor productive in a civilian work setting. Most employees in this setting have not been trained to respond to such treatment and may be naturally inclined, as was the case here, to feel humiliated, offended, and threatened by it. Such a supervisory style might tend to escalate a personnel problem rather than de-escalating it, particularly where the original problem is abandoned, and the entire focus is shifted to the employee's defensive response. The hearing officer further finds it more likely than not that Mr. Ra'Shadd misinterpreted Appellant's naturally smiling countenance, which aggravated Mr. Ra'Shadd's perception that Appellant's reaction was defiant and insubordinate.

Mr. Ra'Shadd further testified that Appellant challenged his authority by responding "Or what" to several of his repeated questions, "Do you understand?" However, not only is this version once again inconsistent with that of all the other witnesses, it is also a nonsensical response to the question at issue. Mr. Ra'Shadd's version, if true, would clearly represent a non-response, defiant, even affirmatively provocative response to a reasonable question by a supervisor. On the other hand, Appellant admits saying "Or what?" but testified that he said this in response to Mr. Ra'Shadd's repeated statement of "You don't want to try me."11 Appellant testified that at this point Mr. Ra'Shadd was "getting in his face" and perceived that Mr. Ra'Shadd was the one engaging in provocation. The hearing officer finds this version of events more persuasive simply because it makes more sense that Appellant would be responding to "You don't want to try me" with "Or what?" than to "Do you understand?" Furthermore, it is consistent with the written statement in his Grievance as well as the testimony of Mr. Torres. Finally, Mr. Stockton testified that Appellant responded to Mr. Ra'Shadd's question with "I understand."

While responding to a supervisor with confrontational, defiant language even in response to such challenging behavior is not appropriate, such encounters must be carefully considered on a case-by-case basis. The hearing officer is not prepared to always hold employees responsible, no matter how egregiously they are provoked, simply because the other party is a supervisor. Given the excessively confrontational, provocative nature of Mr. Ra'Shadd's approach, his treatment was sufficiently inappropriate to warrant some protest on the Appellant's part. This

11 The Written Reprimand, which has already been determined unreliable as an historical source, is vague and not terribly helpful with respect to this particular allegation.
mitigates Appellant's unfortunate choice of words. In light of this version of events, the hearing officer is not persuaded that Appellant's response rises to an actionable level.

Finally, Mr. Ra'Shadd testified that Appellant failed several times to respond at all to his repeated question, "Do you understand?" Yet Mr. Ra'Shadd is the only one of the four men in the meeting to make this claim. The other three, including Mr. Stockton who was the Agency's witness, testified that when Mr. Ra'Shadd repeatedly asked Appellant "do you understand?" Appellant responded with either "I hear you" or "I understand." The preponderance of evidence suggests that Appellant responded in some way to each of Mr. Ra'Shadd's repeated questions. 12

When presented with this scenario of events, Mr. Barbee testified that it would substantially impact his assessment of the seriousness of Appellant's offense. The hearing officer is inclined to agree. Furthermore, a reasonable person would not likely find the response of "I hear you" so outside the realm of acceptability to be actionable, absent some other evidence tending to suggest deliberately defiant, insubordinate behavior.

Mr. Barbee testified that his decision in denying the Grievance against the Written Reprimand was based in part on Appellant's admitted insubordination in that Appellant himself seemed "proud" of the fact that he failed to respond to Mr. Ra'Shadd during the meeting. However, Mr. Barbee further testified that during this same conversation, Appellant explained that he had consulted with a CSA employee, who had said if Appellant responded at all to Mr. Ra'Shadd, then legally that was enough.

Based on the totality of the evidence, it appears more likely than not to the hearing officer that the following series of misunderstandings occurred. Mr. Ra'Shadd began with the mistaken impression that he had already had words with Appellant earlier that week. Here he was in trouble again, and smiling about it. Mr. Ra'Shadd therefore responded from the outset with anger and impatience. This time he elected to do all the talking and would make clear once and for all that the supervisor is in charge. Mr. Ra'Shadd therefore was not interested in hearing the facts. He demanded complete submission from these employees because he had no more patience with them. When complete submission was not forthcoming from Appellant, Mr. Ra'Shadd represented to Mr. Barbee that Appellant repeatedly refused to respond to his question "do you understand me?" Mr. Ra'Shadd told Mr. Barbee this because Mr. Ra'Shadd considered the response of "I hear you" (rather than "I understand") non-responsive to the question, and therefore was an insufficient gesture of compliance by an employee already in hot water once that week.

Meanwhile, Appellant, not realizing Mr. Ra'Shadd had him confused with someone else, was taken aback with Mr. Ra'Shadd's immediate reaction to him. He felt inappropriately confronted and challenged by Mr. Ra'Shadd's repeated statement, "You do not want to try me young man!" before Appellant even had a chance to present his side of the story. He reacted in turn with indignation and offense at Mr. Ra'Shadd's apparently unprovoked aggressive and demeaning attitude, saying, "Or what?"

12 It is noteworthy that Appellant affirmatively states in his Grievance (see. Exhibit 3, p. 3) that he responded to "each and every" one of Mr. Ra'Shadd's questions, and that the other two men witnessed this and would attest to it. Both witnesses testified as much, including the Agency's witness, Mr. Stockton, the supervisor who initiated this disciplinary action.
Upon receiving notice of the allegations, Appellant consulted with the CSA employee, who apparently expressed a legal opinion to him. When reviewing Appellant's assertions concerning that advice, it is apparent that she was presented with a scenario which presumed some response by Appellant. If she had been opining about no response, then she would not have said "any response" was sufficient.

Then, when Mr. Barbee talked with Appellant, it was with the preconceived notion that Appellant refused to respond at all to Mr. Ra'Shadd. Consequently, he was shocked to observe Appellant's apparently proud demeanor, not recognizing that the advice Appellant had received presumed that Appellant did respond. In light of this set of facts, Mr. Barbee's misinterpretation of Appellant's air of vindication, as being "proud" of his failure to respond, is as understandable as Appellant's indignation. The hearing officer further suspects, once again, that Mr. Barbee's interpretation of Appellant's attitude was colored somewhat by Appellant's naturally smiling demeanor.

The hearing officer concludes that Mr. Ra'Shadd's perceptions of Appellant's behavior during this meeting were influenced by his anger and resulting overreaction. This reaction was aggravated by Mr. Ra'Shadd's mistaken recollection that he had already counseled Appellant earlier that week. There are a number of apparent errors not only in Mr. Ra'Shadd's recollections, but in the Written Reprimand he authored. Testimony from other witnesses to the meeting does not corroborate Mr. Ra'Shadd's allegations of insubordination during the meeting in his office, which allegations form the primary basis of the Written Reprimand. Based on the totality of this evidence, the hearing officer concludes that the Agency has not shown Appellant's behavior during the meeting in Mr. Ra'Shadd's office rose to the level of any CSR violation sufficient to warrant disciplinary action.

4. Severity of the discipline.

The hearing officer must determine 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 applying this test of whether the discipline is within the range of reasonable alternatives, the hearing officer has previously held that discipline may be found excessive where its severity is justified by allegations that are found not to be 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).

A substantial portion of the allegations in the Written Reprimand have not been sustained by a preponderance of the evidence here. First, while the Written Reprimand references violations of Executive Order 112, "Violence in the Workplace," and a related POB administrative regulation, the Agency tendered no evidence to support these citations. Those charges and the corresponding CSR rules have been deemed abandoned.
Second, the Written Reprimand contains inaccurate allegations that Appellant failed to work scheduled overtime. Those allegations have been withdrawn.

Finally, it has not been shown that Appellant refused to stand during the meeting, or that he "continually interrupted" the supervisors. It came out in the hearing that Appellant actually did respond to Mr. Ra'Shadd's repeated questions during the meeting, just not to the liking of Mr. Ra'Shadd. Mr. Barbee testified that assuming this alternate scenario to be accurate, it would significantly impact his assessment of the severity of Appellant's offense.

Mr. Barbee testified that he denied Appellant's Grievance because Appellant's account of events was virtually identical to that of Mr. Ra'Shadd and Mr. Stockton. While this was Mr. Barbee's impression at first blush, after further analysis it has not been shown to be the case. Instead, Mr. Barbee's conclusion to this effect appears to have been based on the same series of misunderstandings which also led Mr. Barbee to conclude that Appellant was "proud" of his own alleged insubordination.

This leaves two remaining offenses justifying the disciplinary action: Appellant's failure to complete his supervisor's instructions by going to the dump instead of getting the computers, and his failure to maintain a working relationship with his supervisor by inappropriately suggesting he "Calm down" and then to "Give me a verbal if you have to."

Mr. Barbee did not opine as to the appropriate level of discipline for these comparatively ancillary offenses in light of all the other charges having been dismissed as abandoned, withdrawn or not unproven. Virtually the entire scenario upon which the disciplinary action was based has changed. The hearing officer therefore must look to the offenses themselves, the context in which they occurred, and the mitigating circumstances for guidance as to a determination of the appropriate severity of discipline.

First, the hearing officer finds Appellant's failure to complete his assigned duties mitigated somewhat by the circumstances. While Appellant did not have the authority to exercise independent judgement in this decision, the hearing officer is persuaded his intentions were good. He reasonably believed it was important to remove the lockers from the area, because the location was set aside for Emergency Preparedness. While Mr. Stockton testified the lockers were not blocking the area, he was still in a meeting when the men finished pulling the debris from the room, and they had already taken it from the location and left when he came back to check on them. This evidence tends to suggest that he did not have the opportunity to observe whether or not the lockers were blocking passageways. Furthermore, it is important to consider that Appellant did not consciously or directly contravene an order (i.e. going to the dump after he was told not to). Taking the lockers to the dump was not totally unrelated to Appellant's assignment, but apparently was intended to further the objective of cleaning the area for preparation as a computer room. Indeed, Mr. Stockton's own assumption of the relatedness of this task is reflected in his comments tending to suggest that it would have been an appropriate task for the following day, and therefore did need to be done at some point. Finally, there is no evidence that a sense of urgency was ever communicated to Appellant. The fact is that the computer room remained nonfunctional at the time of this hearing.
The second remaining offense is Appellant's inappropriate comments to Mr. Stockton upon his confronting Appellant about why the computers weren't up. While these comments were mentioned in the Written Reprimand, they apparently were assumed to be in response to Appellant's having been counseled for his alleged failure to work overtime, not his decision to go to the dump (see, Exhibit 2, p. 2). Once again, while Appellant's comments were inappropriate, in the absence of the more severe allegations of insubordination which originally justified a written reprimand, this is a comparatively minor infraction given very little attention by Mr. Ra'Shadd and Mr. Barbee during their testimony.

When considering the Agency's determination that allegations comparatively much more egregious than those which remain warranted a written reprimand, and that the absence of some of the more serious of those allegations would have a substantial impact on the director's determination of the severity of discipline, the hearing officer concludes that a verbal warning is the most appropriate action for the remaining offenses.

**CONCLUSIONS OF LAW**

1. The Agency has demonstrated by a preponderance of evidence that Appellant engaged in the following violations:
   a) CSR 16-51 A. 4), proscribing failure to maintain satisfactory relationships with co-workers, other City and County employees or the public, with respect to Appellant's response to his supervisor upon returning to the office and telling his supervisor to "Calm down" and to "Give me a verbal warning";
   b) CSR 16-51 A. 10), proscribing failure to comply with the instructions of an authorized supervisor, when Appellant went to the dump without authorization, preventing him from completing other duties assigned by his supervisor.

2. The Agency failed to demonstrate by a preponderance of the evidence that Appellant engaged in the following violations:
   a) CSR 16-50 A. 18), proscribing violation of an executive order, and corresponding Executive Order 112;
   b) CSR 16-51 A. 5), proscribing failure to observe departmental regulations, and the corresponding POB Administrative Regulation titled "Violence in the Workplace" (cite not provided);
   c) CSR 16-51 A. 4), proscribing failure to maintain satisfactory relationships with co-workers, other City and County employees or the public, with respect to events during the meeting in Mr. Ra'Shadd's office only;
   d) Failure to appear for voluntary overtime work and all allegations surrounding this charge.
e) CSR 16-50 A. 20) and CSR 16-51 A. 11) proscribing conduct not specified by other CSR rules. The proven conduct violates the CSR rules specified above in paragraph 1.

3. The Agency has demonstrated just cause for disciplining Appellant by a preponderance of the evidence.

4. The Written Reprimand was issued based substantially on allegations which were subsequently abandoned, withdrawn, or not proven by a preponderance of the evidence. Based on testimony of the reviewer that elements not proven were of substantial importance in the determination of the severity of the discipline, and given the comparatively minor nature of the remaining offenses, the hearing officer concludes that disciplinary action of a written reprimand is no longer 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 discipline Appellant is AFFIRMED and MODIFIED as follows.

The Written Reprimand is to be withdrawn from all files, and replaced with a Verbal Warning. The Verbal Warning shall be a concise, non-repetitious, specific recitation of only the facts related to the allegations proven in this case as set forth above in paragraph 1 of the CONCLUSIONS OF LAW, and shall exclude all allegations set forth in paragraph 2 therein as not proven by the Agency.

This case is hereby DISMISSED.

Dated this 7th day of September, 2002.

Joanna Lee Kaye
Hearing Officer for the Career Service Board