

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 18-09

DECISION

IN THE MATTER OF THE APPEAL OF:

TINA MARTINEZ,
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Tina Martinez, appeals her dismissal from the Denver Sheriff's Department, (the Agency) on March 6, 2009, for alleged violations of specified Career Service Rules. A hearing concerning these appeals was conducted by Bruce A. Plotkin, Hearing Officer, on August 14 and September 11, 2009. The Agency was represented by Andrea J. Kirshner, Assistant City Attorney, while the Appellant was represented by Joseph A. Salazar, Esq. Agency exhibits 1-5, 7-11, 14, and 15-1 through 15-4 were admitted. Appellants' exhibits A, B-3, B-5, B-6, C-4, C-5, E, F, G, I, K-2, K-3, H, and N were admitted. The following witnesses testified for the Agency: the Appellant; Fantasia Ochoa; Omar Ochoa; Betty Dalton; Peter Padro; Herbert Peagler; Sgt. Byron Shannon; Sgt. Charles DeNovellis; Capt. Craig Meyer; and Director and Undersheriff William Lovingier. The Appellant testified on her own behalf during her case-in-chief and presented witness Deputy Victoria Gallo.

The Appellant appealed both the denial of a grievance and her dismissal. Prior to hearing she withdrew the appeal of her grievance. The hearing proceeded only as to the dismissal.

The Agency acknowledged during hearing that, at the time Martinez acquired a vehicle impounded at the Vehicle Impound Facility (VIF), employees were not prohibited from doing so. Consequently, the Agency withdrew its claims under Career Service Rule (CSR) 16-60 K., failure to meet established standards of performance, and CSR 16-60 Y, insofar as it included violation of CSR 15-5. The case proceeded on the Agency's remaining claim, that Martinez' obtaining a waiver of impound fees was misconduct under the Career Service Rules.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules: 16-60 A., B., C.1.,2., E.3., F., J., L., O., Y and Z.;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss her conformed to the purposes of discipline under CSR 16-20.

III. FINDINGS

Martinez was a supervisor at the VIF, the impound lot for the city of Denver. On May 25, 2008, she obtained a 1992 Ford Explorer directly from the owner, Fantasia Ochoa. Martinez paid nothing to Ochoa for the vehicle, which functioned, but had been impounded at the VIF as abandoned.

Before Martinez met Ochoa at the VIF, Ochoa's husband had called or visited the VIF several times to inquire how to reclaim the vehicle without paying the tow and storage fees. The Ochoas were angry about the impoundment and told VIF employees they would rather give away their vehicle than allow the City to profit by keeping it. When Mrs. Ochoa came to the VIF to remove her personal property from the impounded Explorer, Martinez overheard her talking to the cashier, Betty Dalton, about giving away the vehicle. Martinez approached Ochoa about acquiring the vehicle. Dalton, a subordinate of Martinez, overheard part of that discussion. She complained to another supervisor about the pending transaction as an ethical violation. Martinez had disciplined Ochoa several times for unrelated reasons.

Martinez called her supervisor, Herbert Peagler, and asked him to waive the tow and storage fees in order to facilitate her acquisition of the Ochoas' Explorer. Impound fees may be waived only under a hardship exemption. Peagler agreed to waive \$400 in storage fees without finding hardship, but required Martinez to pay the \$100 tow fee. Martinez, then transacted the free title transfer with the Ochoas off-site, and signed a VIF "authorization to release" form, required to be shown to the VIF cashier. Martinez had a friend present the title and release to Dalton, along with the \$100 tow payment. Dalton balked, and cited her concerns to her supervisor, Peter Pedro, about the propriety of a VIF employee, engaging in, or permitting, such a transaction. Pedro then approached his supervisor, Peagler, about the trouble at the cashier's office. Peagler directed Pedro to approve the transaction. Pedro, in turn, instructed Dalton to release Ochoas' Explorer to Martinez' friend upon payment of only the \$100 tow fee. Dalton complied but remained anxious about the entire incident.

When she obtained the Ochoa vehicle, Martinez asked Sgt. Shannon, a supervisor, if he knew a car mechanic. Shannon had Martinez follow him to a friend's mechanic shop. When Martinez told Shannon she had obtained the vehicle for \$100,

Shannon asked how she got such a great deal. Martinez explained she obtained the vehicle from a divorced friend who needed the cash.

Dalton eventually reported her observations to Sgt. Shannon. An internal affairs bureau investigation was opened. Following the investigation, a pre-disciplinary meeting was convened on February 24, 2009. The Appellant attended without a representative. She admitted she did not qualify for the only exception to payment of storage fees – a hardship exemption - yet sought and obtained a waiver of those fees from Peagler. The Appellant also admitted she was aware of the Ochoas' numerous calls to the VIF regarding their attempts to have the same fees waived. Nonetheless, Martinez denied any wrongdoing, explaining Peagler's waiver of storage fees was common practice at the VIF.

When the investigation concluded, the Agency determined Peagler improperly permitted Martinez to forgo payment of the \$400 in impound storage fees and required Peagler to seek restitution from Martinez. Both complied. [Exhibit K-2, Martinez testimony].

The Agency sent its notice of termination to the Appellant on March 5, 2009, effective March 6, 2009. This appeal followed timely on March 20, 2009

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A.1.a., as a direct appeal of a dismissal. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to dismiss the Appellant complied with the purpose of discipline under the Career Service Rules. CSR 16-20. The Agency retains the burden of persuasion, throughout the case, to prove the Appellant engaged in wrongdoing under one or more of the cited rules. The standard by which the Agency must prove each of the elements for each of its claims is a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 A. Neglect of duty.

This rule is violated when an employee neglects to perform a job duty which the employee knows she is supposed to perform. In re Compos et al, CSB 56-08 through

59-08, 2 (6/18/09).

a. job duty.

The Appellant acknowledged she was under a duty to lead by example and was familiar with Denver Revised Municipal Code (DRMC) 54-813 regarding what circumstances would entitle an applicant to a waiver of storage fees at the VIF.¹ [Appellant testimony]. This element is established.

b. failure to perform.

The Agency claimed the Appellant failed to abide by her obligation to pay storage fees under DRMC 54-813. The Appellant claimed she met the “extraordinary circumstances,” exemption also known as the “hardship exemption” to the payment of storage fees under DRMC 54-813 because it is common practice to have those fees waived. [Appellant testimony].

First, common practice, *per se*, does not meet the extraordinary circumstances exception. Second, Agency witnesses whose credibility was not challenged denied there is such a common practice. [Meyer testimony; Lovingier testimony]. Most importantly, Peagler testified, without rebuttal, that Martinez’ request to waive fees was the only time an employee asked him to waive storage fees. [Peagler cross-exam]. Because the Appellant was aware of the limited exceptions to the waiver of fee policy and sought a waiver for herself when she did not meet the exception she neglected her duty as a supervisor to set an example and uphold legal requirements for waiver of fees at the VIF. Consequently the Appellant violated CSR 16-60 A. by a preponderance of the evidence.

2. CSR 16-60 B. Carelessness in performance of duties and responsibilities.
[Formerly CSR 16-51 A. 6)].

While CSR 16-60 A) and CSR 16-60 B), share similar elements of proof, they are distinguished in that, under 16-60 B., it is the Appellant’s acts (performance), rather than her omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, a violation under this rule occurs for substandard performance, rather than neglecting to perform, an important duty.

Lovingier testified Martinez violated this rule in the way she circumvented normal paperwork for an abandoned vehicle, for example having the excuser form (for waiver of impound fees) filled out on her behalf. Lovingier’s testimony describes neglect of duty, and ethical violations, but does not describe a substandard performance of a

¹ 54-813(a) states “No vehicle removed and impounded shall be released until the charges for impoundment and storage shall have been paid.” The exception to this rule is stated at 54-813(b), in pertinent part as “[the fees described 54-813(a) may be waived] (a) whenever in the manager’s judgment it would be inequitable or result in an injustice to collect or require the payment of such charges.” No such finding was made by one with authority to do so in the present case.

³ In the Sheriff’s Department, Lovingier is the ultimate decision maker concerning discipline of civilian employees such as Martinez, while the Manager of Safety or his designee decides on discipline of the uniformed employees.

duty. The evidence does not otherwise support a finding of carelessness, thus no violation is found under this rule.

3. CSR 16-60 E. Any act of dishonesty, which may include, but is not limited to... Lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions...

This rule is not limited to false statements made to superiors, but includes any knowing misrepresentation made within the employment context. In re Mounjim, CSB 87-07, 6 (1/8/09).

The Agency claimed Martinez was dishonest in the following ways: she made inconsistent statements about when she called Peagler to ask for a waiver; she was inconsistent as to whether she paid \$100 to the Ochoas or merely paid the \$100 tow fee; she waffled as to whether she was actively seeking to purchase a vehicle, and inconsistent in her statements as to how much she paid for it; she was inconsistent in stating whether there were other cars on the market for \$100. [Agency closing argument].

Director Lovingier³ testified the allegation of dishonesty arose from the conflict between Dalton's and Martinez' statements over what Martinez heard and how she reacted at the time Ms. Ochoa first spoke with Dalton at the VIF . He stated "the problem was Martinez' failure to transact business in the light of day, which caused Dalton's distress."

None of these allegations, even if true, were consequential to the Agency's remaining claim, the propriety of a VIF employee obtaining a waiver of impound fees. When allegations of dishonesty, such as here, are inconsequential to an underlying basis of wrongdoing, no violation of 16-60 E may be found.

The record, however, contained other evidence germane to this rule. When Martinez told Sgt. Shannon, a supervisor, she obtained the vehicle from a divorced friend who needed the cash, that subterfuge could only have been intended to avoid inquiry into the circumstances of her acquisition of the Ochoa vehicle, including the waiver of \$400 in impound fees. Consequently, Martinez made a false statement, in the employment context, to a superior, in violation of CSR 16-60 E.

4. CSR 16-60 F. Using official position or authority for personal profit or advantage...

The Agency's claim here is Martinez had access to information, not available to the public, which allowed her to have \$400 in storage fees waived. In addition, Mr. Ochoa testified he would have taken the car back had the fees been waived and vehicle returned to him; however, Martinez failed to discuss the option of fee waivers with the Ochoas while she obtained the same waiver for herself.

Martinez also claimed she gained no advantage under this rule since she had to repay the \$400 and pay for repairs to the car. The personal profit or advantage described in this rule is considered at the time it is gained, and not from the time of subsequent remedial events, in the same way that returning stolen property does not eliminate theft.

Finally, Martinez claimed since Peagler approved the waiver, she did nothing wrong. First, Peagler testified Martinez misled him to some degree about the circumstances of the transaction. [Peagler testimony]. He also acknowledged his approval was improper. [Id]. A supervisor's approval of an improper act by a subordinate does not bestow propriety on it. This violation is proven by a preponderance of the evidence.

5. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

A violation of the first part of this rule is established by proof that (1) a supervisor communicated a reasonable order to a subordinate, (2) proof the subordinate violated the order (3) under circumstances demonstrating willfulness. In re Mounjim, CSA 87-07, 7 (7/10/08), *citing* In re Dessureau, CSA 59-07, 7 (1/16/08). A violation of the second part of this rule is established by (1) proof of an assigned duty (2) which the employee is capable of performing, but (3) which the employee fails to perform. In re Mounjim, CSA 87-07, 7 (7/10/08).

Lovingier testified he found Martinez violated this rule by failing to abide by the Denver ordinances and Agency regulations concerning impounded vehicles. [Lovingier testimony]. While the failure to follow established standing law, rules and regulations may violate other Career Service Rules, such failure does not constitute a violation of this rule. [see in re Espinoza, CSA 30-05, 3, 8 (1/11/06), *affirmed* CSB (7/6/06). The Agency did not otherwise address this rule violation, [see e.g. Agency closing argument], and the evidence does not otherwise support a finding of violation under this rule.

6. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules. The Agency claimed the Appellants violated the following written policies.

a. Denver Sheriff Department. Vision Statement. Guiding Principles.

Aspirational principles are not enforceable as regulations, policies or rules outside of ethical violations. In re Rogers, CSA 25-08, 8 (3/13/09), *affirmed on other grounds*, CSB 25-08, (7/16/09). No violation is found.

- b. Departmental Rule 200.4 Deputy Sheriffs and employees shall not depart from the truth, knowingly make misleading statements or falsify any report, record, testimony or work related communications.

The same reasons which established a violation of the rule against dishonesty, CSR 16-60 E., above, also establish departure from the truth here.

- c. 300.13 Deputy Sheriffs and employees shall not indulge in the misappropriation or theft of any property.

This Agency rule has broader application than the Career Service rule against theft. "Misappropriation" includes the concept of peculation, meaning in pertinent part, the improper conversion of property, entrusted to the care of the taker, for her own use. See BLACK'S LAW DICTIONARY 6TH EDITION (1991). Vehicles entrusted to Martinez, as VIF supervisor, obligated her to ensure any value of the vehicles inure to the public benefit, and not to her private gain.⁵

While Martinez maintained she acquired the vehicle with the permission of the owners, the inquiry under this rule does not end there. Martinez' obtaining a waiver of fees thwarted the City's right to revenue from auction or scrap sale. Martinez argued the car was worthless, but it was valuable enough to Martinez that she sought to acquire it. More importantly, even if the vehicle were unsellable at auction, it would be sold for scrap, with the proceeds covering at least some portion of the above-stated costs. [Lovingier testimony]. The waiver of \$400 in storage fees for Martinez' private benefit was a conversion of those funds to her own use in violation of Department rule 300.13.

- d. 300.19 Deputy Sheriffs and employees shall not violate any lawful rule duty, procedure or order.

This catchall rule was covered by more specific violations alleged elsewhere.

- e. 300.20 Deputy Sheriffs and employees shall not indulge in any conduct that is contrary to Career Service Authority (CSA) rules and regulations.

This rule addresses wrongdoing not specifically addressed by other Career Service rule violations. The Agency alleged wrongdoing under other specific rules, and the evidence does not support a violation of any other rule.

- f. 300.21 All employees of the Department shall read and obey all directives and orders...and carry out all Department Orders, Post Orders and written procedures relating to their specific duty posts and assignments. The Agency's allegations are covered by reference to more specific rules

⁵ the ultimate disposition of abandoned vehicles at the VIF is sale through public auction with the proceeds going first to cover the tow and storage costs, then to the costs of sale, with any balance to the City's general fund. DRMC 54-816 (b),(c).

elsewhere in this Decision.

g. Departmental Orders

5. Standard of Conduct: ...

Restricting any employee from using his or her official position to gain any personal advantage... or gives rise to the appearance of a conflict of interest.

For reasons stated above regarding misappropriation of property under CSR 16-60 L., the same evidence proves, by a preponderance of the evidence, that Martinez used her official position to gain a personal advantage by obtaining a waiver of fees not available to the Ochoas or to the general public. The advantage Martinez had was made possible only by her access to inside information she enjoyed in her official position. Consequently, Martinez violated this Departmental Order. Martinez' violation of each of these Departmental rules and order constitute separate violations of CSR 16-60 L.

7. CSR 16-60 O. Failure to maintain satisfactory working relationships with co-workers...

After Dalton observed Martinez' actions in acquiring a waiver of fees for her private benefit, she agonized for days over whether to report the incident. There was nothing in her demeanor or her interview with internal affairs to suggest her distress over the matter was anything other than genuine. [See Exhibit 11-197 Dalton interview; Dalton testimony]. The Agency apparently contends Dalton's discomfort whether to report Martinez' misconduct constitutes a violation of this rule. None of the Agency's evidence, however, suggests Dalton's working relationship with Martinez suffered. Where a supervisor's improprieties are observed by, but not directed toward, a subordinate, there is no presumption this rule is violated unless the Agency proves their working relationship suffered. The subordinate's discomfort at observing the impropriety, alone, is insufficient.

8. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code,...

The Agency claimed that Appellant's violations of this rule arose when she violated Denver's Code of Ethics at Sec. 2-67, Use of Public Office for private Gain and Denver's Revised Municipal Code at §§ 54-813 Costs and 54-816 Disposal Procedure. For reasons stated above regarding misappropriation of property under CSR 16-60 L., the same evidence proves Martinez used her official position to gain a personal advantage by obtaining a waiver of fees not available to the Ochoas or to the general public and thus violated Denver's Code of Ethics and this rule. The same reasons that established a violation of CSR 16-60 A and 16-60 L (at Policy 300.13)

apply here to her violation of DRMC §§ 54-813 and 54-816 respectively, and consequently establish violation of this rule.

9. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

To sustain a violation under this rule, the agency must prove the Appellant's conduct hindered an agency mission, or negatively affected the structure or means by which the agency achieves its mission. In re Simpleman, CSA 31-06, 10 (10/20/06). Actual harm must be shown. In re Catalina, CSA 35-08, 8 (8/22/08). Lovingier testified Martinez violated this rule because her actions compromised the integrity of, and brought disrepute to, the Agency. He added the Agency's mission compromised was the fair and impartial discharge of duties. [Lovingier testimony]. No actual injury to the Agency or its mission was shown, therefore no violation is found.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-20.

A. Severity of the proven violations

The Agency proved Martinez improperly sought and obtained a waiver of \$400 in fees which waiver she did not make available to the Ochoas. In addition, the waiver constitutes an improper conversion of that value from public revenue. Martinez' reimbursement was a mitigation of the latter impropriety. Her position as supervisor requires her to uphold a higher standard in order to set an example for her subordinates. Therefore, her position as supervisor constitutes an aggravating factor in assessing discipline

B. Past record

The Agency did not claim Martinez' past record contained any negatives.

C. Penalty likely to achieve compliance

The Appellant insisted, throughout hearing, that she engaged in no wrongdoing. Consequently a lesser penalty would be less likely to effect compliance.

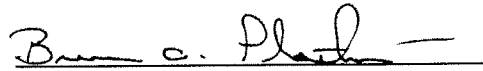
The hearing officer must not disturb the agency's determination unless it is clearly excessive or based substantially upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), *citing In re*

Delmonico, CSA 53-06, 8 (10/26/06). The Agency's election to dismiss the Appellant was within the range of reasonable alternatives available to it, and therefore not clearly excessive. The Agency's decision was supported by a preponderance of the evidence as described in the analysis above.

VI. ORDER

The Agency's termination of the Appellant's employment on March 6, 2009, is **AFFIRMED**.

DONE October 22, 2009.


Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery below. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

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

AND

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