

**DECISION AND ORDER ON REMAND**

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IN THE MATTER OF THE APPEAL OF:

**DANELLE CHAVEZ**, Appellant,

vs.

**DEPARTMENT OF SAFETY, DENVER SHERIFF DEPARTMENT**, and the City and County of Denver, a municipal corporation, Agency.

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The hearing on remand in this appeal was held on December 21, 2009 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing, and was represented by Nikea Bland, Esq. The Agency was represented by Assistant City Attorney Joseph Rivera, and Sgt. Chris Brown served as its advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law on the remanded issue and enters the following order:

**I. PROCEDURAL BACKGROUND**

On Nov. 12, 2008, Appellant Danelle Chavez was suspended for five days from her position as Deputy Sheriff at the Denver Sheriff Department within the City and County of Denver's Department of Safety ("Agency" or "Department") based on charges of driving while ability impaired by alcohol (DWAI) and careless driving as a result of an off-duty incident on June 6, 2007. Appellant filed this appeal on Nov. 26, 2008, challenging that suspension under Career Service Rule (CSR) § 19-10 A.1.b. After the Jan. 27, 2009 hearing, the Hearing Officer issued a decision which found the following:

1. The Agency had not proven a violation of § 16-60 P, which permits discipline for a criminal charge or conviction, based on the lack of evidence that it followed the guidelines of §16-61 before proceeding with pre-disciplinary procedures under that rule,
2. The Agency did not establish a violation of the first clause of § 16-60 Z, conduct prejudicial to the Agency, based on the lack of evidence that Appellant's actions hindered the Agency's ability to perform its mission,
3. The Agency did not establish a violation of the second clause of § 16-60 Z, conduct bringing disrepute on or compromising the integrity of the City, because the

evidence did not support a finding that Appellant's actions caused actual injury to the City's reputation or integrity, and

4. The Agency proved that Appellant violated § 16-60 L, failure to observe departmental regulations; specifically, D.R. 300.11, which prohibits deputy sheriffs from becoming "involved in activities involving violations of the law", based on evidence that Appellant caused an accident while driving under the influence of alcohol. It was found that those actions established the factual basis for violation of two laws: careless driving and DWAI. The five-day suspension was affirmed on the basis of that violation. [Exh. 10.]

Appellant filed a petition for review of that decision with the Career Service Board under CSR § 19-60. The Board reversed the decision of the hearing officer, holding that an agency must comply with § 16-61 before imposing discipline for law violations under a departmental rule, based on its determination that "the requirements of the career service rules must supersede departmental rules on the same subject matter". The Board remanded the matter for further findings and orders on "the requirements of CSR 16-61 as a prerequisite to determining whether Appellant's conduct violated CSR 16-60 L." In re Chavez, CSA 129-08 (CSB 7/29/09).

The Agency's Exhibits 12 and 13 were admitted without objection at the hearing after remand. Appellant offered no additional exhibits.

## **II. ISSUES**

The issues in this remanded appeal are as follows:

- 1) Did the Agency comply with the requirements of CSR §16-61 before imposing discipline under § 16-60 L?
- 2) If so, did the Agency prove that Appellant's conduct justified discipline under § 16-60 L, and
- 3) Did the Agency establish that a five-day suspension was within the range of penalties that could be imposed on Appellant by a reasonable administrator for the violation proven under the rule?

## **III. FINDINGS OF FACT**

At the hearing on remand, Division Chief Gary Wilson described the departmental procedure for review of internal investigations. After the Internal Affairs Bureau (IAB) conducts an investigation, a division chief must review the file to make one of four recommendations: 1) the asserted violation should be sustained, 2) the violation should not be sustained, 3) the events as alleged did not occur, or 4) the officer should be exonerated based on justifiable reasons for the actions. A finding of sustained must be supported by a preponderance of the evidence. If a division chief

recommends a finding of sustained, the case is referred back to the IAB to set up pre-disciplinary proceedings. [Exh. 12.]

In May 2008, Chief Wilson conducted the review of the investigation into Appellant's law violations, as required by IAB procedure. He read the entire IAB file, including reports, witness interviews, and the information supporting the DWAI and careless driving charges. Chief Wilson testified that he first determined there was a preponderance of evidence that Appellant did engage in the conduct forming the factual basis of the crimes charged; i.e., that she drove a vehicle after drinking, and carelessly caused damage to another car as a result. He then considered all the standards included under § 16-61 A. as a part of his analysis that the law violation should be sustained.

Chief Wilson was familiar with the duties of Appellant's position as a deputy assigned to the Court Services Division, where she transports inmates to and from courts. Chief Wilson was also aware that Appellant had been acquitted of the DWAI charge, had maintained her driving privileges, and that she continued to perform all duties of her position. Chief Wilson had no knowledge of any complaints made by the public based on this incident.

In considering the impact of the charges on Appellant's ability to perform her job, Chief Wilson testified that the biggest issue was her assignment to drive a city vehicle responsible for transportation of inmates. He found that the conduct was unbecoming of an officer whose job it is "to uphold the law, not violate it." He concluded that the charges against an officer who drives a city vehicle could cause public concern about the safety of the community and security of the jail. He also believed her judgment and character could be questioned by the community based on her violation of the law, in light of her status as an officer sworn to uphold the law. Chief Wilson anticipated that future discipline based on the charges could be raised on cross-examination to attack her credibility if Appellant testified as an officer in criminal trials.

In conformance with IAB procedure, Chief Wilson returned the file to IAB with a short memo stating that he recommended a finding of sustained as to the asserted law violation, DWAI. The memo was not presented as evidence in this appeal, but Chief Wilson testified that his consideration of the factors listed in § 16-61 A. was a part of his conclusion that the allegation should be sustained.

Deputy Manager of Safety Mary Malatesta also testified at the remand hearing. Ms. Malatesta recalled that Chief Wilson's memo recommending that the law violation be sustained did not contain his conclusions with regard to the factors listed in § 16-61. She was aware that the IAB procedure required screening a law violation case by a Division Chief to determine the seriousness of the violation. If a charge or conviction had only a de minimus impact on the city - for example, a dog at large complaint - the division chief was empowered to close the matter without further proceedings. IAB also is charged with evaluating the nature of the conduct, and reviewing the employee's personnel history, before going forward. On the basis of that requirement, Ms.

Malatesta assumed that Chief Wilson or others in the chain of command performed an analysis “very similar to a 16-61 analysis”, although she did not speak with Chief Wilson about this case.

In considering the impact of the conduct on Appellant’s ability to do her job under § 16-61, Ms. Malatesta concluded that Appellant’s admitted actions of driving after consuming alcohol would temporarily impact the Agency’s perception of her judgment to perform her duties as an officer sworn to uphold the law. Additionally, Ms. Malatesta considered that the charges would appear on reports generated by the city’s Office of Independent Monitor, which has oversight responsibilities over the Department of Safety.

Ms. Malatesta also found that Appellant violated § 16-60 P and Z in that she was charged with a crime, and the conduct was determined to be prejudicial to the Agency and reputation of the city. The Career Service Hearing Office reversed these findings, and that part of its decision was not challenged by cross-petition under § 19-63. After a review of the entire record, Ms. Malatesta imposed a five-day suspension based on her findings that Appellant violated CSR § 16-60 L, P and Z. [Exh. 4.]

Career Service Personnel Director Jeff Dolan testified that he interprets the Career Service Rules as a part of his duties in managing the city’s career service personnel system. CSR § 16-61 was passed in Feb. 2006, before Mr. Dolan was hired. Mr. Dolan believes that ¶ D conflicts with the more general language “before imposing discipline” in ¶¶ A and B. His own conclusion is that applying the § 16-61 guidelines before the pre-disciplinary meeting might lead a manager to “come to a pre-determined decision” prior to listening to the employee’s response at the meeting. In addition, he believes it makes more business sense to apply § 16-61 after the meeting because it may otherwise delay placing an employee on investigatory leave, a procedure Mr. Dolan considers part of the pre-disciplinary process. Mr. Dolan did not communicate this interpretation to the Agency, and he was not aware of this issue until after this appeal was filed. [Testimony of Mr. Dolan.]

#### **IV. ANALYSIS**

The Agency bears the burden to prove that the imposition of discipline was appropriate under the Career Service Rules, and that the level imposed was within the range that could be issued by a reasonable administrator. Appeals from employment actions must be decided based on a de novo determination of the facts. Turner v. Rossmiller, 532 P.2d 751 (Colo.App. 1975).

The Career Service Board has determined that the Agency’s Regulation 300.11 and CSR § 16-60 P. address the same subject matter, and therefore both must comply with the procedural safeguards in CSR § 16-61. The issue on remand is whether the Agency followed the guidelines of § 16-61 before imposing discipline under the regulation.

Chief Wilson testified that he considered the impact of the charges on Appellant's ability to perform her job as a part of his recommendation to sustain the violation. The main factor supporting his conclusion was that her assignment requires her to drive a city vehicle, and members of the public who learn of her discipline may therefore be concerned about safety issues. Next, he found that the community could question Appellant's judgment and character as a law enforcement officer based on her commission of a law violation. In addition, Chief Wilson apprehended that defense attorneys may impeach her credibility with evidence of her conviction.

Deputy Manager of Safety Malatesta conducted her own analysis of the impact of the conduct on Appellant's job performance as a part of her disciplinary decision. She concluded that Appellant's actions would have a negative, though perhaps temporary, effect on the Department's perception of her, and that the incident would be included as a statistic in the Independent Monitor's public report on the Department of Safety.

The Agency argues that it complied with § 16-61 because both Chief Wilson and Ms. Malatesta followed the guidelines contained in the rule. It contends that the Hearing Office should defer to the Personnel Director's interpretation that the § 16-61 guidelines should be applied just before issuance of the disciplinary letter, citing In re Vasquez, CSA 08-09 (5/20/09).

Both Chief Wilson and Deputy Manager of Safety Malatesta conceded that they conducted their analysis as a part of a separate procedure: Chief Wilson assessed the impact of the charge during his review of the IAB investigation, and Ms. Malatesta applied § 16-61 as a part of her disciplinary decision. Both considered the factors set forth in ¶ A to support their conclusion that her actions could have a negative effect on the public's perception of her performance.

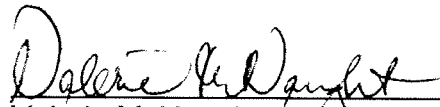
However, there was no evidence that either Chief Wilson or Ms. Malatesta considered the ultimate issues contained in § 16-61 C: whether the conviction or facts "renders the employee unfit to perform their job, brings disrepute upon the City or compromises the integrity of the City." The factors in ¶ A and B are the framework for the conclusions to be drawn in ¶ C, which require an agency to consider if the conviction or facts has an actual effect on the employee's fitness to perform or the city's reputation or integrity. If that analysis is not done, the purpose of the rule, to require that consideration before the pre-disciplinary process, is defeated.

I conclude that the Agency did not "follow the guidelines contained in subsection 16-61 . . . prior to imposing discipline" under the disciplinary rule, as required by the Board's decision. § 16-60 P. It follows that the Agency failed to comply with the requirements for discipline under § 16-60 L, and that the discipline imposed based on the Agency's finding of that violation must be reversed.

**V. ORDER**

Based on the foregoing findings of fact and conclusions of law, the Agency action dated Nov. 12, 2008 is REVERSED.

DATED this 2nd day of February, 2010.

  
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Valerie McNaughton  
Career Service Hearing Officer

**NOTICE OF RIGHT TO FILE PETITION FOR REVIEW**

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

**All petitions for review must be filed with the following:**

Career Service Board  
c/o CSA Personnel Director's Office  
201 W. Colfax Avenue, Dept. 412, 4<sup>th</sup> Floor  
Denver, CO 80202  
FAX: 720-913-5720  
EMAIL: [Leon.Duran@denvergov.org](mailto:Leon.Duran@denvergov.org)

AND

Career Service Hearing Office  
201 W. Colfax, 1<sup>st</sup> Floor  
Denver, CO 80202  
FAX: 720-913-5995  
EMAIL: [CSAHearings@denvergov.org](mailto:CSAHearings@denvergov.org)

AND

Opposing parties or their representatives, if any.