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

Appeal No. 180-03

DECISION

IN THE MATTER OF THE APPEAL OF:

EDWARD J. MAES, Appellant,

Agency: Department of Safety, Denver Sheriff's Department, and the City and County of Denver, a municipal corporation.

The hearing in this appeal was commenced on June 9, 2004 before Hearing Officer Valerie McNaughton, and continued with daily testimony until June 14, 2004. The parties submitted simultaneous written closing arguments on July 14, 2004. Appellant was present throughout the hearing and was represented by Reid J. Elkus, Esq. The Agency was represented by Assistant City Attorney Robert D. Nespor. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and order:

FINDINGS AND ANALYSIS

This is an appeal of the termination of Appellant Edward J. Maes from the position of Captain with the Denver Sheriff's Department on November 10, 2003 for violation of Career Service Authority (CSA) rules governing discipline and work hours, departmental rules, and the City Charter and state statutes governing ethical conduct. The timely appeal asserts that his termination violated CSA disciplinary rules and discriminated against him based upon political affiliation.

I. NATURE OF DISCIPLINE

Appellant was terminated based upon the appointing authority's conclusion that he had committed the following misconduct:

1. Fraternization, by means of inappropriate contact with A.B.[1], the sister of two "known members of the Mexican Mafia and convicted felons" on

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1. A.B. will be used in this decision in place of the name of the first individual with whom Appellant was accused of fraternizing in 2001 and 2003.

December 20 and 21, 2001 and June 8, 2003, and associating in May 2003 with C.D.[2], a woman who was convicted of a criminal offence,

2. Failing to secure the safekeeping of the Denver Police Department Gang Database in August 2002,

3. Inappropriately seeking information from the Career Service Authority (CSA) in August 2003,

4. Falsification of leave documents and taking unauthorized leave on May 29 and 30, 2003,

5. Failing to notify Career Service Authority of his new address in June 2003,

6. Working off-duty in uniform without written permission on June 8, 2003 in Denver, and working off-duty outside the city in uniform without permission on June 27, 2003.

7. Engaging in a violation of law by writing four checks totaling $800 which were dishonored in 1997, resulting in a prosecution for a Class D felony in Nevada, and writing one check for $1,429.54 in July 2003, all of which were still outstanding at the time discipline was being considered, and

8. Failing to return Family Medical Leave paperwork for 40 hours of claimed family sick time in September 2003.

The Agency asserts that the above misconduct violates the following Career Service Rules (CSR) and statutes governing the causes for which an employee may be dismissed from employment:

1. CSR § 16-50 A. (1), gross negligence or willful neglect of duty,

2. CSR § 16-50 A. (3), dishonesty, including . . . altering or falsifying official records, . . . false reporting of work hours, . . . or any other act of dishonesty not specifically listed in this paragraph,

3. CSR § 16-50 A. (13), unauthorized absence from work, including . . . leaving work before completion of scheduled shift without authorization,

4. CSR § 16-50 A. (17), conduct violating the City Charter or Revised Municipal Code, including violations of Article IV, Code of Ethics § 2-51, which states as follows:

2. C.D. will be used in this decision in place of the name of the second individual referenced in the fraternization charge.

It is the intent of the city that its officers, officials, and employees adhere to high levels of ethical conduct so that the public will have confidence that persons in positions of public responsibility are acting for the benefit of the public. Officers, officials, and employees should comply with both the letter and spirit of this ethics code and strive to avoid situations which create impropriety or the appearance of impropriety.

Appellant was also charged under the same rule with violating § 2-63 of the Code of Ethics, which requires officers to "report existing or proposed outside employment . . . in writing to their appointing authorities prior to accepting the same."

5. CSR § 16-50 A. (20), conduct not specifically identified in § 16-50 A. Under this section, Appellant was charged with a breach of fiduciary duty under C.R.S. 24-18-103, and a violation of CSR § 15-10, failing to fulfill his duties in a conscientious manner or to conduct himself during working hours to reflect credit on Career Service and the City and County of Denver. Appellant was also charged with a violation of CSR § 15-51 by his failure as a Career Service employee to submit a written request to his appointing authority before outside employment commences.

Further, Appellant was found to be in violation of the following provisions of the rules governing the causes for which progressive discipline can be imposed:

6. CSR § 16-51 A. (2), failure to meet established standards of performance,

7. CSR § 16-51 A. (5), failure to observe department regulations, defined in the Preface as conduct prejudicial to the efficiency, good name and reputation of the City and County of Denver, or conduct which would cause the public to lose confidence in the Denver Sheriff Department or the Department of Safety, including the following:

a) Sheriff's Department Rule (SDR) § 100.1, which prohibits Agency employees from being absent from duty without authorized leave,

b) SDR § 100.3, which requires employees to be responsible for their own time card and for the accuracy of their Time Accounting Forms,

c) SDR § 100.4, which requires employees to be at their assigned post or performing their duties at their scheduled times,

d) SDR § 100.7, which governs when the official uniform must be worn,

e) SDR § 200.4, which prohibits the making of misleading statements or the falsification of any report, record, testimony or work-related communication,

f) SDR § 300.11, which forbids an employee from becoming involved in activities involving violations of the law,

g) SDR § 300.17, which bans an employee from "knowingly fraterniz[ing] with any prisoner in any jurisdiction except in line with authorized duties or as explicitly authorized by division heads or the Director of Corrections and Undersheriff."

Subsection 17 continues, "Deputy Sheriffs and employees shall not knowingly fraternize, associate or continue to associate with ex-prisoners, the family of current or ex-prisoners, [or] reputed crime figures . . . where there is a clear indication that such association could damage public trust, threaten the employee's personal integrity or present a potential for conflict of interest or corruptive behavior." Exceptions must be "explicitly authorized by the Division Chief or the Director of Corrections and Undersheriff" by a "determination whether further contact is likely to impair the reputation, adversely affect the employee's credibility and integrity or create an appearance of impropriety or conflict of interest." After that determination is made, the Director or Division Chief "may then prohibit or limit future contacts upon penalty of disciplinary action for disobedience to a direct order."

h) SDR § 300.19, which directs employees not to violate any lawful rule, duty, procedure or order,

i) SDR § 300.20, requiring that employees not indulge in any conduct which is contrary to Career Service Authority Rules and Regulations,

j) SDR § 300.21, obligating employees to read and obey all directive and orders issued by the Mayor, the Manager of Safety, the Director of Corrections, command officers or their designees and relating to the Sheriff Department or their duties and assignments,

8. CSR § 16-51 A. (6), prohibiting carelessness in performance of duties and responsibilities, and

9. CSR § 16-51 A. (11), conduct not specifically identified herein.

II. EVIDENCE ON ISSUE OF TERMINATION

At the hearing in this appeal, the Agency presented the testimony of the following witnesses: Major Gary Anderson, Major Victoria Connors, Sergeant Robert Fuller, Senior Personnel Analyst Edward Gietl, Captain Mike Horner,

Sergeant Elton Yamada, Director of Corrections and Undersheriff Fred J. Oliva, Senior Personnel Analyst Tyrone Abeyta, Division Chief Walter Smith, Dan Foster of the Colorado Department of Corrections, and Deputy Sheriff Phil Swift. Appellant testified on his own behalf, and presented the testimony of the following additional witnesses: Anthony Guzman, Mike Britton, Deputy Michael Jackson, Sergeant Cuauhtemoc Espinoza, Sergeant Silver Gutierrez, Ricardo Ayala, and Deputy Jeff Shaw.

The following Agency exhibits were admitted without objection: Agency's Exhibits 1 – 5, 8 – 11, 13 – 15, and 17. Agency's Exhibits 6, 7, 16, 18 and 19 were admitted over Appellant's objection. Exhibit 12 was withdrawn by the Agency. Appellant's Exhibits A – I and K – L were admitted without objection, and Exhibit J was admitted over the Agency's objection.

1. Fraternization

Based on his association with A.B. and C.D., Appellant was charged with violating SDR § 300.17, which bans an employee from knowingly associating with the family of current or ex-prisoners where there is a clear indication that such association could damage public trust, threaten the employee's integrity or present a potential for conflict of interest or corruptive behavior.

The Agency presented the testimony of Sgt. Fuller, Capt. Horner, Dan Foster, Dep. Phil Swift, and Director and Undersheriff Fred Oliva in support of its allegation of fraternization. Appellant testified himself and presented the testimony of Maj. Connors, Anthony Guzman, Sgt. Espinoza, and Ricardo Ayala on that issue.

Sgt. Fuller is a law enforcement officer with 25 years' experience with the Adams County Sheriff's Office. Sgt. Fuller has been engaged for many years in an ongoing investigation into gang unit activity in the Denver metropolitan area as a member of the Metro Gang Task Force and the North Metro Drug Task Force. In that effort, Sgt. Fuller has worked with Appellant, who was the Gang Captain for the Denver Sheriff's Office from 1999 until his termination.

Sgt. Fuller testified that Appellant told him in July or August 2000 that he was calling A.B., and stated that a man could fall in love with a woman like her. Sgt. Fuller replied that he knew that, since he had a wiretap on him. Sgt. Fuller testified he told Appellant that some of those calls were pretty steamy, and that Appellant laughed and agreed. Thereafter, Sgt. Fuller determined that he would keep his distance from the Appellant, since he had heard rumors that the crime family at issue had police officers on their payroll. Sgt. Fuller did not report either his conversation with Appellant or the results of a wiretap to Internal Affairs.

Sgt. Fuller testified that indictments for two of A.B.'s brothers were returned in mid-August 2000. One brother was convicted of conspiracy and habitual criminal in April 2002, and the other was convicted of solicitation and habitual criminal in the fall of 2002.

On December 29, 2001, Sgt. Fuller dictated a report that he had seen a vehicle listed to Appellant parked in the driveway at the home of A.B. at 10:48 p.m. on December 21, 2001. [Exh. 4.] Sgt. Fuller testified that the house was under spot surveillance because A.B.'s brother, who lived next door, was on bond awaiting trial on the indictment returned in August 2000. The evidence did not indicate whether this report was submitted to Internal Affairs for investigation or discipline.

On June 11, 2003, Sgt. Fuller interviewed Appellant with three other law enforcement officers for the purpose of investigating Appellant's information about a possible death threat against him. [Exhs. 15 and B; and testimony of Sgt. Fuller.] Sgt. Fuller testified that three months of phone records obtained with Appellant's consent showed that there had been forty-one incoming and outgoing calls between Appellant and A.B. from May to early June 2003. [Exh. 15, p. 16.] The phone records were not offered into evidence.

Capt. Horner, Commander of the Internal Affairs Unit for the Denver Sheriff's Department, testified that he was at a meeting with Appellant, Maj. Connors and Maj. Anderson in early June 2003. Appellant related a series of suspicious events which had led him to conclude that he was the subject of a contract for murder. The first of those events was an unexpected phone call on June 2, 2003 from A.B., who asked to meet with him after many years of silence. Appellant also said that the day after that phone call, he received a call from an informant who told him there was a "hit" out on Appellant and the informant. Appellant told those present at the meeting that he believed the death threat arose from the B. crime family[3], who may have blamed him for the arrest of A.B.'s brother in the summer of 2000.

During the investigation into the death threat, Sgt. Fuller told Capt. Horner that Appellant's car had been parked at A.B.'s house in December 2001, and that A.B. had been seen with Appellant at a Christmas party the day before that. Capt. Horner began to suspect there was more to this than he had at first thought. Capt. Horner then spoke with the Denver Police Department's Commander in charge of the investigation, who also referred him to Sgt. Fuller, and who suggested that the case should be "looked at as a possible fraternization." Sgt. Fuller referred Capt. Horner to an officer named Ronnie Smith, who told Capt. Horner that A.B. had approached him and Appellant at the Puerto Rican Festival on June 8, 2003, and that she had a conversation with Appellant while the two officers were working security at the event. Capt.

3. The "B. crime family" will be used to identify those in A.B.'s family who were known to the police to be involved in illegal activity.

Horner then telephoned A.B., who denied any ongoing relationship with Appellant, and added that she hated cops.

On Sept. 25, 2003, Capt. Horner received the criminal history for C.D., with whom Appellant had gone to Las Vegas in May 2003. Capt. Horner testified that the criminal history showed that C.D. had been twice convicted of domestic violence. Domestic violence is not a separate crime in Colorado, but is rather a basis upon which any sentence may be enhanced. C.R.S. §§ 18-6-800.3(1); 18-6-801(1)(a).

Dan Foster of the Dept. of Corrections testified that in June 2003 Appellant told him that he had once dated A.B. Appellant also told him that he believed the murder contract arose from A.B.'s belief that Appellant was responsible for her brother's arrest.

Deputy Sheriff Phil Swift testified that when Internal Affairs began its investigation on Appellant he asked Appellant, "[w]hat's the big deal?" Appellant replied that A.B. was a relative of the B.'s, who were involved in "this larger indictment, but that she wasn't involved in it." Appellant stated that he had had a short-lived relationship with A.B., and that A.B. had been trying to reach him by telephone to meet him places. Appellant told Dept. Swift that he had been reluctant to meet her because he suspected that he was being "set up".

Director of Corrections and Undersheriff Fred J. Oliva testified that dismissal was warranted because the Sheriff's Department has a policy of zero tolerance on fraternization with "known criminals or family members." Mr. Oliva stated that the rule exists in order to avoid compromising the safety of officers whose job it is to maintain security over those accused of crimes, and to protect the integrity of the department's record-keeping. Mr. Oliva recalled that over the past ten years, twelve or more employees have been dismissed for contact with known criminals. He testified that he may have reconsidered imposing the penalty of dismissal if the fraternization had not occurred.

The Agency supported its fraternization charge in large measure on the taped statement given by Appellant on June 11, 2003. [Exh. 15.] The interview was held in order to investigate the facts surrounding Appellant's belief that he was the subject of a contract for murder. During that interview, Appellant again recounted the series of events he considered indicative of the existence of the murder threat. Appellant told the interviewers that he had met A.B. in the summer of 2000 before her brothers were convicted of murder. When he learned her last name a short time later, he immediately called Officer Greg Romero, a gang officer with the Denver Police Department, and informed him of the contact. Officer Romero asked him not to sever the tie in case they need it later. [Exh. 15, pp. 11 – 12.] Appellant nonetheless stopped all contact with A.B. He told the interviewers that he had one final conversation with her that summer to

persuade her to encourage her brother to turn himself in after an indictment was returned on him. [Exh. 15, p. 12; Exh. 18.]

Three years later, A.B. resumed contact with Appellant, first in mid-May 2003 to request help in relaying a message to a jail inmate, and the last occurring on June 2nd to ask if they could get together. Although Appellant stated he was wary of the latter request, he invited her to the jail to learn what she wanted. A.B. did not show up at the jail, and never phoned him again. The next night, he got a call from a past confidential informant who told him that there was a hit out on Appellant and the informant. A few hours later, he got a call from a woman who did not identify herself, but who asked to meet him at a restaurant. [Exh. 15, pp. 2 – 3.]

Appellant then described his efforts to determine whether the three phone calls in early June were related. He explained that he called A.B. a number of times to try to determine what she wanted, but was not successful in reaching her. [Exh. 15, p. 4.] Appellant speculated that the hit might be related to A.B.'s anger at him for assisting in the arrest of her brother. [Exh. 15, p. 9.] At the conclusion of the interview, Appellant gave the investigators consent to obtain the last three months of his phone records in order to assist them in determining the source of the various suspicious phone calls. [Exh. 15, p.16.]

Appellant's testimony on the fraternization charge at hearing was consistent with his previous statements on the subject. [Exhs. 15, 18, and D.] He obtained corroboration for his belief that the threat was real through a statement from a deputy who was told of the threat by an inmate. [Exh. I.] As a result, he reported the matter to his supervisor Maj. Connors, who ordered an investigation into the existence of the threat. [Exhs. D, 18.]

Appellant testified that he was not with A.B. at the 2001 Latin American Law Enforcement Association (LA LEY) Christmas party, and did not see her at the party. He stated that if A.B. had been seen at the party, she would have been asked to leave. LA LEY President Anthony Guzman and Ricardo Ayala both confirmed through testimony that A.B. was not in attendance at the Christmas party.

Appellant further testified that he was working off-duty security for the Blue Corn Lounge at 10:48 p.m. on December 21, 2001, the date and time indicated on Sgt. Fuller's report, and that he was not parked in front of A.B.'s house that evening. [Exh. 4.] Off-duty scheduling officer Sgt. Espinoza confirmed that Appellant was scheduled to work at the Blue Corn Lounge every Friday in December that year between 10 p.m. and 2 a.m. I take administrative notice that Dec. 21, 2001 fell on a Friday. Appellant also denied seeing A.B. at the Puerto Rican Festival on June 8, 2003. There was no other direct evidence presented as to that allegation. Finally, Appellant testified that he had been unaware that

C.D., who had accompanied him to Las Vegas in May 2003, had a criminal history at the time they were dating.

The Agency's notice of termination asserted that the misconduct was prejudicial to the efficiency, good name and reputation for the City and County of Denver by compromising his ability to perform the duties of Deputy Sheriff Captain and causing the public to lose confidence in the Denver Sheriff Department of the Department of Safety. [Exh. 2, pp. 8 – 9.]

The first paragraph of SDR § 300.17 against fraternization requires proof that an employee knowingly fraternized with a prisoner. Since the evidence does not indicate that either A.B. or C.D. were ever prisoners, this paragraph is not relevant to this appeal.

The second paragraph of SDR § 300.17 prohibits knowing fraternization with the family member of current or ex-prisoners. The evidence supports a finding that A.B. was a family member of a current or ex-prisoner upon her brother's arrest in late August 2000. The rule is reasonably related to the mission of the Sheriff's Department to secure inmates, whether they are awaiting trial or serving a sentence after conviction. In December 2001, the brother living next door to A.B. was an ex-prisoner on bond awaiting trial within the meaning of the departmental rule against fraternization.

The evidence indicates that Appellant's association with A.B. in the summer of 2000 occurred before her brother was arrested or imprisoned on the returned indictment. The only other contact in 2000 was in aid of the business of the Sheriff's Department, when Appellant either called A.B. or drove with her in order to assist in securing the brother's peaceable arrest. By its nature, the latter contact also occurred before her brother's arrest and imprisonment. Since the brother was not yet a prisoner, Appellant's contacts with A.B. in 2000 do not establish fraternization in violation of SDR § 300.17.

The Agency asserts that Appellant had two contacts with A.B. in December 2001, the first at the LA LEY Christmas party on Dec. 20th, and the second at A.B.'s home on Dec. 21st. As to the first, Sgt. Fuller's second-hand testimony is contradicted by two credible eyewitnesses, and Appellant's convincing denial that A.B.'s presence at a law enforcement function would go unnoticed. As to the second, Appellant denied he was with A.B. on Dec. 21st, and testified that he was working an off-duty assignment at that time. Sgt. Espinosa corroborated that Appellant was scheduled to work at the time indicated in Sgt. Fuller's report.

Sgt. Fuller's failure to submit his Dec. 29, 2001 report for disciplinary action is some evidence that that information alone was insufficient to establish fraternization, since it appears improbable he would have failed to report a potentially dangerous violation of departmental rules. The eighteen-month delay

in producing the report deprived the parties of a contemporaneous investigation, and thus reduces its probative value. Sgt. Fuller's testimony was also colored by his tendency to exaggerate,[4] and his stated resentment of Appellant for wasting his time during an April 2000 murder investigation by his referral of an unreliable informant. In addition, it is deemed unlikely that Appellant as Gang Commander would risk his security by a public visit next door to the residence of a notorious gang family. For these reasons, it is found that Appellant was not at A.B.'s house on Dec. 21, 2001.

The Agency also asserts that Appellant exchanged forty-one phone calls with A.B. between May and June 2003 from a phone listed to another party. Appellant testified that he only remembered a handful of calls when he actually spoke with A.B. The phone records, which may have resolved the issue of the number of conversations between Appellant and A.B., were not offered into evidence. The testimonial evidence does not support a finding that the calls were sufficiently numerous to establish fraternization, or that the calls damaged public trust, threatened Appellant's integrity, or created a potential conflict of interest or corruption, as required by SDR § 300.17.

The pre-disciplinary letter and notice of termination raised two other incidents in support of the fraternization charge regarding A.B. On Sept. 2, 2003, the jail intercepted an inmate phone call between one of A.B.'s brothers and his wife, in which the wife said, "Do you remember the cop that [A.B.] used to talk to?" [Exh. 3, p. 7.] The overheard remark does not establish fraternization, since it does not establish either a time frame or any conduct that was in conflict with Appellant's duty of loyalty to the Agency.

In addition, the notice of termination asserted that "witnesses state that you informed them of your relationship with [A.B.] starting in October of 2002." [Exh. 2, p. 9.] The evidence presented at hearing in support of that allegation was that Appellant told Dan Foster that he had once dated A.B. The Agency also presented the testimony of Deputy Sheriff Swift that Appellant had informed him that he had had a short-lived relationship with A.B. That testimony is consistent with the relationship in 2000 described by Appellant, which does not establish fraternization for the reasons stated above.

The fraternization charge also included an allegation that Appellant had violated this rule by his association with C.D. in May 2003, who it was later discovered had two domestic violence convictions. Those convictions do not

4. Sgt. Fuller testified that Deputy Swift told him Appellant "tried to pin [the disappearance of the gang data base] on a deputy or former deputy that was fired for fraternization." Deputy Swift's testimony does not support that assertion. Sgt. Fuller also testified that Appellant's "story kept changing" during his June 11th interview. The transcript of the interview indicates that Appellant appropriately volunteered information as it became relevant to the subject under discussion, which was to investigate Appellant's belief that someone had ordered his murder. [Exh. 15.]

support a finding that C.D. was an ex-prisoner within the meaning of SDR § 300.17, since a prison sentence cannot be assumed based upon an unidentified sentence enhancement of a misdemeanor or felony conviction. Thus, Appellant's association with C.D. does not support a finding of fraternization.

Director Oliva testified that the department's zero tolerance no-fraternization rule has been used to dismiss twelve or more employees for fraternization with known criminals. In contrast, this termination is based upon an association with the sister of two prisoners.

The evidence indicates that Appellant's contact with A.B. in 2000 assisted the Agency in securing the arrest of A.B.'s brother. Appellant answered and returned A.B.'s calls in 2003 to determine her motive for renewing contact after almost three years of silence. Appellant promptly informed his supervisor of A.B.'s renewal of contact with him. [Exh. D; testimony of Maj. Connors.] The evidence does not support a finding that Appellant knew or should have known these contacts were in violation of the fraternization rule. SDR § 100.17; and see Flosi v. Board of Fire and Police Commissioners, 582 N.E.2d 185 (Ill.App. 1991).

The fraternization rule also requires a clear indication that the association could damage public trust, threaten an employee's integrity or raise a conflict of interest or corruption if, as here, the association is with a non-prisoner. SDR § 300.17, ¶ 2. If mere conversations with a relative of a known criminal or prisoner is sufficient to establish fraternization, the rule would not require proof of a nexus with the needs of the Agency. "Agencies that discipline employees for off-duty misconduct, particularly associational, must pay particular attention to the nexus requirement [between the misconduct and the efficiency of the service]." James v. Dale, 355 F.3d 1375, 1380 (Fed. Cir. 2004) (citing Gloster v. GSA, 720 F.2d 700 (D.C.Cir. 1983). The Agency presented no evidence to support a finding that Appellant's contacts with A.B. were either publicly known or created integrity or conflict issues, as required by the language of the departmental regulation against fraternization. Without proof supporting a finding of this necessary element of the rule, there can be no finding that Appellant's conduct was in violation of CSR § 16-51 A. (5) or SDR § 300.17.

The Agency also asserted that the conduct established gross negligence or willful neglect of duty under CSR § 16-50 A. (1). Since the conduct at issue did not relate to Appellant's employment duties, the rule is found inapplicable to the facts used to support discipline. There is also no evidence to support a violation of City Charter Code of Ethics § 2-51, which requires employees to avoid impropriety or the appearance thereof. Thus, the Agency has failed to establish a violation of CSR § 16-50 A. (17). Likewise, subsection (20) prohibiting other misconduct has not been proven. Both C.R.S. § 24-18-103 and CSR § 15-10 relate to the duty of a public officer to carry out his duties for the benefit of the public. They do not support imposition of discipline based on Appellant's contacts with A.B., since the evidence does not indicate that

Appellant's conduct was inconsistent with his fiduciary duty to the public in this regard.

The cited behavior bears no relation to performance standards in any conventional sense, and thus does not establish a violation of CSR § 16-51 A. (2). Finally, CSR § 16-51 A. (11), prohibiting conduct not specifically identified in the rule, does not support discipline based on this allegation.

The evidence, when considered *de novo* as required by City Charter provision C5.25(4) and CSR § 2-104, fails to support discipline on the charge of fraternization by a preponderance of the evidence. C.R.S. §13-25-127(1); In re: appeal of Collins, Appeal No. 133-02 (Oct. 18, 2002).

2. Gang Database

Appellant was also charged with gross negligence, failure to meet performance standards and carelessness in failing to secure the gang database of the Denver Police Department in August 2002. CSR §§ 16-50 A. (1); 16-51 A. (2) and (6).

The evidence as to this charge was that Appellant maintained custody of the compact discs containing the gang database given to the Denver Sheriff's Department by the Denver Police Department for the use of the Gang Taskforce. Appellant kept the compact discs in his office file cabinet, which was kept unlocked when he was in the office in order to allow members of the gang unit to access it.

On August 13, 2002 Appellant informed Capt. Horner that the compact discs had been missing for about six months. [Exh. 14; testimony of Capt. Horner.] Appellant testified that he made the report as soon as he learned that the data base was missing. Sgt. Gutierrez of the Internal Affairs Unit was assigned to investigate the matter. In aid of that investigation, Deputy Sheriff Phil Swift interviewed the three or four gang unit officers who had access to it. He asked them only if they took the database, since he did not believe it was taken for unlawful purposes. He determined that any one of several persons could have taken it, since it needed to be accessible to gang unit members. The investigation never recovered the database, and did not recommend the discipline of any employee for its loss.

The results of the contemporaneous investigation and the absence of timely discipline when taken together indicate that the Agency did not believe Appellant was guilty of either theft, neglect, or any other misconduct based on the loss of the database. The Agency did not submit any evidence that would support its assertion in its closing argument that Appellant supplied the database to the crime family. The Agency has failed to establish by a preponderance of

the evidence that Appellant was guilty of any neglect, dishonesty or carelessness on the basis of this allegation.

3. CSA Information

Appellant is charged with dishonesty, breach of fiduciary duty, failure to meet performance standards, and making misleading statements by virtue of his request for workforce racial statistics from the Career Service Authority in August 2003. CSR §§ 16-50 A. (3) and (20); 16-51 A. (2), (5) and (11); and SDR § 200.4.

Senior Personnel Analyst Tyrone Abeyta testified that Appellant phoned to ask him for certain public records about the Sheriff's Department. He knew Appellant from various Hispanic leadership functions, and passed the request on to Senior Personnel Analyst Ed Geitl. Mr. Geitl testified that he called Appellant, who asked him to supply the racial and gender breakdown of the Sheriff's Department, and the numbers of authorized and actual employees. Mr. Geitl recalled that Appellant told him the information was needed for a meeting on August 19th at the request of City Council.

Deputy Mike Jackson, who is the vice president of the Fraternal Order of Police, testified on behalf of Appellant that he had asked Appellant to obtain the information from CSA in order to support his argument to City Council that minorities were underrepresented in the Sheriff's Department. Dep. Jackson told Appellant that City Council had asked for it because City Council President Elbra Wedgeworth requires facts before she will add an item on the council agenda. Dep. Jackson intended to present the statistics at the next City Council meeting on August 19, 2003, and he so informed Appellant. The issue did not get on the agenda for that meeting. [Exh. F; and testimony of Dep. Jackson.]

The evidence does not support a finding that Appellant misrepresented himself or the reason for his request to CSA. Appellant is known by his colleagues as "Jim" or "Ed", since his full name is Edward James. [Exh. 15, pp. 1, 17.] Both CSA employees who testified knew Appellant, and neither was confused as to his identity. The testimony of Dep. Jackson makes it clear that Appellant accurately conveyed the request to CSA personnel, and that the request was intended for use to lobby City Council on behalf of the Fraternal Order of Police. Appellant's communication of that request to CSA does not violate any of the rules cited by the Agency in its dismissal letter. The evidence indicates that there was a misunderstanding as to whether City Council itself ordered the information. However, Appellant was merely communicating the union's request for public information to the CSA.

It is concluded that the cited conduct was not dishonest within the meaning of CSR § 16-50 A. (3), nor a breach of fiduciary duty under CRS § 24-18-103 or CSR § 16-50 A. (20). Likewise, the request did not constitute a failure

to meet performance standards under CSR § 16-51 A. (2), a misleading statement under SDR § 200.4, or other conduct that would support discipline under CSR § 16-51 A. (11).

4. False Leave Records and Unauthorized Leave

As a result of Appellant's absence from work on May 29 and 30, 2003, he was charged with five categories of misconduct: 1) dishonesty in violation of CSR § 16-50 A. (3) and SDR § 200.4; 2) unauthorized absence in violation of CSR § 16-50 A. (13), and SDR §§ 100.1, 100.3 and 100.4; 3) breach of fiduciary and ethical duties under CSR § 16-50 A. (20) and C.R.S. § 24-18-103; 4), violation of applicable rules, regulations and orders under CSR § 16-51 A. (5), SDR §§ 300.19, 300.20, 300.21; and 5) failure to perform his duties as prohibited by CSR § 15-10 and CSR § 16-51 A. (2).

In May 2003, Appellant was scheduled to work ten-hour days from Tuesday to Fridays. He was required to notify a captain or major of sick leave, and verify by his signature that the information on the rosters and time accounting sheets were accurate and that all leave slips were attached. [Exh. 16, p. 3.] He was allowed a flexible schedule within established rules because his assignment as Watch Commander required his attendance at numerous meetings outside of his regular day, and the sheriffs in the receiving unit provided coverage at the jail in his absence. His supervisor, Maj. Connors, testified that Appellant's flexible schedule allowed him to start and stop his shift at varying hours, as long as he worked the required forty hours per week. Appellant was required to give prior notice if he wished to "flex" an entire day, although prior notice was not necessary in order to take a few hours off. Maj. Connors expected time records to be accurate within fifteen-minute increments.

Maj. Connors testified that Appellant persuaded her that he was not able to provide an accurate statement of his hours in advance because of the number of out-of-schedule meetings he was required to attend. After much discussion, Major Connors compromised by allowing Appellant to submit an after-the-fact accounting of his monthly work and leave hours in an Excel spreadsheet he developed himself entitled "Time Accounting Actuals". [Exh. J.] This document was intended to be an accurate statement of Appellant's hours for inclusion in the department's Time Accounting Report. [Exh. 6.] Maj. Connors notified Appellant in detail of her revised expectations regarding his time records. [Exh. 16.] Appellant somewhat resentfully acknowledged those policies shortly thereafter. [Exh. 16, p. 1.] Departmental regulations require that leave other than sick leave must be authorized in advance. SDR § 100.1.

On May 29, 2003, a scheduled work day, Appellant left for a four-day vacation to Las Vegas. [Exh. 15, pp. 10-11.] That day, Appellant submitted a leave slip for four hours' comp time for May 29th, which was not approved in advance, and which was signed by his sergeant rather than a supervisor. [Exh.

7, p. 8.] The department's Time Accounting Report showed that on May 29th, Appellant worked six hours and took four hours' comp time. Appellant signed but did not date the Time Accounting Report on the line provided for a supervisor, and indicated no changes to the report. [Exh. 6, p. 3.] Appellant's Excel report of his actual hours indicated that he worked eight hours on May 29th. [Exh. J, p. 1.] Appellant testified that he worked until 2:00 p.m. that day. The most reliable evidence indicates that Appellant did not work any hours on May 29th, since his flight left early that morning. [Testimony of Officer Guzman.]

Appellant testified that he submitted a sick leave slip to Maj. Connors for ten hours to cover his absence on May 30th. That slip was not produced at hearing, and Maj. Connors testified that she did not recall having received it. The department's Time Accounting Report reflects that Appellant worked a ten-hour day on May 30th. [Exh. 6, p. 1.] Appellant signed that report on June 2nd upon his return from his vacation. [Exh. 6, p. 3.] Appellant's Excel report indicates that Appellant took ten hours' sick leave to cover that day. [Exh. J, p. 1.] Atypically, the Excel report for May did not contain Maj. Connors' initials, as did the same reports for June and July. [Exh. J, pp. 1 – 3.] Maj. Connors testified that she did not remember seeing the May report, and that it was her practice to initial those reports when they were submitted to her. Appellant testified that the sick leave was justified since he was in need of a "mental health" day. Major Connors testified that she would have questioned anyone who put that description on a sick leave slip before approving such leave.

It is concluded that Appellant submitted false time and attendance records for May 29 and 30, 2003. Appellant failed to request either comp or sick leave in advance for either day, in spite of his obvious knowledge of his own plans to be absent once he booked an airline ticket to Reno, Nevada. Appellant made false statements about his work and leave hours in violation of CSR §§ 16-50 A. (3) and SDR § 200.4. Those false statements undermined his superiors' trust and confidence in his integrity with regard to those records. Appellant's absences on May 29th and 30th constituted unauthorized absence from work in violation of CSR §§ 16-50 A. (13), 16-51 A. (5) and SDR §§ 100.1, 100.3 and 100.4. The evidence also supports a finding that Appellant violated the orders of his command officer related to work hours and leave, in violation of SDR §§ 300.19 and 300.21. Based upon Appellant's violation of the above Career Service Rules, he also violated SDR § 300.20. I find that the evidence does not establish a breach of fiduciary duty under CSR § 16-50 A. (20) and C.R.S. § 24-18-103, or failure to perform his duties as prohibited by CSR § 15-10 and CSR § 16-51 A. (2).

5. Change of Address

The Notice of Termination asserts that Appellant's failure to file a change of address form during his absence from his home in June 2003 also supports his removal from employment. [Exh. 2, p. 7.]

The evidence demonstrates that Appellant removed himself from his home on June 3, 2003, the day he received a call informing him there was a murder contract on him. During the investigation into the murder threat, he informed Detective Dale Fenstermacher that he would be staying with various friends as a result of the threat. [Exh. 18, p. 3.] At his June 11th interview, he informed Sgt. Fuller and the three other officers present of his temporary address. [Exh. 15, p. 4.] Appellant testified that he also maintained a post office box through which he could receive mail from the department. Maj. Connors testified that she was aware at the time that Appellant did not want to furnish his home address in light of the possible threat on his life. Capt. Horner confirmed that Maj. Connors had given Appellant permission to change his hours and move to different residences for the same reason. Under such circumstances, failure to submit a written change of address does not constitute a violation of any of the Career Service or departmental rules cited in support of discipline.

6. Secondary Employment

Appellant was also charged with violation of the Agency and departmental rules governing secondary employment based upon his failure to obtain written authorization for private security work on June 8, 2004 at the Puerto Rican Day Festival in Denver, and again on June 27, 2004 at Club Space in Douglas County.

The Denver Revised Municipal Code (D.R.M.C.) § 2-63 requires officers to report existing or proposed outside employment in writing to their appointing authorities prior to accepting such employment. CSR §15-51 mandates a written request to the appointing authority before outside employment commences. Sheriff's Department Order #2430.1E requires the written permission of the Director of Corrections and Undersheriff or his designee for in-city assignments, as well as the written permission from the local Sheriff or Chief of Police for employment outside Denver's jurisdiction. [Exhs. 8 and 10.]

The Agency asserts that termination should be upheld based upon Appellant's violation of the above provisions and eleven other rules violations by his failure to comply with the rules governing secondary employment.

Maj. Anderson and Capt. Horner both testified that the Sheriff Department's secondary employment file contained no approval forms for Appellant's June 8th or June 27th assignments. Maj. Anderson and Sgt. Espinoza stated that oral permission is sometimes granted for last-minute, short-

term assignments, but that the signed paperwork must be submitted later. Director Oliva testified that verbal approval must be confirmed in writing within twenty-four hours, even for one-time events. Mr. Oliva explained that compliance with these policies is necessary to permit the Sheriff's Office to perform the appropriate oversight of secondary employment in keeping with the limitations set forth in the department's policy, and to allow coordination with other law enforcement agencies.

Appellant testified that he worked at the Puerto Rican Festival on June 8th after he and Sgt. John Romero filled out the request form in the presence of the scheduling officer, Ronnie Smith, who submitted the request for approval. Appellant did not file the completed approval after working the event because he believed past practice permitted work at one-time events without it.

As to the June 27th employment at Club Space in Lone Tree, Colorado, Appellant testified that he received verbal approval from Division Chief Walter Smith, who was the Acting Director at the time of the request, and thus had authority to grant approval. Chief Smith conditioned his approval on Appellant receiving permission from the Douglas County Sheriff, according to Appellant's testimony. Appellant stated that he also got the verbal approval of the Lone Tree lieutenant who was Acting Sheriff in Douglas County at the time of the request. He testified that he did not obtain or submit the written approvals after the event, because he understood past practice made written approval unnecessary for a one-time event.

The evidence supports a finding that there was no exception for one-time assignments from the requirement of obtaining written approval in accordance with the City Charter, Career Service rule and Sheriff's Department policies. The absence of written approval for these assignments violates D.R.M.C. § 2-63, CSR § 16-50 A. (17) prohibiting violation of city ordinances, and CSR § 15-51 (requiring written permission for outside employment) and SDR § 300.20 (barring violations of Career Service rules). Appellant also violated Department Order Number 2430.1E regarding secondary employment , and as a result also violated CSR § 16-51 A. (5) (failure to observe departmental regulations). [Exh. 8, ¶ 5 a) and g).]

7. Violation of Law

It is undisputed that Appellant wrote four insufficient checks in Nevada in 1997 and failed to pay them until late 2003. Appellant also issued a check to a Denver car repair service in June 2003 without the funds in his account, and failed to pay it until December 1, 2003. After these checks were discovered by the Sheriff's Department, Appellant was charged with violations of the following rules: 1) dishonesty under CSR § 16-50 A. (3); 2) other misconduct; specifically, breach of fiduciary duty under CRS § 24-18-103 and on-the-job misconduct under CSR § 15-10, in violation of CSR § 16-50 A. (20), 3) failure to meet

performance standards under CSR § 16-51 A. (2), 4) failure to observe departmental regulation § 300.11 prohibiting violations of law under CSR § 16-51 A. 5), and 5) other misconduct under CSR § 16-51 A. 11).

On Nov. 10, 2003, the Agency issued its disciplinary letter which concluded that Appellant had committed a Class D felony in Clark County, Nevada based upon his 1997 issuance of four bad checks. The Agency also determined that in June 2003 Appellant had blatantly disregarded his reputation as a Captain and that of the department by leaving a business card with a car repair service to which he had issued a bad check for $1,429.54, thus causing the proprietor to fear police retaliation.

At hearing, Appellant admitted he wrote all five bad checks, but stated that he satisfied four of the checks by the date of his pre-disciplinary meeting on November 6, 2003. He testified he paid the final check on December 1, 2003 after the repair service dropped his demand for treble damages during the small claims court action. [Exhs. 17, B, C, G and H; testimony of Appellant.] Appellant stated that two of the Nevada checks were paid in certified funds, but that the creditors did not issue receipts for those payments. The Agency argued in its closing that two of the checks are still outstanding, but it did not support that argument with any evidence. In the absence of any contrary evidence, it is found that Appellant paid all five checks by December 1, 2003.

The Agency first claims that non-payment of the five checks constitutes dishonesty. [Agency's Closing Argument, p. 12.] Dishonesty has been defined as a "disposition to lie, cheat, deceive or defraud". Black's Law Dictionary 324 (6th ed. 1991). The Agency argues that Appellant issued the checks with knowledge of the lack of funds to cover the checks, and intentionally failed to satisfy four of the underlying debts for six years. Appellant testified that their dishonor was a mere bookkeeping problem, but offered no explanation for his failure to correct that problem for six years.

The larger question is whether dishonesty in one's private affairs may be used as a basis for discipline. There is no dispute that the five checks were issued based on Appellant's personal financial obligations. The Agency was not a party to any of the checks, and therefore the Agency was not the victim of any dishonesty in the issuance of the checks. Failure to pay personal debts without more has been held to bear no relationship with employment sufficient to justify the imposition of discipline. White v. Bloomberg, 345 F.Supp. 133 (D.Md. 1972); McGuire v. U.S., 145 Ct.Cl. 17 (1959); Merritt v. Dept. of Justice, 6 MSPR 585 (1981); Monterosso v. Dept. of Treasury, 6 MSPB 573 (1981); and Vilt v. Marshals Service, 16 MSPR 192 (1983) (refusing to presume a nexus between dishonored personal checks and federal employment.)

The Agency's only evidence of a connection between Appellant's employment and the off-duty conduct was that Appellant gave the auto repair

service a business card during their transaction. That evidence does not by itself prove the existence of a connection between the issuance of the check and Appellant's employment sufficient to impose discipline, given the nature of a business card as an accepted method of exchanging contact information, and the fact that the card was given to the repair service before the dispute arose. The evidence indicates that Appellant's tender of a business card to the repair service was to facilitate contact, not an attempt to retaliate against the business. The fact that the proprietor expressed fear of retaliation was more likely to have been based on his past unfavorable experience with police in his country of origin than on any action taken by Appellant. Based upon the lack of a nexus between the employment and the misconduct, it is concluded that Appellant's issuance of bad checks does not support a finding of dishonesty under CSR § 16-50 A. (3).

The Agency next asserts that the issuance of and failure to satisfy bad checks was a violation of departmental policy against becoming involved in activities involving violations of the law. SDR § 300.11. In the context of this appeal, that policy prohibits a Deputy Sheriff from committing an offense against property such as theft, or a crime involving fraud such as fraud by check. At the time disciplinary action was proposed, the Agency had learned that Appellant was the subject of a criminal prosecution in Nevada based on one or more of the checks at issue. By the time discipline was imposed, Appellant had communicated to the Agency that the prosecution had been dismissed on July 3, 2003. [Exh. C.] Thus, it is found that Appellant was not in violation of departmental policy SDR § 300.11.

The Career Service disciplinary rule under which Appellant is charged with violating SDR § 300.11 is CSR § 16-51 A. (5). The preface of the Sheriff's Department Rules and Regulations prohibits "conduct prejudicial to the efficiency, good name and reputation of the City and County of Denver or which would cause the public to lose confidence in the Denver Sheriff Department or the Department of Safety. [Exh. 2, p. 3, SDR Preface.] The evidence did not prove that the civil and criminal cases filed in an effort to collect the debts were publicized or otherwise affected the reputations of Appellant or the department. Therefore, the Agency failed to establish a violation of CSR § 16-51 A. (5).

The Agency has failed to prove that the issuance of the bad checks was a violation of CSR § 16-51 A. (20), which prohibits other misconduct. The Agency cites a state law, CRS § 24-18-103, and CSR § 15-10 in support of discipline under this section. The state statute mandates that a public officer "carry out his duties for the benefit of the people of the state." CSR § 15-10 governs employee conduct during work hours or while representing the city. Since the five checks were not issued or dishonored as a part of Appellant's employment, and there was no fiduciary relationship between the parties to the checks, they cannot be used as the basis for discipline under either the state law or CSR § 15-10. Therefore, discipline under CSR § 16-51 A. (20) is not sustained.

CSR § 16-51 A. (2) permits discipline for failure to meet established standards of performance. Since the checks were unrelated to Appellant's job performance, the subsection is inapplicable.

The Agency also claims that discipline is appropriate under CSR § 16-51 A. (11), which states that "[c]onduct not specifically identified herein may also be cause for progressive discipline." Because there is no evidence that any of the five dishonored checks bore any connection to either Appellant's employment or the reputation of the Agency, it is found that the evidence does not support a violation of this rule. The Agency has not borne its burden of showing that § 16-51 A. (11) gives reasonable notice to an employee that failure to pay personal debts may give rise to disciplinary action, and the case law and commentary are to the contrary. Criminal Convictions, "Off-Duty Misconduct" and Federal Employment, 39 Am. U. L. Rev. 869 (Summer 1990); and Arbitral Practice and Purpose in Employee Off-Duty Misconduct Cases, 69 Notre Dame L. Rev. 135 (1993).

The Agency failed to prove by a preponderance of the evidence that Appellant's financial failings constituted a violation of any of the cited Career Service or departmental rules.

8. FMLA Request

The final ground for discipline cited in the dismissal letter was Appellant's failure to return Family Medical Leave Act (FMLA) forms to request family sick leave for forty hours of leave taken in September 2003. Neither party presented any evidence at hearing as to this asserted misconduct. Since the parties have not cited a departmental or Career Service rule that requires an employee to request or use FMLA-permitted leave, and none is apparent from a review of the rules, there can be no discipline based upon an employee's failure to make such a request.

III. DISCRIMINATION CLAIM

Appellant claims that the Agency dismissed him based upon Appellant's public statements as a member of the Fraternal Order of Police, including his public support for City Charter Amendment 1A, an amendment opposed by Mr. Oliva.

The only evidence presented by Appellant on this issue was his testimony that Mr. Oliva appeared angry before the November 2003 election when he told Appellant that he believed Appellant's position on the Charter Amendment issue was wrong. Mr. Oliva testified that he did not base his disciplinary decision upon Appellant's affiliation with the union, and that his opposition to the amendment was based on his concern for the future of the Department.

The Career Service rules prohibit discrimination on the basis of political affiliation. Political affiliation generally refers to membership in a political party rather than a union. Appellant had not proven he is a member of any class protected by CSR §§ 19-10 c) or 15-101.

An employer is separately proscribed from discriminating against an employee because of membership in a union or other employee organization. CSR § 15-91. Here, Appellant claims that it is his public statements in support of union positions that caused the adverse action. [Appellant's Closing Argument, pp. 15 – 16.] Since the rule protects union membership rather than activity, it cannot serve as a defense to disciplinary action.

The above rules cannot reasonably be interpreted to include a prohibition against discrimination because of a position taken on a single election issue. Appellant has not met his burden to prove discriminatory intent on the basis of any protected status under CSR §§ 19-10 c), 15-101 or 15-91.

IV. PENALTY

The Agency has established that Appellant committed two of the seven asserted rules violations: submission of false leave documents and violation of policies regulating off-duty employment. The testimony of the appointing authority indicates that he would not have approved dismissal if he had not concluded that Appellant had violated the policy against fraternization. On the basis of the evidence as a whole and the findings herein, it is determined that the penalty of dismissal is not reasonably related to the seriousness of the proven offences. The penalty for the two proven charges must therefore be reconsidered.

While the proven charges are substantially less serious than those upon which the dismissal was based, they nonetheless demonstrate an extraordinary degree of carelessness in Appellant's obligation to keep his superiors informed of his activities in May and June 2003. Appellant's testimony revealed a disregard for the reasons behind the rules related to leave and off-duty employment that is unsuitable to an officer of Appellant's rank and experience. These actions undermined his superiors' confidence in his integrity, and justified the imposition of discipline proportionate to the nature of the misconduct.

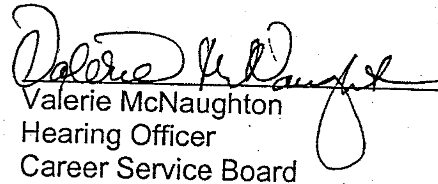
In mitigation, it is undisputed that Appellant had no previous disciplinary action throughout his eighteen-year career with the Denver Sheriff's Department. It is also undisputed that Appellant received an outstanding performance evaluation less than a month before the investigation began into the misconduct charged herein. That evaluation included outstanding ratings for attendance. Appellant also received outstanding evaluations for the three preceding years, and ratings of exceeds expectations for the three years before that.

For the above reasons, it is determined that the appropriate penalty for the proven misconduct is a suspension of four weeks: one week for each day off taken without approved leave (May 29 and 20, 2003), and one week for each of the two incidents of failure to follow the department's rules related to off-duty employment (June 8 and 27, 2003.)

DECISION

The Agency's dismissal of Appellant dated November 10, 2003 is MODIFIED by substituting a four-week unpaid suspension in place of the dismissal. The Agency is ordered to reinstate Appellant to the position from which he was removed, and to pay Appellant any lost pay and benefits resulting from this decision. The Agency is further ordered to remove all references to the dismissal action from Appellant's personnel file.

Dated this 21st day of
October, 2004



Valerie McNaughton
Hearing Officer
Career Service Board

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CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing **DECISION** this 21st day of October, 2004, in the U.S. mail, postage prepaid, addressed to:

Reid Elkus
Hamilton and Faatz
1600 Broadway St., Suite 500
Denver CO 80202

I further certify that a true and correct copy of the foregoing was deposited in interoffice mail this 21st day of October, 2004, addressed to:

Robert D. Nespor
Assistant City Attorney
Litigation Section