

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

Appeal No. 87-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

LARRY WATSON, Appellant,

Agency: Department of General Services, Public Office Buildings Division, and the City and County of Denver, a municipal corporation.

Hearing in this matter was held before Hearing Officer Michael S. Gallegos, on September 11, 2003, in the Career Service Hearings Office, 201 West Colfax, 1st Floor, Denver, Colorado 80202. Appellant, Larry Watson, appeared in person and was represented by John Mosby, Esq. The Agency was represented by Assistant City Attorney, Mindi L. Wright. Dan Barbee was the Agency's advisory witness at hearing.

Within these Findings and Order, the Hearing Officer refers to Larry Watson as "Appellant"; to Appellant's father as "Mr. Watson" or "Appellant's father"; the Department of General Services, Public Office Buildings Division as the "Agency"; the Director of the Public Office Buildings Division at the time of hearing, Dan Barbee, as the "Director" or "the appointing authority" and the Career Service Rules as "Career Service Rules" or "CSR". The Career Service Rules are cited by section number and are those currently in effect unless otherwise indicated.

For the reasons set forth below, the disciplinary action taken by the Agency against Appellant is **AFFIRMED**.

ISSUES FOR HEARING

Whether Appellant violated his March 21, 2003 Stipulation and Agreement with the Agency, whether Appellant was smoking in the City and County Building on May 1, 2003, and, if so, whether such actions are cause for discipline. If so, whether the degree of discipline imposed (dismissal) is reasonably related to the severity of the offense.

BURDEN OF PROOF

The burden of proof is upon the Agency to prove, by a preponderance of the evidence, that Appellant violated his March 21, 2003 Stipulation and Agreement with the Agency, that Appellant was smoking in the City and County Building on May 1, 2003, that such actions are cause for discipline and that the degree of discipline imposed (dismissal) is reasonably related to the severity of the offense.

PRELIMINARY MATTERS

The Agency stipulated to the acceptance into evidence of Appellant's Exhibits A, B, D, E, and F. Appellant's Exhibit G was accepted into evidence over the Agency's objection as to relevancy.

The Agency's Exhibits 2, 3, 6, 8, 9 and 11 were accepted into evidence without objection from Appellant. Appellant stipulated to the acceptance into evidence of the Agency's Exhibits 4, 5 and 13. The Agency's Exhibits 7 and 10 were accepted into evidence for the limited purpose of reviewing the Director's consideration of prior disciplinary actions. The Agency's Exhibit 14 was accepted into evidence, as rebuttal evidence, over the Appellant's objections that it was cumulative and not disclosed prior to hearing.

Judicial Notice is taken of (1) Executive Order 94, regarding the City and County of Denver Employee's Alcohol and Drug Policy, (2) Executive Order 99, the City Smoking Policy, and (3) that a blizzard began with snowfall, in the Denver area, throughout the day on March 18, 2003. The blizzard/snowfall was of such magnitude that all non-essential City offices were closed on March 19 and 20, 2003. City offices were open on March 21, 2003.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Hearing Officer finds the following to be fact:

1. Appellant's employment with the Agency was terminated on June 5, 2003. He worked for the Agency as a Custodian, beginning in July 1995, and was an employee in career status at the time of his dismissal. In 2002 and 2003, Appellant was assigned to the night shift at the City and County Building. Daniel Swarinski (Swarinski) was Appellant's supervisor from December 2002 through the date of Appellant's dismissal.

2. On January 2, 2003, Swarinski found Appellant sleeping on the job¹. Based on Appellant's behavior and an odor of alcohol, Swarinski's supervisor, Steve Pacheco (Pacheco) accompanied Appellant to Denver Health Medical Center for a drug and alcohol screen. Appellant tested negative for drugs. However, test results showed a .14 BAC (Blood Alcohol Content) which means that Appellant was under the influence of alcohol. Appellant was immediately placed on investigatory leave.

3. Following a pre-disciplinary meeting, the Director determined that Appellant should be dismissed from employment due to his violation of Executive Order 94 regarding the City and County of Denver Employee's Alcohol and Drug Policy. Appellant appealed the dismissal. However, as a result of settlement negotiations, after obtaining Appellant's agreement to sign and abide by an Executive Order 94 Stipulation and Agreement, the Director agreed to suspend Appellant for 30 days, rather than dismiss Appellant. Appellant agreed to withdraw his appeal of the dismissal.

4. Appellant was suspended for 30-days, from February 21, 2003 through March 21, 2003, for violation of Executive Order 94 and CSR 16-50 by being under the influence of alcohol. As a condition of continued employment, Appellant signed an Executive Order 94 Stipulation and Agreement (a single document).

5. The City Attorney's Office handles the process of signing an Executive Order 94 Stipulation and Agreement. Under the usual procedure, a copy of the Stipulation and Agreement is mailed or hand-delivered to the employee, for his or her review 48 hours prior to the agreed upon signing date. If the employee signs the Stipulation and Agreement, the original is then presented to the appointing authority for his or her signature. Copies of the signed document are mailed, hand-delivered or sent by inter-office mail to each of the parties to the Stipulation and Agreement.

6. Appellant met with Assistant City Attorney R. Craig Hess (Hess) on March 18, 2003. At that time Hess explained the terms and conditions of the Stipulation and Agreement to Appellant and his father. Appellant and his father took an unsigned copy of the Stipulation and Agreement home with them to review the document. The City Attorney's Office was closed on March 19 and 20, 2003 due to a blizzard. Appellant signed the Stipulation and Agreement on March 21, 2003, at the City Attorney's Office, 201 W. Colfax, Denver, Colorado. At that time, Hess hand delivered a copy of the Stipulation and Agreement to Appellant. Hess told Appellant he could return to work on Monday and that he would get "paperwork" from his (Appellant's) supervisors.

¹ Evidence regarding the January 2, 2003 incident was considered in this matter only as it pertains to prior discipline including the March 21, 2003 Stipulation and Agreement. Note: Appellant denies sleeping on the job on January 2, 2003.

7. Paragraphs 1 and 2 of the Stipulation and Agreement state, in pertinent part: "The Employee agrees as a *condition of his continued employment* with the Department/Agency, Employee shall abide by a substance abuse plan approved by the Department/Agency and the Mayor's Office of employee Assistance (hereinafter "MOEA"). Specifically, *within 3 working days of signing this Stipulation and Agreement*, Employee shall meet with the MOEA, which shall determine the minimal acceptable level of treatment/education required, develop a treatment plan...the Employee understands that the MOEA's minimum plan may require him to abstain from using alcohol." (Emphasis added.)

8. The effective date of the Stipulation and Agreement was March 24, 2003. Three business days from March 24 was March 27, 2003.

9. Appellant's testimony and that of his father, that Appellant signed the Stipulation and Agreement on March 18, 2003 (the day the blizzard began), did not return to the City Attorney's Office on March 21, 2003 and that Appellant never received a copy of the Stipulation and Agreement, is not credible.

10. Appellant returned to work as a Custodian for the Agency, assigned to the night shift at the City and County Building, on Monday, March 24, 2003. Prior to reporting for work on March 24, 2003, Appellant went to MOEA for an alcohol screen/breathalyzer as per a telephone message from Pacheco.

11. In cases such as Appellant's, where no drugs are involved and the Stipulation and Agreement is signed on the last business day before the scheduled return-to-work date, the employee may be allowed to return to work after completing an alcohol screen/breathalyzer. The City Attorney's office usually sends a letter to the Agency, reminding the Agency that the employee must meet with MOEA to set up a substance abuse plan as soon as possible.

12. On March 24, 2003, Hess sent a letter to the Agency regarding Appellant's Stipulation and Agreement. The letter was received by Regina Garcia (Garcia), a Human Resources Specialist for the Agency.

13. The City and County Building does not have a sprinkler system installed and, therefore, does not meet present fire codes. Because there is no sprinkler system in the City and County Building, Executive Order 99 bans all smoking in the building. Building employees were advised, in writing, regarding the Agency's no-smoking and no-drugs-or-alcohol policies. Appellant acknowledged the Agency's policies, by his signature, to the Agency's "Custodial Staff Administrative Policies" on October 4, 2001.

14. On May 1, 2003, shortly after 12 Midnight, Swarinski entered the Men's restroom on the second floor of the City and County Building. Appellant was standing next to a sink with a puff or "cloud" of smoke near him. Swarinski

recognized the cloud of smoke as cigarette smoke. He verbally confronted Appellant who denied smoking and stated that the cloud of smoke was aerosol cleaner. Swarinski checked the toilets for a cigarette and, finding none, returned to where Appellant stood. At that time, Swarinski saw a cigarette butt on the floor near Appellant's feet. Swarinski picked up the cigarette butt and it was warm.

15. At the time of the incident, Swarinski wrote a note, regarding the incident, to his supervisor, Pacheco. Later on May 1, 2003, Swarinski submitted a more formal report to Pacheco and his supervisors. The formal report indicates that Swarinski informed Appellant "that he would receive a written reprimand."

16. A written reprimand was never issued to Appellant regarding the May 1, 2003 smoking incident.

17. As of Wednesday, May 7, 2003, Appellant had not yet met with MOEA as required by his Stipulation and Agreement. By letter dated May 8, 2003, the Director ordered Appellant "to report to MOEA during the business day on Friday May 9, 2003" and when he reported to work on Friday, May 9, 2003, to provide documentation to his supervisor that he visited MOEA.

18. On May 9, 2003, a copy of Appellant's Executive Order 94 Stipulation and Agreement was faxed to James R. Schefe (Schefe) at MOEA by Garcia. When Appellant reported to MOEA on May 9, 2003, he was required to submit to an unannounced urinalysis (UA). Appellant's UA was negative for drugs or alcohol. At that time, Schefe tried to find an appointment time to meet with Appellant about setting up a substance abuse plan. However, because Schefe could not find an appointment time, he gave Appellant a telephone number and instructed Appellant to call the number and make an appointment for an intake interview.

19. Appellant called the number given to him by Schefe, made an appointment and completed the intake interview. Appellant then took paperwork, given to him at the intake interview, to Pacheco. Appellant was scheduled to start rehabilitation (rehab) classes on June 5, 2003, the same day his employment was terminated.

20. On May 15, 2003, Appellant was ordered to submit to an unannounced breathalyzer test. Appellant breath was tested twice. His BAC level on the first test was 0.010 and on the second was 0.006. Both BAC levels indicate that Appellant was not under the influence of alcohol.

21. Appellant violated his Executive Order 94 Stipulation and Agreement by failing to schedule an appointment with MOEA within three days of signing the Stipulation and Agreement. He violated Executive Order 99 by smoking on the job on May 1, 2003.

22. Paragraph 5 of the Stipulation and Agreement states, in pertinent part: "Should the Employee fail to comply with any part of this agreement...such failure shall be considered a violation of the terms and conditions of employment and disobedient of the order of an authorized supervisor. Such action by the Employee shall be grounds for appropriate discipline up to and including dismissal at the discretion of the agency."

23. Paragraph 8 of the Stipulation and Agreement states: "Employee agrees that, if he is disciplined for failing to comply with the terms of this agreement, the sole issue that he can raise on appeal with the Career Service Authority is whether he complied with the terms and conditions of this agreement. Employee voluntarily and knowingly waives his right to raise any other issues or defenses on appeal or to raise any other defense to the discipline."

24. In considering whether discipline was appropriate for Appellant's violation of his Stipulation and Agreement, the Director considered the terms and conditions of the March 21, 2003 Stipulation and Agreement and that Appellant did not meet with MOEA until May 9, 2003. With regard to Appellant's May 1, 2003 smoking violation, the Director considered Appellant's work record and Appellant's disciplinary history which consists of a 30-day suspension for violation of Executive Order 94 (alcohol) in January 2003, a 3-day suspension for refusing to comply with supervisor's directives and violation of Executive Order 99 (smoking) in October 2002 and a written reprimand for refusing to comply with supervisor's directives and violation of Executive Order 99 (smoking) in July 2000.

25. The Director dismissed Appellant from his employment with the Agency, pursuant to CSR 16-50, for gross negligence for smoking in the City and County Building, for willful neglect of duty by non-performance of his duties while smoking, for dishonesty because Appellant knew he wasn't supposed to smoke in the building and denied that he was smoking, for non-compliance with his supervisor's orders by smoking, and for violation of the Stipulation and Agreement by not meeting with MOEA within 3 days of signing the Stipulation and Agreement.

DISCUSSION

1. **Authority of the Hearing Officer:** The City Charter and Career Service Rules require the Hearing Officer to determine the facts, by *de novo* hearing, in "[a]ny action of an appointing authority resulting in dismissal, suspension, involuntary demotion...which results in alleged violation of the Career Service Charter Provisions or Ordinance relating to the Career Service, or the Personnel Rules." (City Charter C5.25 (4) and CSR 19-10 b.) A *de novo* hearing is one in which the Hearing Officer makes independent findings of fact, credibility assessments and resolves factual disputes. (See *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. App.1975).)

2. Cause for discipline: In this case, the Agency alleges 2 causes for discipline. The first is violation of the March 21, 2003 Stipulation and Agreement and the second is violation of Executive Order 99 on May 1, 2003.

a. Executive Order 94 Stipulation and Agreement: Paragraph 8 of the Stipulation and Agreement, signed by Appellant on March 21, 2003, states: "Employee agrees that, if he is disciplined for failing to comply with the terms of this agreement, the sole issue that he can raise on appeal with the Career Service Authority is whether he complied with the terms and conditions of this agreement. Employee voluntarily and knowingly waives his right to raise any other issues or defenses on appeal or to raise any other defense to the discipline." Because Appellant did not meet with MOEA within 3 days of signing the Stipulation and Agreement, he failed to comply with the terms of the Stipulation and Agreement. Further, with regard to his failure to comply, Appellant waived his right to raise any other issues or defenses on appeal. (See Findings of Fact, paragraphs 6 through 12, 17 and 23.)

Nonetheless, at hearing, Appellant argued that he never received a copy of the Stipulation and Agreement and that, when ordered to do so, he met with MOEA immediately. (See Findings of Fact, paragraphs 17 through 20.) However, the Hearing Officer finds that Appellant did receive a copy of the Stipulation and Agreement on March 21, 2003. (See Findings of Fact, paragraph 6). Further, the Hearing Officer finds that Appellant violated the terms and conditions of the Stipulation and Agreement by not meeting with MOEA on or before March 27, 2003. (See Findings of Fact, paragraphs 7, 9 and 21.) Therefore, the Hearing Officer concludes that, while it may have been to everyone's benefit, upon Appellant's return to work, for the Agency to order Appellant to meet with MOEA, ultimately it was Appellant's responsibility to meet with MOEA no later than March 27, 2003. Because Appellant did not meet with MOEA within 3 business days of signing the Stipulation and Agreement, he violated the terms and conditions of the Stipulation and Agreement and such violation is cause for discipline.

b. Executive Order 99 and failure to follow supervisor's order: Because the City and County Building has no sprinkler system, adherence to Executive 99 and the City's no-smoking policy is of utmost importance to the safety of City employees and others in the City and County Building. Additionally, as part of Appellant's past discipline, he was ordered by his supervisor to refrain from smoking on the job. Although Appellant denies that he was smoking on the job on May 1, 2003, the Hearing Officer concludes that Appellant was smoking on the job in the City and County Building on May 1, 2003. (See Findings of Fact, paragraph 14.) Therefore, the Hearing Officer concludes that there is cause for discipline in that Appellant violated Executive Order 99 and his supervisor's orders by smoking in the City and County Building on May 1, 2003.

3. **Degree of discipline:** The Agency alleges 2 causes for discipline. The first is violation of the March 21, 2003 Stipulation and Agreement and the second is violation of Executive Order 99 on May 1, 2003. The Hearing Officer concludes that each cause for discipline, in and or itself, is reasonably related to the discipline imposed, dismissal. Therefore, degree of discipline is considered (below) separately for each cause.

a. **Executive Order 94 Stipulation and Agreement:** Paragraph 1 of the Stipulation and Agreement, signed by Appellant on March 21, 2003, states, in pertinent part: "The Employee agrees as a condition of his continued employment with the Department/Agency, Employee shall abide by a substance abuse plan approved by the Department/Agency and the Mayor's Office of employee Assistance (hereinafter "MOEA"). Specifically, within 3 working days of signing this Stipulation and Agreement, Employee shall meet with the MOEA..." (Emphasis added. See also Findings of Fact, paragraph 7.) The Hearing Officer interprets this paragraph to require compliance with the terms and conditions of the Stipulation and Agreement or face dismissal from employment. Appellant did not comply with the terms and conditions of the Stipulation and Agreement. Therefore, by the terms of the Stipulation and Agreement, he must face dismissal from employment with the Agency. Certainly, the Director (or the Hearing Officer) may consider arguments in mitigation. However, dismissal is reasonably related to the seriousness of the offense by the terms of the Stipulation and Agreement itself. Therefore, the Hearing Officer concludes that dismissal from employment is within the range of reasonable alternatives available to the Director. (See *Adkins v. Div. of Youth Services*, 720 P 2d, 626 (Colo. App. 1986).

b. **Executive Order 99 and failure to follow supervisor's order:** Career Service Rules provide, in pertinent part: "The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record." (See CSR 16-10.) With regard to Appellant's May 1, 2003 smoking violation, the Director considered Appellant's work record and Appellant's disciplinary history which consists of a 30-day suspension for violation of Executive Order 94 (alcohol) in January 2003, a 3-day suspension for refusing to comply with supervisor's directives and violation of Executive Order 99 (smoking) in October 2002 and a written reprimand for refusing to comply with supervisor's directives and violation of Executive Order 99 (smoking) in July 2000. Considering Appellant's work record, including disciplinary history, and the public safety issues raised by Appellant's history of smoking in the City and County Building, the Hearing Officer concludes that Appellant's May 1, 2003 act of smoking in the City and County building is of the utmost seriousness and that dismissal from employment is reasonably related to Appellant's gross negligence, willful neglect of duty and non-compliance with his supervisor's orders regarding smoking in the City and County Building.

CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction to make and issue Findings and Order in this matter.

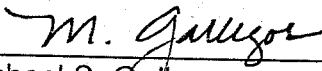
2. The Agency met its burden to show there is cause for discipline in that Appellant violated the terms and conditions of the March 21, 2003 Stipulation and Agreement and he violated Executive Order 99 by smoking in the City and County Building on May 1, 2003.

3. The Agency met its burden to show the level of discipline imposed, dismissal, is reasonably related to the severity of the offense in that compliance with the terms and conditions of the March 21, 2003 Stipulations and Agreement was a condition of employment and, due to the lack of a sprinkler system in the City and County Building and Appellant's prior smoking violations, Appellant's violation of Executive Order 99 and the orders of his supervisor regarding no-smoking in the Building is an extremely serious matter in and of itself.

ORDER

Therefore, for the reasons stated above, the Agency's termination of Appellant's employment is **AFFIRMED**.

Dated this 24th day of November 2003



Michael S. Gallegos
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 United States Mail, postage prepaid, on the 24 day of November 2003, addressed to:

Larry Watson
3384 Niagara
Denver, CO 80207

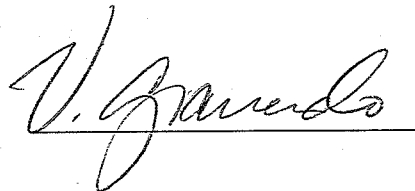
John Mosby, Esq.
621 17th Street, Ste, 925
Denver, CO 80293

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in interoffice mail, on the 24 day of November 2003, addressed to:

Mindi L. Wright
Assistant City Attorney

Luis A. Colón
Department of General Services

Dan Barbee
Public Office Buildings



A handwritten signature in cursive script, appearing to read "V. Garza", is written over a horizontal line.