

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

Appeal No. 363-01

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

WILLIAM J. SCHNEIDER, Appellant;

Agency: DEPARTMENT OF PARKS AND RECREATION,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

INTRODUCTION

This matter comes before the Career Service Board on appeal by William J. Schneider (hereinafter "Appellant") filed November 6, 2001. Appellant challenges the Department of Parks and Recreation's (hereinafter "Agency") decision to terminate his employment for cause after Appellant's blood-alcohol content ("BAC") test registered at .083 and .081 over four hours after the beginning of his shift. Appellant admitted to consuming approximately twenty drinks the previous day, and drove a City vehicle to work early that morning before the test.

A hearing in this matter was held before Personnel Hearing Officer Joanna L. Kaye ("hearing officer") on January 17, 2002 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Sybil R. Kiskan, with the Agency's Human Resources Director, Amy Greenburg, present for the majority of the proceedings and serving as advisory representative for the Agency. Appellant was present and was represented by Mr. Paul A. Baca, Esq.

Witnesses for the Agency included Ms. Greenburg, Appellant as an adverse witness, and the following Agency employees: Senior Safety and Loss Analyst Jerry Quintana, Field Superintendent David Acosta, and Deputy Manager of Parks Abel Shaw.

Appellant's witnesses included Employee's Assistance Counselor Deb Martin, and Appellant himself.

In his prehearing statement, Appellant had listed additional witnesses who are fellow Agency employees. Appellant listed these individuals for the purpose of showing inconsistencies in the Agency's disciplinary actions for similar violations in the past. These witnesses were stricken on the Agency's Motion after the Agency offered prior case law and authority tending to demonstrate that the CSR is not a "comparative discipline system," but

rather a "progressive discipline system." *See, e.g., In the Matter of John F. Sandoval*, Appeal No. 33-00 (November 27, 2000 by Hearing Officer Robin R. Rossenfeld); Denver Code, Subtitle B, Section C5.25 (5); *c.f.*; Section C5.73-2 (7). The Agency further made an offer of proof that those individuals were disciplined before amendments relevant to the offense in this case were subsequently made to Executive Order 94. *See, Executive Order 94, Section IV. A. 2* (Exhibit 1, p. 11). Thus those cases are distinguishable from Appellant's case.

The parties stipulated to the admission of Agency Exhibits 1 through 11 and Appellant's Exhibits B and C. Exhibit A, which contains Appellant's Performance Evaluations since June of 1997, was admitted over the Agency's objection that it was not provided to the Agency before the morning of the hearing. The document was admitted on the grounds that Appellant had listed his personnel file in his prehearing statement, the Agency was already in possession of Appellant's personnel file which contained the evaluations, and the Agency representatives considered Appellant's work history in the course of their deliberations.

No additional exhibits were offered or admitted.

For purposes of the Findings and Order, the Rules of the Career Service Authority shall be abbreviated as the "CSR" with a corresponding numerical citation. The City and County of Denver shall be referred to as the "City."

ISSUES

1. Whether the Agency has demonstrated by a preponderance of evidence that Appellant drove a City vehicle, performed other duties during his scheduled work hours, and/or was on City property while subject to the effects of alcohol.
2. Whether Appellant has demonstrated by a preponderance of the evidence that the Agency lacked reasonable suspicion to require Appellant to submit to a BAC test.
3. Whether Appellant has demonstrated by a preponderance of the evidence that the Agency made a determination respecting Appellant's disciplinary action prior to the pre-disciplinary meeting in violation of Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) and CSR Rules 16-30 and 17-21.
4. Whether Appellant has demonstrated by a preponderance of the evidence that the Agency deprived Appellant of his right to representation as set forth in CSR Rules 16-30 and 17-21 during the pre-disciplinary meeting.
5. Whether, given the totality of the evidence, the Agency demonstrated just cause for disciplining Appellant.
6. If so, whether the totality of evidence demonstrates the Agency's dismissal of Appellant is reasonably related to the seriousness of the offense.

FINDINGS OF FACT

1. Appellant was a Field Superintendent on probationary promotional status for the Agency's Central District at the time of his dismissal on October 31, 2001. Appellant was a long-time employee of the Agency, having begun as a Seasonal Laborer during the summer months of 1970 through 1982, during which time he was also a schoolteacher. He became permanent with the Agency as a Utility Worker I from 1982 until he audited up to Utility Worker II in 1983. In 1986 Appellant joined the supervisory ranks when he became a Grounds Foreman. From 1987 until 2001 Appellant served as Acting Field Superintendent for the Agency's South District until his appointment to his latest probationary promotional position in the Fall of 2001.
2. At the time of his dismissal, Appellant supervised 2 foremen, 28 employees, and 20 seasonals. In addition to his supervisory duties, he interacted with the public, including representing the Agency in interactions with City Council, and handling complaints from the Denver citizenry. Appellant's Performance Enhancement Program Reports ("PEPR's") have consistently been "Exceeds Expectations" since 1997 (Exhibit A). Appellant had no prior disciplinary actions.
3. As a supervisor, one of Appellant's duties was to assure his employees remain up to date on Agency Policies and Rules, Executive Orders and other regulations controlling their performance and responsibilities as Agency employees.
4. In August of 1995 the Agency issued a "Policy Restatement" which reflects a "zero-tolerance policy" concerning alcohol in the workplace (Exhibit 3). Appellant testified that he was familiar with this Policy Restatement at the times relevant to this appeal.
5. Approximately one and a half years prior to the hearing in this case, Human Resources personnel from the larger City agencies coordinated with local health experts, the Occupational Health and Safety Council ("OHSC"), and the Career Service Authority to formulate training for all City employees on drug and alcohol abuse and then recent amendments to Executive Order 94 (Exhibit 1). A Training Committee was formed and subsequently engaged in the training of approximately 1000 city employees.
6. Human Resources Director Amy Greenburg, who participated in the formulation and execution of this training, testified that Appellant's name turns up in the training attendance records of November, 2000. Appellant testified he recalled participating in this training around that time. Ms. Greenburg testified that the training specifically included information concerning the length of time it takes for a human body to metabolize and eliminate alcohol from the bloodstream. Ms. Greenburg testified that the training in this subject included the effect of many variables, such as the amount of alcohol consumed, bodyweight, metabolic rate, the amount of food consumed, sleep, and personal body chemistry.¹

¹ The Agency demonstrated that while the rule of thumb regarding the length of time it takes for the average human body to metabolize and eliminate alcohol is one hour per one ounce (meaning the equivalent of one beer, one average mixed drink or one glass of wine), this length of time can vary greatly depending on these variables.

7. Executive Order 94, Section IV. A (Exhibit 1, p. 11) states that an employee "*shall be dismissed even for the first offense*" (emphasis added) if, as set forth in subsection 2, (s)he "*foreseeably could have endangered the lives of others*" (emphasis added) through actions involving the influence of alcohol, as that legal standard is determined by State legislation and adopted by the Order (*see*, Section I A; Exhibit 1, p. 1). Ms. Greenburg further testified that the "foreseeably could have endangered the lives of others" language was added to subsection 2 of Section IV. A in January of 2000. Ms. Greenburg testified that due to the specific substitution of the word "*shall*" in the current Section IV. A for the word "*may*" in the previous version, the Agency considers termination mandatory in the event of any such violation, with no latitude for lesser forms of discipline, as was the case under the former wording. Ms. Greenburg could not recall whether this change in wording was made in March of 2000 or March of 2001, but apparently these changes were made in March of 2001 (*see*, Exhibit 1).
8. It was undisputed during the course of the hearing that under the current State legislation, "driving under the influence" or "DUI" legally occurs when the individual's BAC is .10 or higher, and that "driving while ability impaired" or "DWAI" occurs when an individual's BAC is .05 to .10. These limits are further adopted and incorporated by Executive Order 94, sections I A and Memorandum No. 94A; *see*, Exhibit 1, pp. 1 and 15).
9. In the Summer of 2001, Appellant was placed on promotional probation for the position of Field Superintendent. Appellant testified he was aware that during the probationary period for such a supervisory position, there is a heightened level of scrutiny of the probationary promotee's performance. (*See*, CSR Rule 5-51.)
10. On August 8, 2001 the Agency prepared Appellant's Performance Evaluation Plan ("PEP") for the coming year (Exhibit 4). Included in the PEP is the Agency's Mission Statement, which states that one of the employee's responsibilities is "to fulfill the special public trust" conferred by the citizenry, Agency traditions and the City Charter. On page 5 of the PEP under Item 7, "zero incidents where employee's action endangered the health and well being of himself, fellow employees, [or] the public" is listed as a priority-1 job responsibility. Appellant testified he had read this PEP and was aware of these items in it.
11. Item 4 of The Class Specifications for the position of Field Superintendent (Exhibit 5, p.2) indicates that one of the duties of the position is the implementation of Agency policies and procedures. Appellant testified that while he was not specifically well acquainted with this item in the Class Specifications, he was nonetheless well aware that one of his supervisory responsibilities was to enforce policy and procedure.
12. On Sunday, October 7, 2001 Appellant treated several friends to a Broncos game. Appellant testified he drank an unusually large amount of alcohol that day compared to his normal consumption, which was approximately four beers at a time mostly on weekend nights. Appellant testified he had about 4 or 5 12-oz. cans of Keystone Light before they went to the game, which started at 2:00 p.m. He testified that during the game, his friends were buying him rounds of Mike's Hard Ale Lemonade to show their appreciation for his having treated them to the game. Appellant testified that this is about a 16 oz. sweet drink containing some portion of hard alcohol. Appellant testified that he had an uncertain

number of these during the game, but estimated it could have been as many as ten, as they continued to buy them for him. Appellant further testified that he had as much as a six-pack of Keystone Lights when they returned home, and that he stopped drinking about ten or eleven that night.

13. Appellant testified that when he awoke the next morning, he was aware he had a hangover. He testified he knew he still had some alcohol in his system but did not suspect it was sufficient to put him over the legal limit or otherwise impair his driving ability. He considered calling in sick, but decided to go to work. Appellant testified that he left at about 5:40 a.m. and drove approximately ten miles from his home in Bear Valley to Congress Park in Capitol Hill, where his office was located.² He drove to work in the City vehicle he had taken home for the weekend. He arrived shortly before 6:00 a.m. Appellant testified he did no more driving in the City vehicle that morning after he arrived at work.
14. At approximately 9:30 that morning, Appellant was notified of an accident at the intersection of I-25 and Santa Fe possibly involving a cracked water main. He responded to the scene, as did Senior Safety and Loss Analyst Jerry Quintana, which is protocol for such an accident. Appellant testified that Jose Palma, the employee assigned to the affected area, drove him to the scene of the accident.
15. At approximately 10:00 a.m., while Mr. Quintana and Appellant were consulting on the accident, Mr. Quintana noticed Appellant's face was flushed and his eyes were bloodshot.³ Mr. Quintana further detected the odor of alcohol on Appellant's breath despite that they were outside and standing at arm's length. Mr. Quintana testified that Appellant's demeanor and speech were otherwise normal.
16. Mr. Quintana testified that because of Appellant's appearance and the odor of alcohol on his breath, he suspected Appellant was under the influence of alcohol. Mr. Quintana called Appellant's supervisor, Mr. Acosta, to the scene to verify Mr. Quintana's suspicion was reasonable, as is required by procedure. Mr. Acosta arrived and Mr. Quintana told him they should take Appellant to the Occupational Health and Safety Clinic "OHSC" for a BAC test.
17. Appellant willingly complied with this procedure. Mr. Acosta gave Appellant a ride to the OHSC.
18. Mr. Acosta testified that he did not detect the odor of alcohol on Appellant's breath until they got in Mr. Acosta's vehicle, at which time he did detect that odor. During the ride to the OHSC, Mr. Acosta asked Appellant if he was worried about what the results of the BAC test might be. Appellant told Mr. Acosta he was not concerned about the test.

² It is undisputed that Appellant's office in Congress Park is an Agency facility on City property, and that Appellant was on duty when he arrived at work.

³ The hearing officer observed Appellant during the entire day of the hearing. The hearing officer observed that Appellant's facial tone appears to be naturally ruddy and his eyes appear naturally somewhat bloodshot. Appellant's appearance did not change during the course of the hearing, which began at 9:00 a.m. and lasted until 4:15 p.m.

19. Mr. Acosta testified that he is around Appellant once or twice a month as his supervisor. Mr. Acosta testified that Appellant's appearance in the face and eyes as observed on the day of the hearing was typical for Appellant in recent years. However, Mr. Acosta testified that Appellant's eyes did appear somewhat more bloodshot than usual at the scene of the water main accident on the morning of October 8, 2001.
20. When they arrived at the OHSC, Mr. Quintana prepared the required forms (Exhibits 6 and 7). Appellant was tested at 10:47 a.m. and his BAC registered at .083. Appellant then did a second test for verification at 10:57 a.m. and his BAC registered at .081 (Exhibit 8).
21. Mr. Acosta placed Appellant on investigatory leave (*see*, Exhibit 9) and gave him a ride home from the OHSC. During the ride Appellant asked Mr. Acosta what he thought his chances were. Mr. Acosta responded that it did not look good because of the results of the BAC test. Mr. Acosta credibly responded under cross-examination that he did not tell Appellant what the discipline would be because Mr. Acosta did not have the authority to determine such a thing on his own at that time.
22. The Agency scheduled a pre-disciplinary meeting for October 24, 2001 and notified Appellant of this meeting (Exhibit 10).
23. During the week following the incident on October 8, before the pre-disciplinary meeting had occurred on October 24, Mr. Acosta called Appellant "off the record" as a friend and told him what the range of possible outcomes of the disciplinary investigation might be. Mr. Acosta testified that he told Appellant he might want to consider the option of resigning to avoid being fired so that he could apply for other City positions, since the rules prohibit such re-application for a period of five years after termination for cause. (*See*, CSR Rule 3-22 d) 6); CSR Rule 4-93 A.) Mr. Acosta further credibly testified he did not intend to relay to Appellant that a decision had already been made during this conversation. He testified that to his knowledge, no decision was made prior to the pre-disciplinary meeting held on October 24, 2001.
24. Appellant testified that during this telephone conversation, Mr. Acosta said something to the effect of "It looks like the Department is going for dismissal." Appellant also testified that they discussed resignation as a "possible option" in Appellant's words.
25. During the days following October 8, Deputy Executive Manager of Parks Abel Shaw, who is Mr. Acosta's supervisor, was notified of the incidents leading to Appellant's investigatory leave. He contacted Mr. Acosta who told him the details about Appellant's case. He was also in communication with Human Resources about the case during this time.
26. On or around October 12, Mr. Shaw called Appellant on the telephone. Appellant testified that Mr. Shaw said something to the effect of "It looks like you might be losing your job." During this conversation, Mr. Shaw reiterated the possible outcomes of the disciplinary action and told Appellant about the option of resignation in lieu of termination to avoid being barred from applying for a City position for five years. Appellant asked Mr. Shaw if he "needed" an attorney for the predisciplinary meeting and Mr. Shaw told him he did not,

but that if the matter proceeded to a CSA hearing he should probably get one. Mr. Shaw also credibly testified he did not intend to relay to Appellant that a decision had already been made during this conversation. He testified that to his knowledge, no decision was made prior to the pre-disciplinary meeting held on October 24, 2001.

27. Appellant credibly testified that he interpreted his telephone conversations with Mr. Acosta and Mr. Shaw as relaying that a decision had already been made regarding his termination.
28. Ms. Greenburg has been the Agency's Human Resources Director for 16 years. On approximately October 23, the day before the pre-disciplinary meeting, Ms. Greenburg, who had recently returned from extended sick leave, familiarized herself with Appellant's case. She was not familiar with the case and had not discussed the case with anyone prior to October 23.
29. Mr. Acosta, Mr. Shaw and Ms. Greenburg each testified that no single person involved in the deliberation of an individual's disciplinary action has the power to make the decision in a given case, but rather the decision is made by consensus after the pre-disciplinary meeting, based on a discussion and consideration of all the participants' recommendations.⁴ Ms. Greenburg testified that in the event of a deadlock her recommendation as Human Resources Director usually prevails. The Agency witnesses also testified that the Agency Manager (in this case Parks and Recreation's Executive Director James Mejia) has the ultimate power of veto and makes the final decision.
30. There is no evidence tending to suggest that Mr. Mejia knew of Appellant's case or discussed it with anyone prior to October 24, 2001.
31. The pre-disciplinary meeting was convened on October 24, 2001. Mr. Quintana, Mr. Acosta, Mr. Shaw and Ms. Greenburg represented the Agency at the pre-disciplinary meeting. Ms. Greenberg, Appellant and Fred Norris, a friend and fellow employee of Appellant's, were the first to arrive. Ms. Greenburg asked Mr. Norris if he was there to represent Appellant. He and Appellant both responded that he was not there to represent Appellant but was only present for moral support. Ms. Greenburg asked Mr. Norris if he was familiar with the procedures and the information in the pre-disciplinary letter. He stated he was not. Ms. Greenburg testified that she concluded Mr. Norris was not serving in the capacity of a representative, and excused him from the meeting at that time. Just as Ms. Greenburg was questioning Mr. Norris, Mr. Shaw and Mr. Acosta arrived. They witnessed the end of the conversation, but did not hear some of the details leading to Mr. Norris' dismissal from the pre-disciplinary meeting. It is unclear from the record when Mr. Quintana arrived.
32. Appellant testified that he said Mr. Norris was there for moral support, but that he also said he had brought Mr. Norris to take notes and that Mr. Norris had a note pad. Ms. Greenburg testified she did not recall whether Mr. Norris had a note pad or not, but that she asked a number of questions designed to determine whether Mr. Norris actually "represented"

⁴ Mr. Shaw also testified that he "made the decision" in this case. The hearing officer takes Mr. Shaw's statement as meaning he marshaled the recommendation to terminate Appellant.

Appellant as permitted by the CSR Rules, and that her conclusion that he did not was based on both their answers. Ms. Greenburg testified that neither of them mentioned Mr. Norris being there to take notes or else she might have considered allowing him to stay in the room during the meeting.⁵

33. The pre-disciplinary meeting lasted about a half an hour. Ms. Greenburg explained the procedure and reiterated the contents of the pre-disciplinary letter (Exhibit 10). During the meeting, Appellant told Ms. Greenburg about his telephone conversation with Mr. Acosta concerning resignation. Appellant did not mention his conversation with Mr. Shaw. Ms. Greenburg told Mr. Acosta that this was not in accordance with procedure and should not have occurred.
34. During the meeting Appellant admitted to consuming approximately twenty drinks on October 7, and admitted that going to work the following morning was a "stupid decision." Appellant expressed that he did not know his BAC was so high until the test, and did not feel his ability to drive was impaired that morning when he drove to work.
35. At the hearing, Appellant offered no evidence that Mr. Acosta's and Mr. Shaw's calls, or Mr. Norris' absence during the pre-disciplinary meeting, prevented Appellant from giving the Agency representatives all the information he thought was important for their consideration, or otherwise prejudiced him.
36. Mr. Quintana, Mr. Acosta, Mr. Shaw and Ms. Greenburg conferred after the pre-disciplinary meeting. All four of these individuals testified that they perceived Executive Order 94 IV. A. 2 to mandate dismissal if an employee's actions could foreseeably have endangered the lives of others. They all further testified that they speculated about Appellant's BAC content at 6 that morning when he drove to work. The essence of the testimony of these witnesses is that under the current State statutory limits, they perceived driving with a BAC over the statutory impairment limit as posing a potential threat as a matter of law. They testified that they concluded they had no flexibility under the Executive Order as it is currently worded. The Agency representatives all concurred that, therefore, the only appropriate action under these circumstances was to recommend termination.
37. Mr. Acosta, Mr. Shaw and Ms. Greenburg testified that they were familiar with Appellant's work history and quality at the time they made the decision in this case, although Mr. Shaw did not review Appellant's personnel file. They all further testified that under the mandatory nature of the current Executive Order 94, they could not allow Appellant's good record to sway their decision to terminate him.
38. Mr. Shaw met with Mr. Mejia following the pre-disciplinary meeting. He relayed the substance of the meeting and the recommendations of the Agency representatives. Mr. Mejia concurred with the recommendations and Appellant was terminated effective October 31, 2001 (Exhibit 11).
39. Appellant timely filed his appeal on November 6, 2001.

⁵ Mr. Norris did not testify at the hearing.

40. During the hearing, Appellant testified that he had heard of people waking up with alcohol in their systems from consumption the night before. Appellant further freely admitted that his actions of driving in a City vehicle with that much alcohol in his system on October 8, 2001 constituted gross negligence, carelessness in the performance of his duties, the operation of a City vehicle while intoxicated, and were a violation of Executive Order 94, directives of his PEP, and Departmental policies and regulations. However, Appellant credibly maintained that none of these violations was knowing or deliberate since he did not suspect his BAC was over the legal limit at the time.

PRELIMINARY MATTERS

1. The Hearing Officer's Jurisdiction

The hearing officer finds she has jurisdiction to hear this case as a dismissal, pursuant to CSR Rule 19-10 b), as follows in relevant part:

Section 19-10 Actions Subject to Appeal

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

- ...b) Actions of appointing authority: Any action of an appointing authority resulting in dismissal... which results in an alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

Jurisdiction over Appellant's termination was not disputed by either party to this case.

2. Burden of proof

In civil administrative proceedings such as this one, the level of proof required in order for a party to prove its case is by a *preponderance of the evidence*. In other words, to be meritorious, the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

It has been previously established that the Agency responsible for terminating a career service employee affirmatively bears the initial burden of establishing, by a preponderance of the evidence, that it had just cause for the termination action. See, In the Matter of the Appeal of Vernon Brunzetti, Appeal No. 160-00 (Hearing Officer Bruce A. Plotkin, 12/8/00). The Agency must also demonstrate that the severity of discipline is reasonably related to the offense in

question. See, In the Matter of Leamon Taplan, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99).⁶

The burden of proof was not disputed by either party to this case.

DISCUSSION

1. The Agency's Case in Support of Appellant's termination.

a. Rules the Agency alleges Appellant violated.

The Agency posits Appellant violated the following relevant portions of CSR Rule 16, DISCIPLINE:

Section 16-50 Discipline and Termination

A. Causes for Dismissal:

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant...

- 1) Gross negligence or willful neglect of duty...
- ... 4) Being under the influence, subject to the effects of, or impaired by alcohol...while on duty; while performing city/agency business; while in a city/agency facility; or while operating city/agency vehicle/equipment....
- ...7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work, which the employee is capable of performing...
- ...18) Conduct which violates an executive order which has been adopted by the Career Service Board.
- ...20) Conduct not specifically identified herein may be cause for dismissal.

Section 16-51 Causes for Progressive Discipline

- A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted...

⁶ Assuming the Agency has met these burdens, the burden of proof then shifts to the Appellant to rebut or mitigate each element of the Agency's case by a preponderance of the evidence.

- ...2) Failure to meet established standards of performance including either qualitative or quantitative standards.
- ...5) Failure to observe departmental regulations.
- 6) Carelessness in the performance of duties and responsibilities.
- 7) Unauthorized operation or use of any vehicles, machines or equipment of the City and County.
- ...11) Conduct not specifically identified herein may also be cause for progressive discipline.

The Agency further cites Executive Order 94 (eff. 3/15/01) (*see*, Exhibit 5), which reads as follows in relevant part:

PURPOSE: As an employer, the City and County of Denver (City) is required to adhere to various federal, state, local laws and regulations regarding alcohol and drug use. The City also has a vital interest in maintaining a safe, healthy and efficient environment for their employees and the public. Being under the influence of, subject to the effects of or impaired by alcohol...on the job may pose serious safety and health risks to the user, the user's co-workers and the public....

I. PROHIBITIONS FOR ALL CITY EMPLOYEES INCLUDING CLASSIFIED MEMBERS OF THE POLICE AND FIRE DEPARTMENTS

A. Alcohol

Employees are prohibited from consuming, being under the influence of, subject to the effects of or impaired by alcohol while performing City business, while driving a City vehicle or while on City property...

The alcohol levels defined by the state legislature that may be amended from time to time for defining "under the influence of alcohol" and "impaired by alcohol" are adopted here for purposes of this executive order....

IV. DISCIPLINARY ACTIONS

- A. If it is determined after the appropriate disciplinary meeting that any of the following situations apply, the employee *shall* be dismissed *even for the first offense* for the following conduct:

- ...2. The employee has endangered the lives of others, *or foreseeably could have endangered the lives of others...*

(Emphasis added.) Memorandum No. 94A, Section I (Exhibit 1, p.15) further specifically adopts the current statutory provisions of DUI at .10 and DWAI at .05.

b. The Agency's arguments.

The Agency asserts that Appellant's BAC level of .083 at ten thirty in the morning can only lead it to reasonably conclude that Appellant's BAC was, at the very least, .083 when he drove to work in a City vehicle over four hours earlier. Therefore, at the very least, Appellant was in the statutory DWAI range, which under the current legislation is between .05 and .10. The Agency argues that under the mandatory language recently added to Executive Order 94 it had no choice but to dismiss Appellant since he was within the statutory "danger zone" adopted under Executive Order 94 I. A and Memorandum No. 94A.

Appellant maintains that his ability to drive was not impaired on the morning in question and that he posed no threat to the citizenry by driving to work. He contends that he was not aware that his BAC was as high as it was when he drove the City vehicle, and that therefore he did not knowingly or deliberately violate any rules, policies or orders.

However, it is undisputed that Appellant drank a large quantity of alcohol the day before the incident in question, that he drove to work in a City vehicle, and that over four hours after that he registered a BAC of .081 to .083. It is further undisputed that the legal limit of .05 or higher is considered "DWAI." Finally, it is undisputed that Appellant's BAC had to be at least that high or higher when he drove the City vehicle to work that morning. Appellant's action was therefore a *per se* violation of the statute prohibiting driving while over this BAC limit, as well as the regulations prohibiting the presence at work or on City grounds, the operation of City vehicles, and the performance of duties while under the influence of the effects of alcohol. Furthermore, Appellant concedes that his action constituted violations of the regulations referenced. Under these facts, the hearing officer concludes that the Agency met its burden of proving that it had just cause to discipline Appellant.

2. Appellant's response to the Agency's case.

a. Reasonable suspicion.

Appellant underscores the hearing officer's observation that while Mr. Quintana noted Appellant's appearance about his face and eyes was part of the reasonable suspicion leading to the BAC test, Appellant appears naturally red about the face and bloodshot in the eyes.

"Reasonable suspicion" must be "based upon specific, personal observations concerning the appearance, behavior, speech *or* body odors of the employee." Casados v. Denver, 832 P.2d 1048 (Colo. App. 1992) (emphasis added), citing Skinner v. Railway Labor Executives' Ass'n, 489 U. S. 602 (1989). Based on the odor of alcohol alone, which was observed by Mr. Quintana and later verified by Mr. Acosta, the Agency had a reasonable suspicion that Appellant was subject to the effects of alcohol. The hearing officer concludes that under the controlling case law, these observations of Appellant's breath render the issue of Appellant's appearance moot.

b. Appellant's allegation of predetermination.

Appellant asserts that the Agency supervisors' calls to him before the pre-disciplinary meeting are evidence that they had already come to a foregone conclusion that Appellant was to be terminated prior to the pre-disciplinary meeting.

The Agency responds that it did not arrive at any predetermined conclusion regarding the appropriate discipline. As evidence of this assertion, it offers the testimonial disclaimers of Mr. Acosta and Mr. Shaw, who communicated with Appellant prior to the pre-disciplinary meeting. Both testified that they had not made any determination at the times of those calls, that they did not have the authority to make such a determination, and that they were just trying to do Appellant a favor by presenting him with options. The Agency further offered testimony that Ms. Greenburg and Mr. Mejia essentially have veto power over contrary recommendations of the other supervisors involved in the pre-disciplinary process. Yet they were not yet familiar with the case when the phone calls in question were made.

The hearing officer finds Mr. Acosta's and Mr. Shaw's telephone conversations with Appellant prior to the disciplinary meeting disturbing. Appellant's perception of those calls demonstrates why such communications are not sound policy even in the absence of ill intent, or any cited authority expressly prohibiting them. However, while these actions may have been inappropriate, the hearing officer is not persuaded that the calls evidence "predetermination" on the part of the Agency in violation of the CSR Rules and governing case law.

The United States Supreme Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) has set out what process is due before the termination of a classified employee. The pre-disciplinary process exists only to provide the employee notice and the opportunity to present any "plausible arguments" that have not been considered, which arguments "might have prevented their discharge." Id. at 543-544. "It should be an initial check against mistaken decisions; essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true." Id. at 545-546. In order to achieve this, "[a]ll the process that is due is provided by a pretermination opportunity to respond, coupled with posttermination administrative procedures as provided by (the hearing process)." Id. at 547-548.

First, the decision itself was not made until after the predisciplinary meeting. Consistent, credible Agency testimony established that these decisions are made by consensus, are subject to veto by the Human Resources Director and, ultimately are within the purview of the Executive Director of the Agency. Neither Ms. Greenburg nor Mr. Mejia knew anything about this case at the time the calls were made. Appellant's termination letter was not prepared until October 29, 2001, and his termination was not effective until October 31 (Exhibit 11).

In addition, it is apparent that Mr. Acosta and Mr. Shaw already knew three critical facts when they made the calls: that Appellant drove a City vehicle to work, that his BAC test was in the DWAI range several hours later, and that Executive Order 94 mandates dismissal in the event of potential foreseeable danger. Under these particular facts, it is a hyper-technical absurdity to prohibit one from postulating the obviously likely outcome. This was clearly the very reason that Mr. Shaw and Mr. Acosta wanted to inform Appellant of his other options.

Mr. Shaw and Mr. Acosta also apparently presumed that Appellant had no rebuttal evidence to present. While this is might be the clearest evidence of predetermination, the

presumption has since proven to be correct. This militates against any contention of prejudice arising from these communications. The calls did not deprive Appellant of the *opportunity* to present any existing rebuttal information at the predisciplinary meeting. Furthermore, there is no evidence that Appellant failed to present any information he would otherwise have offered were it not for the calls. Therefore, no violation of the Loudermill standard has been shown.

While a predisciplinary meeting in the face of an undeniable BAC test might appear to be an "exercise in futility," the fact that Appellant had no defense does not mean his due-process right to present his side of the case was violated. *See, Saavedra v. City of Albuquerque*, 73 F.3d 1525 (10th Cir. 1996) (applying Loudermill, above). In that case, employee Saavedra was terminated after a pretermination hearing because he tested positive for marijuana. He argued that because there was "nothing he could do or say" in response to the positive test, the "opportunity to offer explanations for the positive test presented by the pre-termination and post-termination hearings was nothing more than an exercise in futility" and that he was therefore denied a meaningful hearing. The Tenth Circuit held that Saavedra's inability to present evidence rebutting the positive test was found not to be a due-process violation, where no rebuttal evidence existed and he had openly admitted to using the detected drug, even though such positive test results meant certain termination.

The hearing officer does not intend to excuse the supervisors for their actions. The act of communicating with an employee under disciplinary consideration should raise a presumption of conflict and be closely scrutinized as evidencing predetermination on the part of the Agency. However, the Agency in this case has presented evidence sufficient to rebut such a presumption. The hearing officer concludes that Appellant has failed to demonstrate by a preponderance of the evidence that the Agency determined Appellant's discipline prior to the pre-disciplinary meeting. In addition, there is no evidence that Appellant's due-process rights as set forth in Loudermill and the CSR Rules were prejudiced in any way by the calls.

c. Appellant's right to representation at the pre-disciplinary meeting.

Appellant further contends that he was not afforded his right to "representation" during the pre-disciplinary meeting, despite his choice to have Mr. Norris present. Appellant contends that Mr. Norris was there to take notes, that Appellant told Ms. Greenburg as much, and that Mr. Norris had a notepad.

The Agency responds that Ms. Greenburg did not allow Mr. Norris to stay during the pre-disciplinary meeting because both he and Appellant stated that he was not serving as Appellant's "representative," but rather that he was present for "moral support." He further stated he knew nothing about the case or relevant procedures.

CSR Rule 17-21 states:

The Charter provision concerning employee representation is as follows: "Employees may designate agents to *represent* them in dealing with their supervisors, the Career Service Hearings Officer, the Career Service Board, the City Council, and the Mayor, or any thereof."

(Emphasis added.) Clearly this regulation references *representation* by an agent or representative. Similarly, CSR Rule 16-30 states as follows in relevant part:

E. Notice of contemplation of disciplinary action and pre-disciplinary meeting.

The notice of contemplation of disciplinary action and pre-disciplinary meeting shall contain the following:

...5) That the employee is entitled to have a *representative* of his or her own choosing present at the meeting...

(Emphasis added.) Notably, this regulation does not state that the employee may have “anyone” of his choosing present at the pre-disciplinary meeting, only a “representative.”

The hearing officer finds Ms. Greenburg’s testimony about this discussion more objective and credible than Appellant’s in light of her long experience with such matters. Her determination, that Mr. Norris was not there to serve as Appellant’s representative, is persuasive in the absence of more compelling evidence to the contrary. Appellant offered no such compelling evidence in this case. While Appellant might have had the right to have a “representative” of his choosing present during the pre-disciplinary meeting, the hearing officer has no authority before her tending to establish that Mr. Norris’s role, as he and Appellant described it to Ms. Greenburg, qualifies as “representation.” The only reason this issue was in doubt was because of Appellant’s and Mr. Norris, own responses to Ms. Greenburg’s questions. Since they themselves admitted that Mr. Norris was not there to “represent” Appellant, he has not established by a preponderance of evidence that he was not allowed to have a “representative” at the meeting.

Furthermore, it is entirely unclear to the hearing officer how Mr. Norris’ dismissal prejudiced Appellant during the pre-disciplinary meeting.⁷ Mr. Norris was not an attorney or a union representative. He was not familiar with the facts of the case, nor with the relevant procedures governing the process. It is difficult to imagine how his absence from the meeting might have adversely affected Appellant in the course of the meeting in any way, and Appellant has not offered any evidence that Mr. Norris’ absence adversely affected Appellant’s presentation, his rights, or the outcome of the meeting. See, Loudermill, above.

Based on this evidence, the hearing officer concludes by a preponderance that Ms. Greenburg’s exclusion of Mr. Norris from the pre-disciplinary meeting was not a violation of the CSR Rules, and resulted in no procedural or substantive due-process violations to Appellant.

3. Severity of the discipline.

⁷ While a party is not normally required to prove prejudice when denied the benefits of counsel and such prejudice is presumed, such a presumption is not present and must be affirmatively demonstrated where Mr. Norris was not an attorney or union representative, was ignorant of the facts and procedure, and otherwise verified he did not act as Appellant’s “representative.”

Appellant contends that the Agency did not take his excellent work history into consideration in its deliberations on the appropriate level of discipline, in violation of CSR Rule 16-10. Appellant further argues that the discipline imposed was too severe for a first offense under circumstances where he has an excellent work record, has never been disciplined, and was not aware that he was in violation. Appellant believes he can and should be given a second chance.

The Agency responds that Executive Order 94 mandates termination and does not permit it to consider these mitigating factors.

The hearing officer is charged with the interpretation of the regulations. Regulatory interpretation is governed by well-established canons of construction.⁸ The role of the courts in interpreting a statute is to give effect to the promulgator's intent. Negonsott v. Samuels, 507 U.S. 99, 104 (1993). Because it is presumed that the promulgator expresses its intent through the ordinary meaning of its language, every exercise of statutory interpretation begins with an examination of the plain language. Id. at 202. Where the statutory language is plain and unambiguous, further inquiry is not required. See, Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

In addition, the regulatory scheme should be construed as a whole, giving a consistent and harmonious effect to each of its parts. Martin v. People, 27 P.3d 846 (Colo. 2001); citing § 2-4-201(1)(b), 1 C.R.S. (1999); Charnes v. Boom, 766 P.2d 665, 667 (Colo. 1988). The interpretation should give effect to and construe each provision in harmony with the overall regulatory design. See, City of Florence v. Bd. of Waterworks, 793 P.2d 148, 151 (Colo. 1990).

The language of Section IV. A. 2 (cited above) is broad in its reference to an action which "*foreseeably could have endangered the lives of others.*" The Colorado Legislature has already determined what poses a potential danger to the citizenry by determining that driving while subject to the effects of a BAC of .05 or higher is impermissible. The Executive Order incorporates that determination in Section I (cited above). The language "even for a first offense" in that section is also plain and unambiguous in its meaning.

Another basic premise of regulatory construction is that courts should endeavor to give meaning to every word the promulgator used and therefore should avoid an interpretation which renders an element of the language superfluous. See, United States v. State of Alaska, 521 U.S. 1 (1997), reh'g denied, 521 U.S. 1144 (1997). The regulation is to be interpreted so that no words are discarded as being "meaningless, redundant, or mere surplusage." United States v. Canals-Jimenez, 943 F.2d 1284, 1286-87 (11th Cir. 1991). See, Bailey v. United States, 516 U.S. 137, 145-46 (1995) in which the Supreme Court said: "We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."

This same principal applies to *changes* in regulatory language. The court must consider the promulgator's intent in enacting, amending, and repealing regulations. See, Martin, above, at 852. The Office of the Mayor specifically changed the language in Subsection IV. A (cited

⁸ See, e.g., Silverman v. Eastrich Multiple Investor Fund, LP, 51 F.3d 28, 31 (3d Cir. 1995), which applies the canons of statutory construction to regulations.

above) from "may be dismissed to "shall be dismissed" in the event of such a violation. As the Second Circuit Court of Appeals stated in U.S. v. Maria, 186 F.3d 65 (2nd Cir. 1999):

...[t]he word "shall" is "used to express a command or exhortation," and is "used in laws, regulations, or directives to express what is mandatory." Webster's Dictionary, at 2085. See also Black's Law Dictionary, at 1375 ("As used in statutes, contracts, or the like, this word is generally imperative or mandatory."). Thus... the ordinary understanding of "shall" describes a course of action that is mandatory.

Thus, to interpret the change from "may" to "shall" as requiring anything other than a change in the meaning from permissive to mandatory termination in the event of the violation in question would render the change meaningless.⁹ The hearing officer therefore concurs with the Agency, in concluding that Executive Order 94 is mandatory in the case of a detected violation. This is the most consistent, harmonious and reasonable interpretation of the current language.

The hearing officer found Appellant's assertion that he did not suspect his BAC was over the legal limit when he drove to work on the morning of October 8, and therefore did not anticipate the risk involved, to be very credible. This is further supported by Appellant's response to Mr. Acosta in the truck on the way to the OHSC that he was unconcerned about the potential results of the test. It is apparent to the hearing officer that Appellant did not realize how much alcohol remained in his system that morning and was caught by surprise when the OHSC tested him. His violation of the regulations was apparently therefore unwitting.

However, the hearing officer is unaware of any case law or other authority which permits one's ignorance of his own BAC at the time of the offense to mitigate the violation. In addition, Executive Order 94, which controls this case, includes no language which could be construed as allowing such a consideration to mitigate the severity of discipline in the event of its violation, if the potential danger is *foreseeable*. "Whether harm is reasonably foreseeable depends upon common sense perceptions of the risks created by the conditions and circumstances and 'includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct.'" Bailey v. Huggins Diagnos. & Rehab., 952 P.2d 768 (Colo. App. 1997), quoting Taco Bell, Inc. v. Lannon, 744P.2d 43, 48 (Colo. 1987).

Given the excessive quantity of alcohol Appellant consumed the previous day and evening, coupled with his prior training concerning the variables affecting this issue, the hearing officer finds that Appellant should have suspected his BAC might be too high to drive legally, and therefore reasonably should have foreseen the potential risk. He alone is responsible for such a judgment call. Appellant was further aware of the Agency's "zero tolerance" policy concerning alcohol, and that he was under close scrutiny on probationary status for a mid-level supervisory position.

⁹ The hearing officer concludes from a reading of the other items listed under Section IV. A of Executive Order 94 that each one is sufficient in itself to mandate dismissal as a violation of the Section, and that a violation of all the items is not necessary. Otherwise, Items 4 and 5 would be rendered meaningless as mutually exclusive. These items further appear to apply to situations of intoxication in the workplace *not* involving the foreseeable danger of driving while impaired, and therefore are not options in the case at bar. (See, Executive Order 94, Section IV. A, subsections 1-7; Exhibit 1, pp. 11-12.)

The hearing officer is sympathetic with Appellant's pleas that his good standing and consistent "exceeds expectations" ratings should have been considered in the course of the Agency's determination of the severity of the discipline. CSR Rule 16-10, titled Purpose, states that "The degree of discipline should be reasonably related to the seriousness of the offense and should take into consideration the employee's past record." However, Executive Order 94 is specific in its mandate of termination and does not allow for such mitigating considerations. The canons of construction governing regulatory contradictions dictate that subsequent, more specific legislation overrides prior, more general statutory expressions. *See, L.D.G. v. E.R., 723 P.2d 746* (Colo. App. 1986). ("If two statutes conflict, the provisions of the specific statute will control over the general, and the provisions of the statute enacted last in time will control over one enacted earlier.") The subsequent adoption of Executive Order 94, the more specific statement of required action, therefore overrides the prior general statement of purpose in CSR Rule 16-10 by making dismissal mandatory despite an individual's performance record.

Based on the foregoing, the severity of the discipline is reasonably related to the offense in question as a matter of law, since the severity of that discipline has been mandated under the controlling Executive Order.

CONCLUSIONS OF LAW

1. The Agency has demonstrated by a preponderance of evidence that Appellant drove a City vehicle, performed other duties during his scheduled work hours, and was present in an Agency facility while his ability was impaired by alcohol as defined by State law. The Agency has therefore demonstrated that Appellant engaged in violations of the following CSR Rules:
 - a) Gross negligence in violation of CSR Rule 16-50 A. 1);
 - b) Being subject to the effects of alcohol while on duty, while performing Agency business, while on City property and while operating a City vehicle in violation of CSR Rule 16-50 A. 4);
 - c) Refusing to comply with the orders of an authorized supervisor in violation of CSR Rule 16-50 A. 7);
 - d) Conduct which violates an executive order; namely, Executive Order 94 in violation of CSR Rule 16-50 A. 18);
 - e) Violations of Executive Order 94, which prohibits employees from being subject to the effects of alcohol while present on City property, while performing Agency business, or while driving a City vehicle in such a manner as to pose a foreseeable danger to the safety of others;
 - f) Failure to meet established standards of performance in violation of CSR Rule 16-51 A. 2) as those standards are set forth in The Agency's August, 1995 Policy Restatement, Appellant's PEP and his Classification Specifications;

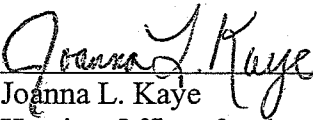
- g) Failure to observe departmental regulations in violation of CSR Rule 16-51 A. 5);
 - h) Carelessness in performance of duties and responsibilities in violation of 16-51 A. 6);
 - i) Unauthorized operation of an Agency vehicle in violation of CSR Rule 16-51 A. 7).
2. Appellant has failed to demonstrate by a preponderance of the evidence that the Agency lacked reasonable suspicion to require Appellant to submit to a BAC test.
 3. Appellant has failed to demonstrate by a preponderance of the evidence that the Agency deprived Appellant of his right to representation during the pre-disciplinary meeting.
 4. Appellant has failed to demonstrate by a preponderance of the evidence that the Agency made a determination respecting the outcome of its contemplation concerning Appellant's disciplinary action prior to the pre-disciplinary meeting.
 5. Given the totality of the evidence, the Agency demonstrated just cause for disciplining Appellant.
 6. In light of the totality of evidence and authority governing the circumstances of this case, the Agency's termination of Appellant is reasonably related to the seriousness of the offense as a matter of law and is mandated under the controlling regulations.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Agency's decision to terminate Appellant is AFFIRMED.

This case is hereby DISMISSED

Dated this 31st day of January, 2002.


Joanna L. Kaye
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 1st day of February, 2002 addressed to:

Paul A. Baca
Attorney at Law
1009 Grant St. Suite 201
Denver, CO 80203

William J. Schneider
6263 W. Flora Pl.
Denver, CO 80327

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the interoffice mail, this 1st day of February, 2002, addressed to:

Sybil R. Kiskan
Assistant City Attorney
Employment Law Section

Amy Greenburg
Department of Parks and Recreation

Virginia Granado