

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 04-09

DECISION

IN THE MATTER OF THE APPEAL OF:

ANGIE SIMMONS,
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Angie Simmons, appeals the termination of her employment from the Denver Sheriff's Department (Agency) on January 15, 2009. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on April 21 and 22, 2009. The Agency was represented by Joseph Rivera, Assistant City Attorney, while the Appellant was represented by Jeff Town, Esq., Elkus & Sisson, PC. The following Agency exhibits were admitted: 1-13; pp. 8-18 of Exhibit 14; Exhibit 15; pp. 11-13 and p. 20 of Exhibit 16; and Exhibits 17-18. Appellant's exhibits 10-1 through 10-15, were admitted. The Agency called the following witnesses to testify: the Appellant; Sgt. Harold Minter; Sgt. Cuauhtemol Espinoza; Major Vicki Connors; Sgt. Kenneth Juranek; Mr. Jerry Gianoutsos; Sgt. Philip Swift; Sgt. Joseph Garcia; Sgt. Saundra Fowler; Capt. Michael Than; and Deputy Manager of Safety Mary Maletesta. The Appellant testified on her own behalf during her case-in-chief, and presented no additional witness.

The Agency based its assessment of discipline upon three separate investigations into the Appellant's actions. For simplicity, the parties agreed to refer to the separate disciplinary matters as the secondary employment case, the babysitter case, and the driver's license case.

II. ISSUES

- A. Whether the Appellant violated any of the following Career Service Rules (CSR): 15-5; 15-15; 16-60 A.; 16-60 B.; 16-60 E.; 16-60 K.; 16-60 L.; 16-60 Q.; 16-60 S; or 16-60 Z.

- B. if the Appellant violated any of the above-referenced rules, whether the Agency's termination of the Appellant's employment complied with the mandates of Career Service Rule 16-20.

III. THE SECONDARY EMPLOYMENT CASE

A. Findings.

The Appellant was a deputy sheriff from 2006 to January 15, 2009 when she was dismissed. She was familiar with the Department's rules concerning secondary employment, leave, and self-reporting of crimes. The following chronology contains the pertinent facts regarding secondary employment.

12/31/07. The Appellant was placed on modified duty. [Exhibit 18]. She acknowledged that she was not allowed to engage in secondary employment while on modified duty. [Exhibit 18-4 @ #4; 4/21/09 Appellant testimony 10:40:50]. Her modified duty extended from 12/31/07 to March or April 2008, then again, beginning about one month later, until the end of August 2008. [Appellant testimony].

2/6/08. The Appellant moved into the Pine Creek Apartments. When she moved in, she entered into a verbal agreement with the manager to pay no rent in exchange for providing part-time services, including staffing the office, conducting rounds of the buildings and parking lots, accompanying staff to their cars at night, and reporting unlawful activity to police. She did not seek approval for this arrangement, and did not report these activities as outside or secondary employment. [Appellant testimony].

3/30/08-5/1/08. Appellant was suspended. [Exhibit 5]. The Appellant knew she was not allowed to work either for the City or any outside employment during her suspension.

6/10/08. Appellant submitted a post-dated application for secondary employment, effective "2/1/08 to present." [Exhibit 10-25]. The Application was rejected as untimely. [Exhibit 10-24].

8/1/08. The Appellant paid rent to the Pine Creek Apartments for the first time since moving in February 6, 2008. [Appellant testimony].

9/17/08. Internal Affairs conducted a telephone interview with the Appellant. During the interview the Appellant acknowledged she worked security at the Pine Creek Apartments. [Exhibit 12-6, lines 228-245].

12/23/08. Internal Affairs conducted a second interview with the Appellant. [Exhibit 13-10 et seq]. Her attorney acknowledged the Appellant's arrangement at the Pine Creek Apartments was "clearly an exchange of services for

benefit...providing employment services at her apartment in exchange for free rent for a few months.” [Exhibit 13-10, lines 414-416].

The Appellant at first admitted she worked secondary employment during her suspension, between March 30 and May 1, 2008. When pressed to repeat her acknowledgment, she waffled, then denied she worked during her suspension. [Exhibit 13-10, 13-11, lines 440-476].

B. Analysis.

1. Generally

The secondary employment case hinges on whether the provision of free rent in exchange for the performance of services constitutes “outside employment” under the Career Service Rules or “secondary employment” under Agency rules. Neither party argued that there is a legally significant difference between the two phrases, and a plain reading of both rules indicates they stand largely for the same thing, although Sheriff’s Department Order 2430 .1G encompasses a broader scope of activities.¹

The Agency claimed the Appellant’s own words and documents acknowledged she was engaged in secondary employment subject to Agency rules. The Appellant claimed her functions at the Pine Creek Apartments were not “outside employment” or “secondary employment” as contemplated by Career Service and Department rules, so that she was not required to seek approval.

It would be impossible for the Agency to anticipate every conceivable variant of outside employment, so it is not surprising that neither Career Service Rules nor Sheriff Department Rules address whether free rent in exchange for services constitutes reportable outside or secondary employment. Adding to this uncertainty, neither party presented legal argument (case law, statutory, regulatory, or other authority) for or against the proposition that the provision of services in exchange for rent constitutes reportable secondary or outside employment under CSA or Agency rules. Instead, each party simply assumed the propriety of his/her implied legal conclusion. For example, the Agency argued the Appellant lied about the hours she worked at the apartments, which assumes her activities were reportable “work” or “employment” under CSA or Agency rule, but omitted the reasoning by which it reached that conclusion. The Appellant stated since she received no payment, her activities at the apartments were not

¹ CSR 15-50 states “any employee desiring to take outside employment or engage in other business activities must submit written request to his or her appointing authority before the outside employment or business activities commence.” Sheriff’s Department Order 2430.1G states, in pertinent part, “No DSD personnel will be permitted to engage in secondary employment without prior approval, as outlined below.” The scope of the Sheriff’s Order appears to encompass a broader scope of activities by its explanatory language that the appointing authority has complete discretion over “all off-duty assignments and/or secondary employment of DSD personnel.” [Exhibit 4-4 @ ¶6, Procedure].

reportable outside employment, without citing authority for her conclusion.

2. Resolving the conflicting views of “secondary employment”

In the absence of clear authority, the standard by which I review the underlying question, above, is whether the Agency’s interpretation of its rule governing secondary employment – the exchange of services rendered for something of value - is permissible under the rules of statutory construction.² To that end, while the common understanding of “employment” is the exchange of services for pay, the Agency’s interpretation of employment as the exchange of services for any recompense also comports with the common conception of employment. Next, the Agency requires prior approval even for volunteer activities under its secondary employment policy, [Exhibit 10-25]. Consequently, if an employee receives a material benefit, e.g. free rent, in exchange for services, it would be illogical that such an arrangement would not fall under the scope of secondary employment while free work does. For these reasons, I find the Agency’s interpretation of its secondary employment rule as requiring reporting of free rent in exchange for services is based upon a permissible construction of that term.

3. Whether the Appellant engaged in secondary employment.

The following evidence, as a whole, indicates the Appellant was aware of her obligation to abide by the Agency’s rule governing secondary employment. (1) The Appellant acknowledged in her application for secondary employment “I do not get paid, but I do get comp[ensation] for my [apartment] rent free.” [Exhibit 10-25, bottom]. (2) The Appellant’s attorney also acknowledged, during an internal affairs (IA) interview, that the Appellant was compensated by receiving free rent in exchange for providing services. [Exhibit 13-10, lines 413-416]. (3) The Appellant at first stated she provided security services to the apartment building, [Exhibit 10-25], and only later declared she did not. The services provided by the Appellant - conducting of rounds of the buildings and parking lots, accompanying staff to their cars at night, and reporting unlawful activity to police - constitutes the provision of security, consistent with the box she checked in her application for secondary employment. (4) During her suspension, 3/30/08-5/1/08, the Appellant acknowledged she was not allowed to work. Her response, that she did not work during that period but had no idea why she continued to receive free rent, is improbable. The Appellant claimed a co-worker who handled scheduling at the apartments knew she did not work during her suspension, however the co-worker did not testify, and the Agency raised credible concerns

² Two rules of statutory construction apply here: any ambiguity of definitions should be resolved to comport with the common understanding of the terms. United States v. Morton, 467 U.S. 822, 828, 81 L. Ed. 2d 680, 104 S. Ct. 2769 (1984); and the agency’s interpretation of the rule should be given great weight unless plainly erroneous or inconsistent with the rule. Department of Administration v. State Personnel Board, 703 P.2d 595 (Colo. App. 1985); Bryant v. Career Service Authority, 765 P.2d 1037, 1038 (Colo. Ct. App., 1988). Consequently, where the rule is silent or ambiguous with respect to a specific issue, as it is here, I must determine whether the agency’s interpretation is based on a permissible construction of the rule.

about the reliability of the co-worker's alleged statement. [Garcia cross-exam]. (5) The Appellant also acknowledged she was not allowed to work secondary employment during her modified duty, from December 31, 2007 to March 2008 and again from April until the end of August 2008. "While on Modified Duty you will not be authorized to work any secondary employment." [Exhibit 18-4]. It is likely she worked during her modified duty for the following reasons. First, unlike her suspension, the Appellant did not claim that she did not work at the Pine Creek Apartments during her modified duty from January 1 to March 2008. Also, as stated above, it is unlikely the Appellant was allowed to stay rent-free at her apartment without providing anything of value in return during her subsequent modified duty. Also, the statements of a non-witness, described above, who may have supported the Appellant's allegation, were not credible evidence. On the other hand, the apartment manager testified without rebuttal that, while he did not oversee day-to-day scheduling, he would not approve such an arrangement. [Gianatsous testimony], and Sgt Garcia, who interviewed Gianatsous during the Agency's investigation of this case, testified credibly that Gianatsous remembered the Appellant worked through July, and expected work in exchange for free rent. [Garcia cross-exam]. (6). Finally, the Appellant acknowledged in her first IA interview that she worked "security" at the Pine Creek Apartments. [Exhibit 12-6, lines 228-245]. It was not until after she retained counsel that she claimed she did not provide security.

The remainder of the Appellant's claims were without merit, to wit: (1) The Appellant used the term "security" to Internal Affairs on September 17, 2008 because "that's how he asked it," [4/21/09 Appellant testimony 10:43:53], or (2) because she had been on a hike that day and was out of breath. [4/21/09 Appellant testimony 10:49:14]. (3) She filled out her request for secondary employment by checking the box for "type of employment" as "security" because she did not see the adjacent boxes. [Exhibit 10-25; 4/21/09 Appellant testimony 10:50:33]. (4) The Appellant explained she continued to receive free rent even though she did no more work at the apartments after March because "I asked the manager that and I still don't understand why, probably because he was being kind, I don't know." (5) She claimed two non-witnesses, Amassi and Frazier, supported her claim that she did no work at Pine Creek Apartments after March 1, 2008. These hearsay claims were rebutted by the testimony of Gianatsous who remembered the Appellant worked through July, and by the testimony of Sgt Garcia, who found Amassi not credible. Garcia's testimony was not rebutted.

The Appellant also claimed she was not required to request approval for her employment at the Pine Creek Apartments because the deputy sheriff she replaced there, Sam Burke, told her command staff told him not to worry about it. [Appellant testimony]. Burke, who would not have such authority himself, did not testify; the command staff who allegedly approved the arrangement without prior approval were not identified; and this hearsay upon hearsay is otherwise unreliable because no time frame was provided with respect to what rules were in effect at the time, and it is unknown if the same supervisors were involved.

Finally, the Appellant seemed to claim, alternatively, that if she were obligated to seek authorization for outside employment, she failed to do so because she was under stress at the time due to having testified as the complaining witness in the criminal trial of her ex-boyfriend. "It impinged on my ability to think about other aspects of my life." [Appellant cross-exam]. Even while there was not reason to question this account, this explanation does not relieve the Appellant's duty to seek authorization for outside employment. For reasons stated here and above, the Appellant was aware of her obligation to seek approval for her secondary employment at the Pine Creek Apartments and failed to do so.

4. The Appellant's conduct violated the following Career Service Rules:

16-60 E Any act of dishonesty including 1) altering or falsifying records or examinations; 2) Accepting, soliciting or making a bribe; 3) Lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours.

This rule includes any knowing misrepresentation made within the employment context. In re Mounjim, CSA 87-07, 6 (CSB 1/8/09). The Agency alleged the Appellant departed from the truth when she said she did not work the courtesy position at the Pine Creek Apartments while under suspension or on modified duty. [Exhibit 4-7; Exhibit 11-2 through 11-7 (6/10/08 IAB interview)].

The Appellant responded she quit working secondary employment during her suspension and modified duty [Exhibit 11-4, lines 170-177]. This representation is contradicted by her statements that she quit working after being informed she was under investigation [Exhibit 11-6, lines 258 – 269] and by the information she provided in her Request for Secondary Employment Approval showing dates of employment during those periods [Exhibit 10-25].

CSR 16-60 L., Failure to observe written departmental or agency regulations, policies, or rules. When citing this subsection, a department or agency must cite the specific regulation, policy or rule the employee has violated.

Departmental Order 2430.1G

5. Provisions. The following shall apply to the performance of and approval for secondary employment.

A. No DSD personnel will be permitted to engage in secondary employment without prior approval, as outlined below.

N. Deputy Sheriffs on approved leave due to ... limited-duty status or suspension will not be permitted to perform secondary employment related to their duties as an officer of the DSD.

For reasons stated above, the Appellant was aware she was not allowed to engage in outside employment during her limited duty leave and during her suspension. Also, as found above, the services she provided to the Pine Creek Apartments in exchange for a waiver of rent constituted outside employment. Consequently, when she performed those services while on modified duty and while under suspension, she violated this department rule, and therefore violated CSR 16-60 L.

6. Procedure: The director of Corrections and Undersheriff shall have complete authority and discretion regarding all off-duty assignments and/or secondary employment of DSD personnel. The Director of Corrections and Undersheriff may delegate this authority to a designee. Approval for secondary employment is a privilege that can be revoked or limited in scope at any time by the Director of Corrections and Undersheriff or his designee.

Approval Forms: There are two types of approval forms. All requests for approval of secondary employment must be made through the chain of command and submitted to the designated DSD secondary employment administrator. Applications for non-Sheriff secondary employment shall be made on DSD form 155 (Attachment A). All other requests regarding secondary employment shall be made on DSD form 153 (Attachment B). Time and dates of work must be clearly indicated on the approval form (DSD 1534). Any subsequent changes or additions in the listed times or dates of work will require submission of a new approval form.

All requests for secondary employment approval forms must be submitted to the secondary employment administrator within twenty-four (24) hours of being signed by a supervisor.

On the whole, this rule is a recitation of the administration for secondary employment. The only employee obligations here are for the employee to submit the request through the chain of command, to mark clearly the dates of employment, and to make a timely submission after approval. The Agency did not allege the Appellant violated any of these provisions, therefore this claim is dismissed.

8. Employment Contract: In the case of a Deputy Sheriff seeking approval for secondary employment, the employer, the Deputy Sheriff and the scheduling officer must sign an Employment Contract; form DSD 154 (Attachment C). The original form is to be forwarded to the secondary employment administrator and will serve as the master signature copy.

Copies of the completed employment contract shall also be retained by the secondary employer and the Deputy Sheriff.

The Appellant fulfilled her obligation to fill out the employment contract under this requirement. [Exhibit 10-26]. No violation is found.

9. Compliance: All DSD personnel, uniformed and civilian, seeking permission to engage in off-duty employment or currently performing secondary employment must comply with this Department Order. Failure to comply with any of the provisions set forth herein shall be cause for revocation of an employee's secondary employment work permit.

This section, permitting the revocation of secondary employment, is inapplicable, as the Agency did not authorize the Appellant's request for secondary employment.

Department Order 2740.1C

3. Responsibility:

G. Off-Duty Employment: Officers on modified duty are not permitted to work any sheriff related off-duty employment.

The proof of a violation of this Order is the same as for Department Order 2430.1G. 5. N., above. For the same reasons stated therein, the Appellant also violated this Order. The Appellant's violations of the aforementioned department orders constitute a violation of CSR 16-60 L. The following Agency allegations were not proven by a preponderance of the evidence.

Departmental Order 2430.1G 5.O. Once an application for Deputy Sheriff secondary employment has been approved, a copy of the signed approval ("work permit") must be carried on his/her person while performing secondary employment.

Since the Appellant failed to procure authorization for secondary employment, she could not have carried a copy of such authorization with her.

5. 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.

An agency's work is prejudiced under the first part of this rule if it is hindered in its ability to perform its mission. In re Strasser, CSA 44-07, 4 (10/16/07) aff'd In re Strasser, CSB 44-07 (2/29/08). No such showing was made by the Agency.

The second part of the rule prohibits conduct that actually injures the city's reputation or integrity. *Id.* The Agency failed to make such a showing.

IV. THE BABYSITTER (UNAUTHORIZED ABSENCE) CASE.

A. Findings.

The Appellant's shift was the first watch, from 1:41 a.m. to noon. On July 4, 2008, the Appellant called Sgt. Minter at 11:15 p.m. stating her babysitter had just cancelled and she had no one else to watch her children. She requested compensatory leave for her upcoming 1:41 a.m. shift. Minter denied her request. She requested sick leave, which Minter granted based upon her representations.

On July 5, 2008, at about 8:00 p.m. the Appellant called Sgt. Espinoza to inquire if she was scheduled to work the forthcoming 1:41 a.m. shift. She did not request leave at that time. She called Espinoza again at about 11:15 p.m. to ask if compensatory time was available. Espinoza told her there was none since the roster was short and overtime would be required in her absence. The Appellant then stated she would not be in due to babysitter problems. She was assessed unauthorized leave for that night. The Appellant wrote Capt. Conners to request she overturn Espinoza's decision and change the status of her leave from unauthorized to authorized leave. She stated Espinoza suggested she contact her (Conners) to approve the change. A deputy may take an unfavorable decision up her chain of command without approval from the supervisor who denied the request.

B. Analysis.

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

Negligence is established by proof that an employee has an important work duty and failed to perform that duty, resulting in significant potential or actual harm. *In re Martinez*, CSA 30-06, 4-5 (Order 10/3/06). In addition, an agency must communicate the importance of the work duty to the employee in such a manner that a reasonably astute employee would be aware of it. *In re Mestas*, CSA 64-07, 24 (5/30/08).

The Appellant called Minter more than two hours before her July 5 shift, and called Espinoza more than two hours before her July 6 shift. [Exhibit 14]. Even if an employee provides a false reason for requesting leave, this departmental rule, concerning timeliness, is not violated. The Agency did not seem to advance any other basis for a violation under this rule, therefore no violation is found.

2. 16-60 B Carelessness in performance of duties and responsibilities.

A violation of this rule is found where an agency proves an employee was heedless of an important work duty, resulting in significant potential harm or significant actual harm. In re Mounjim, CSA 87-07, 5 (7/10/08).

Sheriff's Departmental Rule 100.2 requires employees who are unable to report to their shift must call into work at least two hours prior to their start time. [Exhibit 4-2]. On July 4 and July 5, 2008 the Appellant called more than two hours before her scheduled shifts to request authorized leave. Even if the reason provided for seeking time off were improper, the Appellant called in more than two hours prior to her shift, and therefore did not violate this rule.

3. CSR 16-60 E. Any act of dishonesty...

The Agency alleged the Appellant was dishonest (a) in reporting that she had no notice of childcare issues on July 4 and July 5; b) in reporting that Sgt. Minter agreed to take her off the roster for both her weekend shifts.

In the case filings and at hearing, the parties also disputed whether Sgt. Espinoza suggested to the Appellant that she ask Major Connors to change her leave status from unauthorized to authorized.

(a.) When Appellant first became aware of childcare issues.

The Appellant claimed she called Sgt. Minter between 11:35 and 11:40 p.m. on July 4 requesting leave because her babysitter was "unavailable" and the Appellant was unable to find alternative care. [Appellant 4/21 09 @ 9:19:23]. She recalled telling Minter she "had no childcare for the evening...childcare wouldn't be available until Monday (July 7, 2008) because of the holiday weekend." [Exhibit 15-2 @ lines 83-84; Exhibit 15-4 @ lines 171-175]. The Appellant recalled requesting and being granted two nights off that weekend. [Appellant testimony; Exhibit 14-11]. Sgt. Minter recalled the Appellant told him on July 4 that her babysitter had "just canceled" at the last minute and she needed to be taken off the roster for that night's shift. [Exhibit 14-9; Minter testimony].

Although the Appellant claimed Minter granted her two days leave for July 5 and 6, she inexplicably called Sgt. Espinoza on July 5, about 8:00 p.m. to inquire if she was to be working the upcoming shift. She did not mention babysitting issues at that time. [Exhibit 14-10]. Then, in another reversal, when she called Espinoza back later on July 5, she told him she just tried to drop off her children and found the babysitter was not there. (Exhibit 14-10). She repeated this version of facts in a July 7, 2008 email to Major Connors. (Exhibits 14-17 and 14-18).

The Appellant contradicted her July 7 email in yet another version of the July 5th events. She stated she spoke with Espinoza only once [Appellant testimony], not twice as she stated in her July 7, 2008 email to Major Connors. [Espinoza testimony; Exhibits 14-15 and 14-18]. She could not, however, explain why, if she thought she was off the roster for the July 6th shift, she tried to drop off her children at the sitter's before making the single call to Espinoza to confirm she was off the roster. [Exhibits 15-6,15-7 lines 252-282; Appellant testimony 4/21/09 @ 9:19:23].

When questioned about when she knew her babysitter was unavailable, the Appellant told internal affairs she knew on June 30, not July 4, that her babysitter would be unavailable. [Exhibit 14-12]. She later stated she learned her babysitter would be unavailable for the nights of July 4 and 5 on June 30 or July 2 [Appellant testimony]. Appellant also said that the sitter told her she was unsure of her availability on the weekend. (Appellant 4/22 @ 3:23:53 and Exhibit 15-6 @ lines 237 to241) Due to conflicting information provided by the Appellant, internal affairs contacted the babysitter who recalled with certainty she told the Appellant she would be unavailable until July 6. [Exhibit 14-12]. Thus the Appellant was untruthful about her babysitter's unavailability either during her conversation with Sgt. Minter, her subsequent interview with internal affairs, or when she spoke with Sgt. Espinoza the night of July 5 and emailed Major Connors on July 7, 2008.

(b) Whether Appellant requested and was granted a request to be taken off the roster for both July 4th weekend shifts

Sgt. Minter refuted Appellant's recollection that she had requested leave for both July 5th and July 6th off with the statement that it is his practice, and that of any supervisor, to grant leave only for the day requested. He stated the Appellant asked to be taken off the roster only for her shift on July 5. He added that, if the Appellant had requested leave because her babysitter "just canceled", he would have granted leave for both shifts if she had asked. [Minter testimony].

(c) Whether Espinoza approved Appellant's escalation of her leave request.

When Appellant called in on July 5th requesting leave, Sgt. Espinoza denied compensatory leave because of the agency's policy not to grant such leave when remaining staffing would then require overtime. Espinoza also properly determined granting sick time for childcare issues is an improper use of sick leave. [Espinoza testimony]. He denied as illogical the Appellant's statement that he approved or suggested she could or should ask Major Connors or Chief Foos to override his decision. [Espinoza testimony]. He testified deputies may always escalate the denial of their requests up the chain of command, so it would be unnecessary for him to suggest the Appellant seek to overturn his decision. Espinoza's testimony was unchallenged on this point, and the Appellant

presented no reason for Espinoza to misrepresent his testimony, while the Appellant had much to lose if her leave remained unauthorized.

In view of Minter's and Espinoza's rebuttal of the Appellant's claims, their unquestioned credibility, the Appellant's inconsistent stories, her history of dishonesty in providing justification for leave, [Exhibit 5] and history of leave abuse, [Exhibit 6], Minter and Espinoza are more credible than the Appellant, and this claim is therefore proven by a preponderance of the evidence.

4. CSR 16-60 L Failure to observe written departmental or agency regulations, policies, or rules...

Departmental Rules and Regulations

100.1 deputy Sheriffs... shall not be absent from duty without authorization...

The Agency established above the Appellant was not credible in her various reasons for not working her July 5 and July 6 shifts. Because her July 6 absence was unauthorized and she failed to give an adequate explanation, she was in violation of this Agency rule.

100.4 Deputy Sheriffs...shall not fail to be on their assigned post or performing their assigned duties at their scheduled times.

The agency's allegations related to this rule are more accurately addressed under its unauthorized leave rule.

200.4 Deputy Sheriffs... shall not depart from the truth...

The same evidence which established a violation of CSR 16-60 E., any act of dishonesty..., above, also establish the Appellant's violation of this Agency rule.

Departmental Order 2053.1 Employee use of Sick Time

This order requires deputy sheriffs who will be unable to appear for their assigned shift to contact a supervisor at least two hours before the scheduled shift. It also permits discipline for unauthorized absences even in cases where the deputy contacted her supervisor timely. The same evidence which established a violation of CSR 16-60 E., regarding dishonesty, also establish the Appellant's violation of this order.

5. CSR 16-60 S. Unauthorized absence from work; or abuse of sick leave...

The same facts which proved the Appellant violated CSR 16-60 E., dishonesty, above, also prove the Appellant's violation of this rule.

6. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the dept or agency or conduct that brings disrepute on or compromised the integrity of the City.

The first part of this rule requires proof of conduct that hinders an agency's ability to perform its mission. In re Strasser, CSA 44-07, 4 (10/16/07) aff'd CSB 2/29/08. While the Agency presented testimony that honesty is central to the Agency's mission, and that the Appellant's misconduct cost the Agency considerable resources to discern truth from untruth, no testimony was presented that demonstrated the Agency's mission was jeopardized to the slightest degree, and therefore this violation was not proven.

The second part of the rule prohibits conduct that actually injures the city's reputation or integrity. In re Strasser, CSA 44-07, 4 (10/16/07) aff'd CSB (2/29/08). The Agency failed to show such actual injury and therefore failed to prove this violation.

V. THE DRIVER'S LICENSE CASE.

A. Findings.

On March 3, 2008 the Appellant in a traffic accident in which she struck another vehicle from behind causing \$3300 damage to the other vehicle. She was charged with Careless Driving under the Denver Revised Municipal Code, punishable by jail and a fine. She failed to appear for her mandatory April 17 court date. Consequently her license was cancelled and a bench warrant issued for her arrest.

On September 23 the Appellant posted bond and received a release from the court to take to the DMV in order to lift the cancellation of her license. [Exhibit 16-20]. She did not go to the DMV at that time and the cancellation remained in effect.

On November 15, 2008, a supervisor discovered the Appellant's license had been cancelled and not reinstated. He informed the Appellant. She paid her reinstatement fee, and her license was reinstated on November 18, 2008.

B. Analysis.

The Agency claimed the Appellant's actions and failures to act, above, violated the following Career Service Rules.

1. CSR 15-5 Employee conduct: Every employee in the Career Service shall conscientiously fulfill the duties and responsibilities of his or her position. The conduct of every employee during work hours or at any time while representing the agency, department, or City shall reflect credit on Career Service and the City.

This claim is addressed by more specific allegations of rule violations, below.

2. CSR 16-60 K. Failing to meet established standards of performance, including either qualitative or quantitative standards. While citing this subsection, a department or agency must describe the specific standard(s) the employee has failed to meet.

The Agency's failure to cite or otherwise identify what specific performance standard was allegedly violated precludes finding the Appellant violated this rule.

3. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules. When citing this subsection a department or agency must cite the specific regulation, policy or rule the employee has violated.

An agency establishes an employee's violation of this rule by proving 1) an oral or written departmental regulation, policy or rule, 2) notice of the requirement to the employee, and 3) the employee's failure to comply with the requirement. In re Mounjim, CSA 87-07, 17 (7/10/08).

The Appellant knew the Agency required her to maintain a valid driver's license. [Appellant testimony]. Her license was cancelled April 2008 and not reinstated until November 2008. [Exhibits 9, 16-13]. The first and third elements are established. As for the communication element, an employee's acknowledgment of a prior-established standard obviates the need to prove it was clearly communicated to her.

In rebuttal, the Appellant stated she had a license in her possession, so was unaware it was invalid. She acknowledged, however, receiving a citation containing a mandatory court appearance following her accident in March 2008. [3/21/09 Appellant testimony 9:42:59]. She also acknowledged she missed her mandatory court appearance. The Appellant may not miss her court date then complain she received no notice of the resulting cancelled license. [Exhibit 16-13]. She then claimed when the court issued her a "clearance letter" she

assumed her license was cleared, despite the capitalized, underlined type in the clearance letter which states

YOU MUST TAKE THIS FORM TO:

Department of Motor Vehicle
Driver Services
1881 Pierce St.
Lakewood, Colorado 80215

[Exhibit 16-20. Emphasis in the original].

The Appellant's denial of the obvious language is not tenable. Neither claim rebuts the Agency's establishment of the elements proving a violation of CSR 16-60 L. This violation is proven by a preponderance of the evidence.

Sheriff's Department Regulations

300.11. Deputy Sheriffs... shall not become involved in activities involving violations of the law.

It is unlikely this regulation applies to most traffic violations, even involving an accident, short of reckless conduct. Otherwise every traffic citation would place deputies at risk of their employment, a result surely not intended by the regulation. However, the failure to appear in court resulting in the issuance of a bench warrant is the sort of violation contemplated by this regulation. The Appellant's explanations, above were not credible. The Appellant therefore violated this regulation.

300.20. Deputy Sheriffs... shall not indulge in any conduct that is contrary to Career Service Authority Rules and Regulations.

This claim is addressed by the Agency's reference to more specific rules and regulations elsewhere in this Decision.

300.21. All employees of the Department shall read and obey all directives and orders...

Next, the Agency alleged the Appellant violated Sheriff's Departmental Order 300.21, to read and obey all directives and orders. This Appellant's violation of more specific orders, above and below also establish a violation of this rule.

4. CSR 16-60 Q. Failure to report charges or convictions of crimes as required by Rule 15 CODE OF CONDUCT (Revised effective June 12, 2006; Rules Revision Memo 10C).

Rule 15-15 A. 1 requires employees to report to their supervisors offenses involving, *inter alia*, the destruction of property. The Appellant acknowledged she caused \$3300 damage to another vehicle in the accident for which she failed to appear in court. She also failed to report the underlying careless driving citation, and failed to report missing her court appearance which resulted in a bench warrant being issued for her arrest. Her response, that she was under much stress due to having appeared in court against her boyfriend in a domestic violence case, while undisputed, does not excuse her failure to report charges or convictions. This violation is proven by a preponderance of the evidence.

Rule 15-15 A.2 requires any employees who operates a motor vehicle as part of their job assignments to report any citation for traffic violations, not including parking violations, whether received on or off the job. Deputies are required to have a driver's license in order to travel to reassignments as needed. The maintenance of a valid license is considered an important job duty by the department. [Malatesta testimony].

The Appellant was charged with careless driving following a traffic accident in March 2008. (Exhibit 16-15). The rule requires reporting all traffic citations even if only charged. [Than testimony]. The duty to report traffic violations and warrants is covered in the training academy. *Id.* The Appellant claimed she did not tell the department about her citation because she forgot about it. [Appellant testimony]. She stated she failed to report the accident because she "didn't think it was a big deal." [Appellant testimony]. She also testified she failed to tell the department about the warrant for arrest because she "didn't know I was supposed to." *Id.* The Appellant's failure to provide notice to the department of her traffic citation and warrant are violations of this rule.

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

Malatesta testified the Appellant's failure to know her obligation to report violations of the law to her supervisor was a violation of a fundamental requirement necessary for the Department to function. [Malatesta testimony]. However, the agency failed to show how the Appellant's failure to report her driving-related violations hindered the Agency's ability to perform its mission. In re Compos, CSA 56-08, 15 (12/15/08). Nor did the Agency show the Appellant's failure to report her charges injured the city's reputation or integrity. Strasser, supra. Without proving one or the other of these requirements, the Agency failed to prove the Appellant violated this rule.

VI. DEGREE OF DISCIPLINE

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. In re Blan, CSA 40-08, 6 (7/31/08). A 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).

A. Severity of the offenses

Any one of the Appellant's deceptions and omissions probably would not have been sufficient cause to justify termination if taken alone and out of context. However, as described further below, her continuing pattern of deception and omissions which continued through the dates of hearing, justifies the Agency's decision. The Appellant engaged in a persistent pattern of deception and withholding of information which forced the agency to employ considerable resources to find out the truth. As Malatesta described the Appellant's persistent deceptions: "she lies even when the truth would do."

B. Past record

The Appellant was suspended for 32 days in March 2008. In that case, the Appellant called her supervisor about 1 ½ hours before her shift to explain she was taking sick leave due to migraine headaches, however the Appellant made that call from a work Christmas party, then gave several dishonest explanations for the timing of her call, accused her supervisor of being too drunk to remember accurately, and accused all other witnesses of being too drunk to remember accurately as well. Even when the Appellant "confessed" she hedged her admission, stating she "may have exaggerated the truth a little." [Exhibit 5]. Notably, the Appellant was under this same suspension when her license was cancelled and she failed to appear in court in the present case. 'I was more worried about the suspension than I was the court date – I kind of forgot about it...' [Exhibit 17-2]. In December 2007 the Appellant was assessed a written reprimand for abuse of sick leave.

C. Likelihood of achieving compliance with the rules

The Appellant's pattern of deception and lack of forthrightness continued through hearing, and therefore justified the Malatesta's finding the Appellant's pattern of deception was not correctable. [Malatesta testimony].

D. Miscellaneous considerations.

Malatesta testified without rebuttal that she reviewed the entirety of the IAB investigation, every statement of those interviewed, the Appellant's DMV records, secondary employment documents, interoffice correspondence, pre-disciplinary meeting transcript, and consulted with command staff to obtain their recommendations before assessing discipline. Her decision was within the range of disciplinary options available to a reasonable administrator. Consequently her decision was not made in an arbitrary or capricious fashion.

VII. ORDER

The Agency's decision to terminate the Appellant's employment on January 15, 2009 is AFFIRMED.



Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

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

All petitions for review must be filed by mail or by hand delivery as follows:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

And

Career Service Hearing Office
201 W. Colfax Avenue
Denver, CO 80202