HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 69-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

EDWIN A. KEEGAN, Appellant,

v.

Agency: Department of Aviation, Denver International Airport, and the City and County of Denver, a municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, Edwin A. Keegan shall be referred to as "Appellant." Department of Aviation, Denver International Airport shall be referred to as "DIA." The City and County of Denver shall be referred to as the "City". They will be referred to collectively as the "Agency." The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held February 9 and 10, 2004 before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Diane King, Esq. The Agency was represented by Robert Wolfe, Esq., Assistant City Attorney, with Janell Barrilleaux serving as the advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Agency:

Janell Barrilleaux, Craig Schillinger

The following witnesses were called by and testified on behalf of the Appellant:

Robert Randall. Wiley Pipkin, Kathryn Dolan, Appellant

The following exhibits were offered and admitted into evidence on behalf of the Agency:

Exhibits 5, 6, 10, 11, 18, 20

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

Exhibits K, L, P, Q, S, X, Y

The following exhibits were admitted into evidence by stipulation:

None.

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

None

NATURE OF APPEAL

Appellant is appealing his disciplinary demotion from Senior Engineer to Engineer for alleged violations of CSR §§16-50 A. 1), 3), 7), and 20) and 16-51 A. 2), 4), 6), 10) and 11). He is seeking rescission of the demotion and back pay and all rights and benefits attendant thereto.

ISSUES ON APPEAL

Whether the Hearing Officer has subject matter jurisdiction over this appeal?

Whether Appellant violated CSR §§16-50 A. 1), 3), 7), and 20) and 16-51 A. 2), 4), 6), 10) and 11)?

If Appellant violated any provisions of CSR §§16-50 and 16-51, what is the appropriate sanction?

PRELIMINARY MATTERS

Appellant raised gender and age discrimination claims in his prehearing documents. The Hearing Officer permitted limited discovery on these claims and a claim that the problems between Appellant and Ms. Barrilleaux were due to her communication skills, in so far as they might form the basis of an affirmative defense.

At the commencement of the hearing on the merits, Appellant indicated he was not pursuing the discrimination claims.

FINDINGS OF FACT

1. Appellant is employed by the Department of Aviation, Denver International Airport. He was a Senior Engineer at pay grade 813-E step 15 ($6241) until he was demoted to Engineer at pay grade 811-E step 15 ($5462), effective April 28, 2003. He has a bachelor's degree in petroleum engineering from Texas Tech and a master's degree in environmental engineering from the Colorado School of Mines.

2. During the relevant time period, Appellant was responsible for compliance issues for the Storm Water Permit from the Colorado Department of Public Health and Environment. He was supervised by Janell Barrilleaux, the Director of Environmental Programs at DIA.

3. DIA has three different collections systems: the sanitary system; the storm water system; and the impure storm water system, which collects water from deicing activities which must be discharged into the Metro water system for special treatment. Because there was too much "fugitive" glycol (glycol from deicing not collected by the original system) running into Third

Creek, the West Airfield Diversion System ("WADS") was built. This new system enabled greater diversion into holding ponds awaiting discharge for treatment.

4. A new laboratory facility was built for sampling Pond 009, a 37.5 million gallon pond. All other ponds have to be sampled at the ponds themselves. The new laboratory also contains the control panel for monitoring the valve positions for the system. The lab was staffed by "Rick and Tracy," both persons reporting to Craig Schillinger, the Metro Permit Manager. Julia Barilla, who reported to Appellant and ran the pond samples during the week, worked in the lab building but did not work in the room containing the control panel. Neither Mr. Schillinger nor Appellant work in the lab building.

5. Appellant wrote the sampling protocols. It was nine pages long, with two pages of exhibits. When he showed it to Mr. Schillinger, he was told that the sampling techs wouldn't follow it because it was too long. A revised plan, which is now followed by Ms. Barilla, is 35 pages long.

6. Valves 1101 through 1104 are in a line with each other. Valve 1101 is adjacent to Pond 002. Valves 1103 and 1104 are close to Runway 6.

7. There is a field panel at each valve site. The field panel has a digital read-out where the percentage open/closed can be read. There is a manhole adjacent to the field panel pedestal through which physical entry can be gained into the valve area.

8. The valve system was completed in December 2001. The electronic monitoring system was still under construction in March 2003.

9. Ambient samples were required daily to ensure that the COD (di-oxide) levels were not excessive in the Creek. (COD can be an indicator of glycol or other organic substances contaminating the Creek.) If a qualifying storm occurred, then samples would need to be run at specific points in the ponds.

10. On January 24, 2002, Ms. Barrilleaux sent Appellant a memo clarifying his duties with regard to WADS. Ms. Barrilleaux states that he is responsible for compliance with all aspects of the stormwater sampling and analysis program, including sample collection, recordkeeping, notifications, and reporting to the State. "Rick and Tracy" were made responsible for collecting daily samples on the weekends; they were to report problems with the samples to Appellant and he was to be available by pager each weekend. If Appellant had an emergency and could not cover the sampling, he was to notify Ms. Barrilleaux, and then Nikki Mather and then to Mr. Schillinger, in that order, to assure coverage. (Exhibit 5) Ms. Barrilleaux sent another memorandum setting out Appellant's roles and responsibilities on January 28, 2002, which Appellant signed off on the next day. (Exhibit 6)

11. Mr. Schillinger was not aware of the January 24, 2002, memo, and the assignment of duties to his staff. He testified that Rick and Tracy would do the samples if Appellant asked him and then he relayed the request to them and they had time to do them.

12. Appellant received a Meets Expectations Performance Enhancement Program Report (PEPR) on January 9, 2003.

13. Prior to February 14, 2003, Appellant had expressed his concerns about high COD levels to Ms. Barrilleaux. They theorized that the problem might be due to the drought or

might be due to problem within the WADS system. They initially concluded it was due to the drought.

14. On Friday, February 14, 2003, at around noon, Appellant paged Ms. Barrilleaux. He told her that he was out in the field and that he popped the manhole cover and heard trickling. Ms. Barrilleaux expressed concern that Appellant was out in the field on a Friday afternoon before a three-day weekend when there might not be resources around to fix the problem. Appellant indicated that he was concerned because he heard the trickling noise, which might indicate a leak from the pond into the Creek.

15. Appellant and Ms. Barrilleaux agreed that sampling should be done over the weekend. When Ms. Barrilleaux told Appellant that he should do it, Appellant then said it could wait until Tuesday. Ms. Barrilleaux then told Appellant that if the State told them that a sample was needed, he would have to do it. She also asked him if the National Regulatory Commission needed to be contacted also. Appellant indicated he did not know, but that he would check it out.

16. Appellant contacted Kathryn Dolan at the State Department of Health and Environmental Protection. Ms. Dolan told Appellant there was no need for an immediate sample if the source of the trickling sound was not known.

17. Ms. Barrilleaux testified that she was upset with Appellant because he went out to the site without all the proper documentation (redline drawings) and did not know whether sampling was required under the SAP or if the NRC needed to be contacted. She felt Appellant needed to know the reporting requirements.

18. Appellant kept a set of the redline drawings in his office back at the Terminal Building. He attempted to locate another set near the site of the trickling. He checked with the contractors working on Runway 6. They did not have them. There was not a set at the lab, either.

19. When Ms. Barrilleaux and Appellant spoke again on February 18, he indicated that what he suspected on Friday had been wrong and that the trickling he heard was discharge from Runway 6, which was not operational, and, therefore, did not need to be reported to the State. She testified that Appellant should have checked out everything on Friday so that he did not report something that was not an actual problem. Ms. Barrilleaux was upset about this because reporting something unnecessarily might lead to increased monitoring by the State and Federal government in the future.

20. Ms. Dolan testified that she has worked with Appellant four to five years. She finds him to be extremely knowledgeable about the SAP and the requirements under the permit. She expects him to call her when he has questions about interpreting the permit. She found his work to be conscientious. He communicated with her in an honest fashion about the issues concerning the permit. She stated that his conduct with regard to the February 14 incident was consistent with his history of reporting matters when he became aware of a potential issue. She stated she was comfortable with the process.

21. Neither the State nor the federal government has fined DIA for the February 14 "incident."

22. The COD levels remained problematic. While Appellant and Ms. Barrilleaux still

continued to think it might be due to the drought, Appellant decided to continue his investigation into other possible causes.

23. In March, Appellant was continuing to investigate the situation. On March 5, 2003, Appellant was at the lab. He noticed that the main control panel (CP-1) screen for Valve 1101 indicated it was in a closed position although the valve was set for "open." In addition, valves 1103 and 1004 were in the "alarm" position, which they had been since the field panels for the valves had been moved under an FAA directive. Rick and Tracy assumed that those valves were open and had not reported the alarm. Appellant was concerned that the COD problem was caused by the one closed valve. However, there had been communication problems between the valves and the CP-1, so it was assumed by the field personnel that the main control panel was inaccurately depicting the valve position for 1101.

24. Appellant believed that Mr. Schillinger's staff regularly checked the control panel monitors because they were in their area of the lab. He believed they had been instructed by Mr. Schillinger to make sure that Valves 1101 through 1104 were functioning properly and that they would report any problems to Appellant so he could correct them. Therefore, he did not have Ms. Barilla, who was worked in the lab building, although not in the room where the panels were located, check them regularly. Mr. Schillinger testified that he and his staff were not responsible for checking the monitors on a daily basis during the relevant time and did not do so.

25. Wally Pipkin, Civil Technology, Inc., is the project manager for the WADS system under a contract with the City, Mr. Pipkin stated that the valve construction was substantially completed in December 2002. The work wasn't fully completed until June 2003. During the relevant period, Mr. Pipkin was responsible for administering the warranty part of the contract when things failed to work properly and for the change order moving Valves 1103 and 1104. He testified that while the work was in progress, the contractor was responsible for monitoring the valve positions, but that after substantial completion in December, the monitoring was turned over to DIA.

26. Appellant contacted Mr. Pipkin about the valves possibly being closed prior to March 5. Mr. Pipkin told him the valves had been opened manually in October for testing and that he didn't think they were closed. Mr. Pipkin assured him it was merely a communication problem between the field panels and CP-1.

27. Appellant, Mr. Pipkin and others were in the control room working on a problem with the "bubbler" on March 5. The screens for the valves were brought up. Appellant asked why the screen showed Valve 1101 was fully closed. Appellant indicated that he was concerned that the valves were in the wrong position and that was the cause of the elevated COD in the Creek. Mr. Pipkin, in his own words, "blew him off" about going over to the field panels to check them out because the contracting crew had left for the day and both he and the only other inspector on site were doing other things.

28. In the morning of March 6, Appellant called Mr. Pipkin again to see if he would check the situation out. Mr. Pipkin sent Osama Abbas to the site. Mr. Abbas left a message for Mr. Pipkin that the field panel for Valve 1101 was not working, so he could not tell the position. The field panel for 1102 indicated it was fully open. The field panels for 1103 and 1104 were not checked because they were known not to be operational. Mr. Pipkin explained that Mr. Abbas, the only qualified inspector for entering the manholes where the valves were located, had already left for the day by the time Mr. Pipkin got the message as Mr. Abbas worked an

early shift.

29. Appellant called Ms. Barrilleux and told her that no one was available to go down into the manhole. She, in turn, spoke with Mr. Pipkin and convinced him that someone had to go down into the manholes that day.

30. Ms. Barrilleux testified that she believed that Appellant could have gone into the valves himself on March 5 or 6 to check that they were open. She stated that on March 12, she was able to read the configuration for Valve 1101 from the surface.

31. Mr. Pipkin disagreed with this conclusion. He testified that the only way to check the valves is to go into them. He stated that someone should not just climb into the manholes for the valves to check them out. To do so violates OSHA standards. In order to go into the valves, one must have appropriate equipment and safety gear and another person must be at ground level to ensure the safety of the person descending into the valve. However, Mr. Pipkin agreed to go down into the manholes without the appropriate safety equipment on site because Ms. Barrilleaux was insistent about the need to fix it immediately.

32. When Mr. Pipkin went to examine Valve 1101, he discovered that someone had taken the activator parts out of the valve, apparently to troubleshoot other actuators, and had cut the wires. Someone had later tried to turn the wiring on, thereby "frying" them. Mr. Pipkin testified that this information was discovered sometime after March 6. He also stated that there had been a long history of interface problems, dating back several months prior to March 2003, between Valve 1001 its field panel and panels back in the lab.

33. On March 6, Valve 1101 was only operational manually. Valve 1102 was fully functional.

34. Mr. Pipkin testified that the operators (Tracy and Rick) should have noticed that the light was flashing for Valve 1101 sometime in between January and March.

35. Because Valves 1103 and 1104 were still off-line on March 6, and it was already getting dark, Mr. Pipkin decided not to violate any more OSHA regulations and descend into these two manholes, both of which he considered much riskier in configuration than Valves 1101 and 1102. He merely opened the covers and noted that they were at least at 50% open. The next day, Mr. Abbas went into and checked the valves. He confirmed they were at 90%.

36. Mr. Pipkin opined that he was surprised that the issue of the valves had turned into a "big deal" and that Appellant was being blamed for it.

37. On March 10, Ms. Barrilleaux talked to Mr. Schillinger about the events on March 5 and 6. She went into the lab and noticed that the panels were not working again. On March 12, Keith Pass, Mr. Schillinger and she went out to the field site and she looked into the manholes to read the valves. She discovered they were open. Mr. Abbas, who happened to be passing by at the time, said that the configuration of the field panel on Valve 1101 was still not working.

38. On March 10, Ms. Barrilleaux saw a draft of Appellant's report to the Colorado Department of Public Health and Environment. (Exhibit 20) She found the document to be unclear, confusing and inaccurate. She made corrections, which Appellant later incorporated into the final draft.

39. Appellant was sent notice of contemplation of discipline and placed on investigatory leave on March 11, 2003. (Exhibit 16)

40. A predisciplinary meeting was held on April 15, 2003. Appellant was represented at the meeting by Laura Smith, Esq. Dan G. Brown, and Director of Maintenance for DIA conducted the meeting.

41. Mr. Brown issued a notice of disciplinary demotion on April 23, 2003. (Exhibit 18)

42. Appellant's appeal was filed in a timely manner.

43. Robert Randall is Appellant's current supervisor. Appellant works as an engineer and project manager in life-safety and security work. He testified that Appellant is an exceptional employee. He performs a difficult job. He has a sense of imitative, integrity and work performance Mr. Randall has not seen in others. He stated that Appellant is more than willing to volunteer for extra jobs to make sure that the work gets done. He is a collaborative worker and gets the maximum from group efforts. He is a fastidious worker. He finds Appellant's written work to be effective and to the point.

44. Appellant has no prior disciplinary history.

45. Appellant received "Exceeds Expectations" Performance Enhancement Program Reports in December 1997, 1998 and 1999. He received a "Meets Expectations" in January 2001, a "Below Expectations" in February 2002 and "Meets Expectations" again in April 2002 and January 2003.

DISCUSSION AND CONCLUSIONS OF LAW

Analysis

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined by the Courts to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

Because this is an appeal of a disciplinary action (demotion), DIA has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances.

Appellant has been charged with violating several provisions of CSR Rule 16: 16-50-A. 1) (gross negligence or willful neglect of duty); 16-50 A. 3) (dishonesty, including lying to superiors or falsifying records with respect to official duties); 16-50 A. 7) (refusing to comply with orders of an authorized supervisor or refusing to do assigned work which the employee is capable); 16-51 A. 2) (failure to meet established standards of performance including either qualitative or quantitative standards, to wit: the requirements of the Storm Water Permit Compliance section of Appellant's PEPR dated January 9, 2003); 16-51 A. 4) (failure to maintain a satisfactory working relationship with coworkers); 16-51 A. 6) (carelessness in performance of duties and responsibilities, 16-51 A. 10) (failure to comply with the instructions of an authorized supervisor); and the two provisions for conduct specifically identified, 16-50 A. 20) and 16-51 A. 11).

Neither "gross negligence" nor willful neglect of duty" is defined in the CSR. The Hearing

Officer must look elsewhere for their definitions. They are terms well-defined in the law. Negligence does not require intent. It is commonly defined as the failure to use reasonable care or a failure to act in a reasonably prudent manner under the circumstances. *Lavine v. Clear Creek Skiing Corp.*, 557 F.2d730 (10th Cir. 1977); *Metropolitan Gas Repair Service, Inc. v. Kulik*, 621 P.2d 313 (Colo. 1980); *Rice v. Eriksen*, 476 P.2d 579 (Colo. App. 1970). Gross negligence involves a higher form of culpability than mere negligence. "Gross" in this context means flagrant or beyond all allowance, *Lee v. State Board of Dental Examiners*, 654 P.2d 839 (Colo. 1982), or showing an utter lack of responsibility. *People v. Blewitt*, 192 Colo. 483, 563 P.2d 1 (1977). Willful neglect of duty transcends any form of negligence and involves conscious or deliberate acts. *See Turner v. Lyon*, 189 Colo. 234, 539 P.2d 125 (1976); *Drake v. Albeke*, 188 Colo. 14, 532 P.2d 225 (1975).

"Gross" has been defined as "immediately obvious" or "glaringly noticeable usually because of inexcusable badness or objectionableness."[1] *Black's* defines it as"

> [G]reat; culpable. General absolute; not to be excused; flagrant; shameful; as a gross dereliction of duty; a gross injustice; gross carelessness.[2]

"Gross negligence" is defined by *Black's* as:

> The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. "Gross negligence is substantially higher in magnitude than simple inadvertence, but falls short of intentional wrong." (Cite omitted)[3]

In other words, "gross negligence" does not require that the Department show that Appellant intentionally acted in a wrongful manner, just that he performed his work in a manner that was more than careless or inadvertent and that the failure to perform the work was obviously unreasonable or inappropriate.

On the other hand, "willful neglect" implies that the wrongful conduct was intentional or conscious, not merely negligent. "Willful" is generally defined as "obstinately and often perversely self-willed; done deliberately."[4]

Black's defines "willful" as:

> Proceeding from a conscious motion of the will; voluntary. (Cite omitted)...Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary...A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. (Cite omitted.)[5]

The Hearing Officer has considered the testimony offered during the hearing. Based upon all the evidence, the Hearing Officer concludes that the Department's evidence was deficient to establish that Appellant's work performance was either grossly negligent or willful neglect nor was

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[1] *Miriam-Webster's Collegiate Dictionary*, 10th Ed., 1993
[2] *Black's Law Dictionary*, 4th Ed., 1951
[3] *ibid.*
[4] *Miriam-Webster's, op cit.*
[5] *Black's, op cit.*

he even merely careless.

It is clear to the Hearing Officer that the problems Ms. Barrilleaux had with Appellant cannot be laid solely at his feet. Ms. Barrilleaux, Mr. Schillinger and even Mr. Pipkin bear some of the responsibility for these problems.

Ms. Barrilleaux and Appellant have different communication styles. This has lead to a myriad of problems between them. Appellant found Ms. Barrilleaux's instructions to be confusing and somewhat contradictory. The Hearing Officer would have to agree. Ms. Barrilleaux's explanations as to why she was concerned about the February 14 incident, as it related to the NRC, were confusing. It seemed she was concerned because Appellant made a "false" notification of a problem that might result some negative mark against DIA at some time in the future. But it was clear to the Hearing Officer that Ms. Barrilleaux would have been just as dissatisfied with Appellant had he not made the call to the NRC.

Ms. Barrilleaux spoke a great deal about Appellant's calls to Kathryn Dolan at the Colorado Department of Public Health and Environment. Ms. Barrilleaux found that it was problematic that Appellant did not know the details of the WADS permit by heart. On the other had, Ms. Dolan found no such problem and she found him to be conscientious in ensuring compliance with the permit. She stated that it is a complicated document and that it was appropriate for Appellant to check with her when he was unclear about the permit. Ms. Dolan is the expert on the permit issue. The Hearing Officer must agree that Appellant's knowledge of the permit on February 14-16 was appropriate and not grossly negligent or even careless.

Ms. Barrilleaux complained that Appellant should not have checked the valves late in the day of February 14. The Hearing Officer was never given a clear explanation why stopping by late in the day, even if it was before a three-day weekend, was a problem. Hypothetically, if Appellant was not interested in discovering why the COD levels were so high, and the pond was actually emptying into the Creek (and not the dripping from the construction of the runway that it turned out to be), and the problem was not discovered until the following Tuesday, would Ms. Barrilleaux have been less upset then? Her other explanation, that Appellant did not have the redline drawings with him when he made his impromptu inspection, is not reasonable, either.

Another example put forward by Ms. Barrilleaux of Appellant's problematic work was his draft of the March 10 letter to the Colorado Department of Public Health and Environment. (Exhibit 20) She stated that the draft was confusing and inaccurate. The Hearing Officer looked at the corrections made by Ms. Barrilleaux and found the majority of them to be stylistic, not substantive. This conclusion is supported by Mr. Randall's statement that he found Appellant's writing to be clear and concise. In any case, the fact that Appellant's writing style differs from Ms. Barrilleaux's does not make his work product grossly negligent, or even careless.

A major source of the problems that make up the basis of this disciplinary matter is the failure of Mr. Schillinger and his staff to provide Appellant with the information he needed to perform his job. Ms. Barrilleaux did not make Mr. Schillinger aware of her instructions to Appellant that Mr. Schillinger's staff would be performing certain functions for him. Mr. Schillinger and his staff, it was clear at the hearing, treated the tasks they were assigned by Appellant, to be, in Mr. Schillinger's own words, "requests" that could be done at his staffs' option. As a result, Mr. Schillinger and his staff must bear some of the blame for not notifying anyone of the flashing panel for Valves 1101, 1103 and 1104. Appellant relied on them to pass along the information. He cannot be blamed for their failure to perform their duties. And there is no reason to doubt Appellant's claim that, had he been told Rick and Tracy were not monitoring CP-1, he would have

asked Julia Barilla to do it instead.

Wiley Pipkin's testimony about the condition of the valves in March was most instructive. He was the only witness who had nothing to gain by his testimony; his credibility is not at issue.

Mr. Pipkin was the person who had the most information about the valves, their configurations, and problems encountered during the construction of the pond and runway 6. He testified that he initially blew Appellant off on March 5 when he was asked about the flashing panels in the lab. He talked about the history of interface problems between Valve 1101 and the panels as the basis for his lack of concern. He also explained that, while Ms. Barrilleaux faulted Appellant for not being able to get someone to examine the valves immediately because to her it was early enough in the day, that. In fact, Mr. Abbas, the only qualified inspector working the site at the time, worked the early shift and had already left for the day. He also stated that he only went ahead and entered the manhole for Valve 1101, without safety equipment and clearly against OSHA regulations, after Ms. Barrilleaux talked to him very strongly about the need to do it immediately.

The Hearing Officer also believed Mr. Pipkin when he stated that the only way to clearly read any of the valves is to go into the manholes, thereby directly contradicting Ms. Barrilleaux's contention that she could read the valves from field level.

Looking upon the credible evidence as a whole, the Hearing Officer concludes that the Agency has failed to establish a violation of CSR §16-51 A. 1) by a preponderance of the evidence.

Appellant was also charged with violating CSR §16-51 A. 6), carelessness in performance of duties and responsibilities. This provision differs from CSR §16-50 A. 1) in that this provision does not require that the misconduct rise to the level of either grossness or willfulness. As stated above, the Agency did not provide sufficient credible evidence that Appellant was performing his duties in a careless manner on February 14 through 16 or March 5, 6, or 10. This charge is dismissed.

There was no evidence that Appellant engaged in any acts of dishonesty with regard to his performance of his duties, which the Agency argued was based upon his filing a "false" report with the NRC, the information in the draft of the March 10 letter, his statement to Ms. Barrilleaux that no one was around to go into the manhole on March 6, etc. The Hearing Officer finds that none of these allegations support a finding of dishonesty as contemplated by the CSR. The violation of CSR §16-50 A. 3) is dismissed.

The basis of the charges that Appellant refused to comply with the order of an authorized supervisor (CSR §16-50 A. 7)) and failure to comply with the instructions of an authorized supervisor (CSR §16-51 A. 10) rest in Appellant's alleged refusal to stay late or to come in over the three-day weekend (February 14-17) to run samples. These allegations fail. Ms. Barrilleaux agreed with Appellant that his search for the trickling sound could wait until the following Tuesday and that the weekend samples could be taken by Mr. Schillinger's staff. The fact that Appellant asked Ms. Barrilleaux to reconsider her initial instructions does not substantiate these charges. They would have been made out if and only if Ms. Barrilleaux had continued to insist Appellant stay and locate the source of the trickling sound and come in to take the samples and Appellant then refused to do so. These allegations are dismissed.

Appellant is also charged with failing to meet the established performance standards set out in the Stormwater Permit as a violation of CSR §16-51 A. 2). Whatever Ms. Barrilleaux's

concerns were about Appellant's knowledge of the permit were rebutted by the testimony of Kathryn Dolan, the State official ultimately responsible for determining whether DIA was in compliance with the permit. Ms. Dolan provided very informative testimony about Appellant's knowledge and expertise with the requirements of the permit. She stated that she was very satisfied with the way he kept her informed and would seek her advice when an interpretation was needed. Therefore, this allegation is also dismissed.

The last substantive allegation is the failure to maintain satisfactory working relationships with coworkers. CSR §16-51 A. 4). While Ms. Barrilleaux and Appellant might not have had the best working relationship between supervisor and subordinate, there is no evidence that Appellant did not have a "satisfactory" relationship with his co-workers. This allegation is also dismissed.

The violation under CSR §§16-50 A. 20) and 16-51 A. 11) are dismissed. The Department attempted to tie Appellant's alleged misconduct to the more specific provisions of CSR §§16-50 A. and 16-51 A. The "catchall" provisions cannot be used as a substitute for the failure to produce proof of misconduct by a preponderance of the evidence for the other allegations. These two allegations are also dismissed.

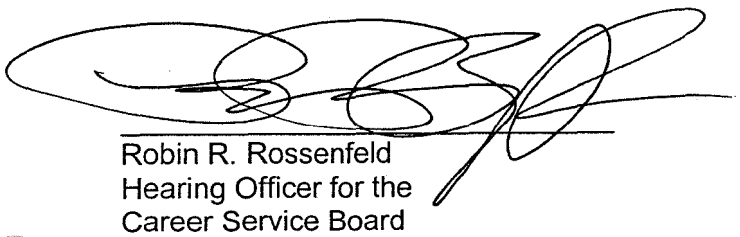
The last question for the Hearing Officer is the appropriate level of discipline.

Because the Hearing Officer has dismissed all the allegations, the disciplinary demotion must be reversed. However, even if the Hearing Officer had found that the Department had established any of the substantive violations, she would also have found the imposition of a disciplinary demotion to have been arbitrary and capricious under the circumstances of this case. A disciplinary demotion is one of the harshest disciplines available since it affects an employee's entire future with the City. It should not be imposed when the employee is not the only person responsible for the arising conditions. In this case, the "problems" that arose were due to the conduct of several people, including other City employees, contractors and, apparently employees of those contractors. Demoting one employee because of the failure of others is unreasonable *per se* and should not be used when an employee has the employment history Appellant has.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer GRANTS the appeal in its entirety. The Agency is ORDERED to reinstate Appellant into his former position of Senior Engineer, along with back pay and benefits. The disciplinary demotion is ORDERED removed form Appellant's personnel files at the Department and the CSA.

Dated this 31st day of March 2004.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board