

**HEARING OFFICER, CAREER SERVICE BOARD  
CITY AND COUNTY OF DENVER, COLORADO**  
Appeal No. 49-07

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**ARMANDO RIVAS**, Appellant,

vs.

**DEPARTMENT OF PARKS AND RECREATION**,  
and the City and County of Denver, a municipal corporation, Agency.

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The hearing in this appeal was held on Nov. 28 and Dec. 4, 2007 before Hearing Officer Valerie McNaughton. Appellant Armando Rivas was present and was represented by Ferdinand L. Torres. The Agency was represented by Assistant City Attorney Franklin A. Nachman. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order in this appeal:

**I. STATEMENT OF THE CASE**

Appellant Armando Rivas appealed his dismissal issued August 3, 2007 by the Denver Department of Parks and Recreation (Agency). Appellant filed a timely appeal of the action on Aug. 17, 2007 pursuant to the jurisdiction provided in the Career Service Rules (CSR) § 19-10 A. 1.

The Agency's exhibits 1 - 4, 6 - 10, 15 and 18 were admitted into evidence. Appellant's exhibit F was also admitted.

**II. ISSUES**

The following issues are raised in this appeal:

1. Did the Agency prove by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules, and
2. Was termination within the range of discipline that could be imposed for the misconduct by a reasonable administrator?

### III. FINDINGS OF FACT

Appellant Armando Rivas held the position of Recreation Coordinator from 2000 to the date of his termination in August 2007. His duties included providing instruction for recreational programs, supervision of staff and volunteers, community outreach, and opening and closing the Harvard Gulch Recreation Center depending on the daily schedule.

The parties stipulated that Appellant was first employed by the City and County of Denver in 1995, and was promoted to Recreation Coordinator in 2000. The parties also agreed that Appellant was placed on investigative leave on May 17, 2007, which was later extended to June 15, 2007, and that the Agency issued its first predisciplinary letter on May 31, 2007, which contained allegations about certain events in July 2006. [Exh. B., p. 3.] It was stipulated that those allegations were withdrawn by the second predisciplinary letter dated July 19, 2007. After the July 30<sup>th</sup> predisciplinary meeting, the Agency dismissed Appellant by the Aug. 3, 2007 letter signed by Manager Michael Barney. [Exh. 8.] This appeal followed.

The termination was based on assertions that Appellant had supplied alcohol to a 17 year old female on-call recreation assistant, and drank with her at the Center after closing time on three dates in April and May 2007, resulting in her intoxication on each occasion. The female assistant was not called as a witness or subpoenaed by either side. The names of the minor employee and her family are not used in this decision by agreement of the parties in order to protect the privacy of the minor and her family. The minor is referred to as AB, her mother as CD, and her stepfather as EF. AB's then-16 year old boyfriend also testified in this appeal, and he is identified as JK.

Appellant hired AB in 2005 at the age of 15 as an on-call employee to assist customers at the front desk at the Harvard Gulch Recreation Center. AB's mother, CD, testified that AB was a straight-A high school student who applied at the Center because she had too much free time. She enjoyed her work there, and was learning responsibility under Appellant's supervision. Appellant testified that he made the hiring decision, and that AB was both a good employee and popular with those who used the Center. In April 2007, she was promoted to Recreation Facilities Assistant on Appellant's recommendation.

At the end of April 2007, AB was hospitalized for alcohol consumption that was considered by her parents and doctors as an attempt at suicide. As a part of her treatment plan, the family and AB's medical providers signed a safety plan that allowed AB to return to work under Appellant's supervision, based on CD's opinion that Appellant was a strong mentor and a positive influence on AB, and that the center was a safe environment which allowed AB to continue doing a job she liked. During the two weeks while AB was recuperating at home, CD called Appellant once every few days to relate information about her progress, and discuss her return to work. CD informed Appellant that AB was drinking tequila

at home while looking through family photo albums and had to be rushed to the hospital. [Exh. 18-2.] CD asked Appellant to allow AB to come back to work, as she enjoyed the job and her co-workers, and to keep a watchful eye out for AB's safety. Appellant spoke with his supervisor Don Bruning about CD's request to have AB come back to work. Mr. Bruning informed Appellant that the Agency would support AB by allowing her to return to the center.

After CD expressed her desire that Appellant befriend AB, Appellant decided to ask CD's permission to take AB to a movie so that she would know who he was outside of work. CD consented, and on May 10<sup>th</sup> Appellant picked AB up at her house and they attended a movie together.

AB's first day back was May 14, 2007. She worked the counter from 6 to 9 p.m., and Appellant spent that time in the gymnasium officiating a basketball game. Appellant stated they spoke only briefly that day. On May 15th, AB mentioned to Appellant that she had a new boyfriend. Since she had never talked to him about her personal life before, Appellant asked if she wanted to talk to him. AB responded that she just wanted to tell him that. At around 8:30 p.m., while Appellant was going through the procedure to close the center, AB again told Appellant she had a new boyfriend. Appellant asked her if she wanted to talk, and this time AB replied, "Yes, I kind of do." Appellant told her they could talk after the customers in the weight room left, or wait until the next day. AB said she would like to talk that night. Appellant asked her to call her mother and ask for permission to stay after the center closes. Appellant then left the office to inform the remaining customers that the center was closing. When he came back, AB told him her mother said it was okay for her to stay there. Appellant then closed and locked the center, and informed AB that he would be back soon and they could talk. Appellant then left for home to let his dog out and do other errands. [Testimony of Appellant.]

Appellant testified he returned to the center at around 9:30 p.m., a half-hour after closing time. AB began by saying that her new boyfriend was in his twenties, that she just met him, but they had a lot of fun together. Appellant asked if she wanted to hear his opinion about this. AB replied that she did, and that's why she wanted to talk to him. Appellant then told her that he didn't think her having a boyfriend was a good idea, since she had just gotten out of the psychiatric ward after a suicide attempt. He added that he believed she should work on her self-esteem issues before she started a relationship in order to make sure the relationship was healthy and mutually beneficial. [Testimony of Appellant.]

AB reacted by crying, and stating she did not believe she was worth very much. She said her new boyfriend cheered her up and made her feel good. Appellant stated he was not trying to be judgmental, but it was his opinion that she should work on her own issues before she moved forward in any relationship. He said that until she did that, she would hit a ceiling in any

relationship because she didn't feel like a whole person inside. Appellant testified that after about 45 minutes AB appeared to see his point of view, and seemed to be happier. AB told him the suicide attempt was not because of her old boyfriend, but because she started drinking while looking at old photos and couldn't stop. Appellant decided he should relay this new information to AB's mother. This conversation ended between 10:45 and 11 p.m., when Appellant told AB he thought they should both get going, as it was a school night. Appellant believed that the conversation allowed both of them to be able to say what they wanted to say on the subject. [Testimony of Appellant.]

At 10:55, after Appellant checked the doors again, they both stepped outside the recreation center. Appellant saw someone behind his car reading his license plate. Appellant started back to the center to call the police, but stopped when AB told him, "That's my crazy-ass dad." Appellant went back inside to disarm the alarm system, but instead triggered the alarm in the nearby police station. AB went outside to join her stepfather. A little after 11 p.m., Appellant was met at the door by a police officer who asked for his identification. Appellant introduced himself and offered to take him inside the center. The officer told him he didn't need to do that, but needed to see his employee I.D. Once Appellant had confirmed his identity, the officer and Appellant walked over to the driver's side of AB's car. AB's stepfather, EF, was at the wheel. EF told Appellant that AB was supposed to be home at a certain time. AB yelled at EF that her mom had said it was okay for her to stay late. EF responded that AB had called her mother and told her she was going to be with her boyfriend. They drove off shortly thereafter. [Testimony of Appellant.]

After they left, Appellant told the officer that he was trying to prevent her from making a second suicide attempt. He left, picked up dinner at a restaurant, and went home. After learning that AB had lied to her mother about her whereabouts, he wanted to contact the mother to explain why they met at the center. At about midnight, EF called Appellant and angrily asked him why he gave alcohol to his daughter. EF added that AB was upstairs crying. Appellant told him that when she left him, she had not been drinking. EF continued to yell, and informed him they were considering filing charges against him. [Testimony of Appellant.]

A half hour later, AB's boyfriend JK called Appellant and asked him how old he was. Appellant told him he is 31, and asked him who was calling. JK told him his name and said he is AB's boyfriend. JK accused Appellant of giving AB alcohol, and said AB ran upstairs and tried to cut herself when she got home. Appellant responded that AB and he were at the center to discuss a new boyfriend, and that when she left she understood what he was saying. Appellant then told him AB's mother had said JK was the reason AB made the first attempt on her life. JK became quiet for awhile. He then started cursing at Appellant. Appellant denied he gave AB alcohol, and hung up. [Testimony of Appellant.]

The next day, Appellant came to work early to talk to his supervisor Don Bruning about the events of the previous night. Mr. Bruning did not have the time to meet with Appellant, as he was on his way to a supervisors' meeting. The next day, Manager II Michael Barney called to speak with Mr. Bruning, and was told he was on a scheduled day off. At 5 p.m., Mr. Barney came to the center and asked to meet with Appellant. He informed Appellant that he was on investigative leave. Appellant knew it related to the incident with AB, and offered to tell Mr. Barney what happened. Mr. Barney told Appellant he would have the chance to tell his side, but in the meantime should collect what he needed and remain away from the center. [Testimony of Appellant and Mr. Barney.]

The evening of May 15<sup>th</sup>, AB called her mother and asked if she could go over to her boyfriend JK's house after her work shift ended at 9 p.m., and stay until 10:30 p.m. JK was identified in AB's safety plan as a positive influence, and so CD agreed to allow the visit. At about 10:30 p.m., JK stopped at AB's house, and went in to say goodnight to her. CD told him she wasn't there because she asked permission to go to his house after work. JK replied that AB had sent him a text message on his cell phone that she was tired and was going home to bed. CD and JK began calling AB and her friends to find out where she was. [Testimony of CD and JK.]

AB's stepfather EF drove to the center to see if AB's car was there. When he saw that it was, he parked a few blocks away, and got into AB's car in order to surprise her. At around 11:30 p.m., EF saw AB leaving the center. She was upset when she saw EF, and told him she did not want to go home. She called her mother, who confirmed that she was to come home with EF. AB got in the car as the police officer and Appellant approached. EF explained to the officer that they had a lost teenager, but the officer was more concerned that the center's alarm had been triggered. Appellant asked EF to tell AB's mother to call him so he could explain. When EF rolled up the window upon their departure, he noticed AB smelled strongly of alcohol and her speech was slurred. EF concluded that she was intoxicated. [Testimony of EF.]

When AB arrived home, she threw her purse at EF and screamed at him to stay out of her life. AB ran up the stairs, closely followed by her mother. AB entered her bathroom, grabbed a razor, and cut her wrist slightly before her mother took it away. CD told her that she would call the police and have her hospitalized unless she sat down and talked to her right then. CD testified that AB had previously always been respectful and well-behaved in their interactions. AB then told her she had been "drinking with Armando." Later that night, CD looked at AB's cell phone and noticed that Appellant had sent her a signed text message, "Have your mom call me so I can explain." CD immediately replaced her daughter's cell phone. [Testimony of CD.]

The next day, CD drove her daughter to a psychiatrist, and attempted to call the center to speak with Appellant's supervisor. She eventually was referred

to Senior Human Resources Professional David Jerrow, and gave him oral and written statements which assert that Appellant supplied her daughter with alcohol. [Exhs. 2, 3; testimony of CD.]

AB's former boyfriend JK appeared under subpoena. He had previously been interviewed by agency representatives with his father present, and gave a written statement shortly after the events at issue. [Exh. 1.] JK was 16 during the time period in question, and voluntarily testified after the hearing officer advised him of his right not to testify against himself.

JK testified that on two occasions about a month before the May incident, he observed AB leaving the center after hours in an intoxicated state, and that Appellant let her out of the center on both dates. On April 12, 2007, AB called him at around 9 p.m. and asked him for a ride home from work, stating she had had a few drinks and was not able to drive. He made the six-minute trip to the center and called her cell phone to tell her he was there. She told him to hold on. He waited a few minutes longer, then went to the front door and knocked. The light was on in the main lobby, but otherwise the center was dark. Appellant came to the door, smelling slightly of liquor, and told JK that AB would be out in a few minutes. About six minutes after that conversation, AB came out. She was unable to walk by herself, her breath smelled of alcohol, and her speech was slurred. JK agreed not to tell AB's parents about her inebriated state so that she would not get in trouble. [Testimony of JK.] Shortly after May 15<sup>th</sup>, JK hand-wrote a statement at his house at the request of someone at the Agency. In that statement, JK places the original call from AB at 10:00 p.m., and AB's emergence from the center at about 10:25 p.m. [Exh. 1.] JK testified that his memory was better closer to the event.

On April 19<sup>th</sup>, JK received a similar phone call from AB at about 9:30 p.m. AB told him she did not think she could drive. JK again went to the center, and called AB to tell her he was there. She told him she would be right down. After a few minutes, JK knocked on the center door. Appellant came down and told him to take it easy, and that AB would be out soon. Five minutes later, AB stumbled on her way out of the center and reluctantly got in JK's truck. AB's words were slurred and JK could smell alcohol on her breath. [Testimony of JK.]

The Agency's predisciplinary letter charged Appellant with violation of its alcohol policy and closing procedures, as well as conduct which violates Denver Revised Municipal Code §§ 34-46 and 34-47, and breach of five other Career Service Rules. The letter cites the events of April 12, April 19 and May 15, 2007 in support of disciplinary action. [Exh. 7.]

At the predisciplinary meeting, Appellant was represented by his attorney Ferdinand Torres. Also in attendance were Deputy Manager Daniel Betts, Michael Barney, Recreation Supervisor Don Bruning, and David Jerrow from Human Resources. Appellant admitted locking the center on May 15<sup>th</sup> at 9 p.m.

with AB in the building, leaving to do errands for up to 45 minutes, and then talking to her in the center until approximately 11 p.m., 2 hours after closing time. He acknowledged that he signed and understood the written policy requiring employees to leave the building as soon as closure procedures were complete, but stated he believed he was conducting city business by protecting AB from a further suicide attempt. [Exh. 18-7.] Appellant denied having alcohol at the center on any of the three dates in question. [Exh. 18-5.]

After the predisciplinary meeting, Michael Barney and the others at the meeting could not reach a conclusion about whether discipline was appropriate. After Mr. Barney determined that Appellant had shown poor judgment by attempting to counsel AB on his own after hours at the center, he started to question whether Appellant was being truthful.

Appellant told those at the predisciplinary meeting that he chose to meet with AB at work after hours because he didn't think he should be seen in public with a 17 year old girl. When Mr. Barney later learned Appellant had taken AB to the movies a week earlier, he determined that Appellant was not being honest about this. Appellant also stated he met with AB that night because he believed she was having suicidal thoughts, and that he needed to counsel her. Mr. Barney decided Appellant's action in leaving the building to feed his dog and do other errands was not consistent with this statement. [Testimony of Mr. Barney; Exh. 18-8.] Moreover, Mr. Barney believed that Appellant was not qualified to provide employee counseling on an issue as serious as potential suicide, and that counseling was not a part of his job. Appellant should have instead referred Appellant to the Employee Assistance Office, which provides counseling for employees in need of it.

Finally, Mr. Barney decided that the emotion displayed by AB and her family seemed genuine, and they lacked any motive to ruin Appellant's life, since they entrusted their daughter to Appellant's care immediately prior to the May 15<sup>th</sup> incident. In contrast, he believed Appellant stood to gain from his denial of inappropriate conduct. Mr. Barney further believed that Appellant displayed poor judgment in leaving an at-risk minor in the facility alone given the circumstances.

Once Mr. Barney decided that Appellant was not telling the truth about providing alcohol to a minor, he weighed the level of discipline to be imposed. Mr. Barney stated he considered Appellant's 12 years of service to the Agency and the minor nature of his previous discipline. However, since he believed Appellant placed a minor in an unsafe situation, Mr. Barney considered termination the only appropriate penalty. His recommendation was ultimately approved by Agency Director Kim Bailey, who delegated the disciplinary function to him. Appellant was terminated effective Aug. 3, 2007. [Exh. 8.]

Appellant presented the testimony of Recreation Instructor Adam Haas, who stated he worked with Appellant for ten years, and considers him a friend.

He believes it would be out of Appellant's character to offer alcohol to a minor based on what he knows of him. Mr. Haas never saw alcohol at the center, and wouldn't expect to since it is against the rules. Mr. Haas never saw any inappropriate conduct between Appellant and AB.

Recreation Coordinator Linda Ferreria testified that she considers Appellant a great program coordinator. She never saw alcohol at the center or observed anything unusual between Appellant and AB. Appellant did tell her he stayed to talk to AB one night about a personal situation in her life, and Ms. Ferreria understood that violated center policy. Ms. Ferreria concedes that if the allegations against Appellant are true, Appellant should not be allowed to keep his job. However, she does not believe they are true.

Don Bruning, who was the supervisor of Harvard Gulch until his Sept. 2007 retirement, found Appellant an outstanding and well-respected recreation coordinator. Mr. Bruning first heard about this incident by a phone call from Mr. Barney on May 18<sup>th</sup>. Mr. Bruning then called Appellant, who informed him that AB wanted to talk to him about her new boyfriend. Appellant thought it was not a good idea for AB to have a new boyfriend, because her relationship with her previous boyfriend was the reason for her recent attempted suicide.

Normally, Mr. Bruning as Appellant's supervisor would make disciplinary decisions. However, Mr. Bruning expressed reluctance to get involved in the disciplinary process, and Mr. Barney turned the matter over to Mr. Jerrow to undertake an investigation. Mr. Bruning disagreed with the resulting letter of dismissal, and indicated he would have imposed a written reprimand for being in the center after hours. Mr. Jerrow met with CD and EF on May 22<sup>nd</sup>, and received their statements at that meeting. [Exhs. 2, 3.] Mr. Jerrow also interviewed all staff members at Harvard Gulch, as well as JK, from whom he received a faxed statement prepared from JK's home. [Exh. 1; testimony of Messrs. Bruning, Barney and Jerrow.]

#### IV. ANALYSIS

##### 1. Career Service Rules

This appeal is within the jurisdiction of the Career Service Hearing Office under former CSR § 19-10 A. 1., in effect at the time the appeal was filed. In this de novo hearing on the appropriateness of the discipline, the Agency bears the burden of proof to show by a preponderance of the evidence both that Appellant violated the disciplinary rules as alleged, and that termination was within the range of discipline that can be imposed under the circumstances. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.); In re Gustern, CSA 128-02, 20 (12/23/02).

A. CSR § 16-60 B: Carelessness in the performance of duties

The Agency asserts that Appellant was careless in his duties by remaining in the center well after closing hours, in violation of the center's known policy. Carelessness in the performance of duties and responsibilities implies a slipshod practice of an important work duty, resulting in potential or actual significant harm. In re Feltes, CSA 50-06, 6 (11/24/06); In re Martinez, CSA 30-06, 4 (10/3/06).

The Agency established, and Appellant admits, that he violated the center's policy by remaining in the building beyond closing hours. The Agency also proved that closure procedures were an important work duty, as evidenced by the written closure procedures, and emphasized by Standard of Operation Policy # (SOP) I-6. [Exhs. 9, 10.] Mr. Barney testified that he changed the policy, and required each employee to sign it to acknowledge that change, after he became aware of the past practice by many employees to use agency facilities before and after hours. Appellant testified he recalled that discussion around the rule change included the information that the city had been sued by one individual who had injured himself after a recreation center was closed for the day.

Appellant disregarded his duty to exit the building in order to speak with AB about her new boyfriend. While Appellant stated he was motivated by a desire to provide counseling to AB, his testimony showed that his actual intent was to communicate his opinion. In any event, Appellant's actions did not demonstrate that he obtained his supervisor's permission to stay after hours to perform official work under SOP I-6. I conclude that Appellant was careless in the performance of his duty to close and exit the center on April 12, 19, and May 15, 2007.

B. CSR § 16-60 L: Failure to observe agency policies

1. Closure policy

The evidence is uncontradicted, and Appellant admits, that he failed to observe closing procedures on May 15, 2007. In addition, I find JK's testimony that Appellant remained after hours on April 12<sup>th</sup> and 19<sup>th</sup> credible. I therefore determine that Appellant violated the known agency policy by failing to secure and leave the center on all three dates. [Exhs. 9, 10.]

The dismissal letter quoted a similar closing policy, which stated, "[u]nder no circumstance without prior approval being obtained should an employee remain in the Center after closing." Appellant admitted at the hearing that he understood the underlying policy, i.e., that he was to leave the center empty at

the 9 p.m. closing time. An agency policy need not be in writing to be enforceable. I find that Appellant had notice of the closing policy which required Appellant to leave the center empty of all persons, and that the Agency proved Appellant violated this policy on three occasions.

## 2. Alcohol policy

The Agency did not submit a copy of the alcohol policy quoted in its disciplinary letter. Absent that evidence, it cannot be determined whether Appellant's conduct violated a specific policy regulating alcohol use by employees or in agency facilities. The Agency has therefore failed to prove this allegation by a preponderance of the evidence.

C. CSR § 16-60 M: Threatening, fighting with or intimidating employees, or members of the public

Mr. Barney testified that the evidence of Appellant's use of alcohol in the center with a subordinate employee established that he had abused an employee. There was no other evidence submitted or argument made in support of this allegation.

Intimidation is defined as "unlawful coercion; duress; putting in fear." Black's Law Dictionary 957 (4<sup>th</sup> ed. 1951). The record does not reveal that Appellant's actions put AB in fear of bodily or other harm, or that he coerced her to use alcohol. Instead, the only eyewitness testimony about the events in the center after it closed was from Appellant. He testified that AB started crying in response to Appellant's expressed opinions about her new boyfriend. There is no evidence from which I can find that Appellant intimidated AB into using alcohol.

D. CSR § 16-60 O: Failure to maintain satisfactory working relationships with co-workers, City employees or members of the public

The Agency may prove a violation of this rule by evidence that Appellant's improper, intentional acts or omissions toward a co-worker inhibited the smooth operation of the unit, or caused an inability to work together. In re Delmonico, CSA 53-06, 5 (10/26/06); In re Katros, CSA 129-04, 10 (3/16/05).

The Agency presented evidence that AB never returned to the job she enjoyed at the center after the May 15<sup>th</sup> incident, and that her family has not signed up of any additional sports or recreational and programs at the center. CD testified that she did not allow AB to return because of her conclusion that Appellant posed a risk of harm to her daughter, and because the staff's reaction to her allegations against Appellant made the family uncomfortable using the center. Since Appellant has not returned to his employment since his investigative leave commencing on May 17, he is not in a position to deny that

testimony. In any event, the family's loss of use of the center appears to be a reasonable reaction to the dramatic events of May 15<sup>th</sup> and the subsequent disclosure of two similar incidents. If Appellant is proven to have provided alcohol to AB or allowed her to use it in the center, the Agency will have established a violation of this rule. I conclude below that the Agency did prove that Appellant allowed AB to use alcohol at the center, and therefore this violation is proven.

E. CSR § 16-60 Y: Conduct violating municipal code

The Denver Revised Municipal Code prohibits any person from causing the health of a minor to be injured or endangered, or impairing or endangering the morals of any minor. D.R.M.C. § 34-46. The Agency claims that on three occasions Appellant furnished AB, a 17 year old part-time employee, with alcohol, thereby endangering her health and morals by causing her intoxication. Appellant denied that he provided alcohol to AB on any of the three dates, and supports that denial by his testimony that he never had alcohol at the center, and did not observe AB either drinking or intoxicated.

As to the two dates in April, the Agency presented the eyewitness testimony of JK. He testified that AB called him on both dates to ask for a ride home from work because she had been drinking and didn't think she could drive. In all essential respects, the events of both days were the same: JK arrived at the center, called AB on his cell phone, and was told to hold on. After waiting in his car for a few minutes, JK knocked on the center's front door. Appellant came to the door and informed him that AB would be right down. AB emerged in an obviously intoxicated state: smelling of alcohol, slurring her words, and unable to walk unaided. On April 12<sup>th</sup>, the initial call occurred at 10 p.m., and AB came out at 10:25 p.m. On April 19<sup>th</sup>, AB made her call at 9:30 p.m. [Exh. 1.] On both dates, Appellant and AB were in the locked center alone well after the 9 p.m. closing time.

The testimony of CD, EF and JK was offered to establish the asserted rules violations on May 15<sup>th</sup>. EF states he saw Appellant let AB out of the center on that date, and observed when she got in the car that she was extremely intoxicated. By that time, it was two and a half hours after the center closed. When EF and AB arrived home, AB was screaming, crying, and unsteady on her feet. CD was so concerned about AB's behavior that she followed her up the stairs and forcibly opened the bathroom door, where she found AB cutting her wrist with a razor. After CD calmed AB down, AB admitted she had been "drinking with Armando". AB later apologized to JK, and admitted she was drunk.

When the factual evidence conflicts, the finder of fact must determine the weight to be accorded the evidence and the credibility of witnesses.

Specific eyewitness testimony buttressed by consistent contemporaneous statements should be accorded great weight. Here, the Agency presented the testimony of three eyewitnesses to the three events in question, along with their written statements taken shortly after the last date, May 15, 2007. Appellant presented his own eyewitness testimony of what occurred in the center on May 15<sup>th</sup>. Appellant's statement at the predisciplinary meeting was also admitted into evidence. [Exh. 18.]

Appellant testified that he did not observe AB drinking alcohol, and did not notice that she was intoxicated over the 90 or so minutes they were together. That testimony conflicts with the evidence of CD, EF and JK that AB smelled of alcohol, slurred her words, and could not walk without tripping. All three saw AB screaming and hysterical, and CD saw AB attempt to harm herself. It is not believable that AB would suddenly develop symptoms of severe intoxication moments after leaving Appellant, or that Appellant would not have seen her drinking during their long talk.

In determining the credibility of witnesses, the internal consistency of their testimony should be evaluated.

Appellant stated that the reason he allowed AB to stay after hours was that he believed he was conducting city business by protecting and counseling AB, and learning more about her. [Exh. 18-5, 18-7, 18-8.] However, it was clear from Appellant's testimony that he spent the majority of the time from 9:30 to 11 p.m. in attempting to convince AB that she should not pursue a relationship with a new boyfriend. Expressions of personal opinion plainly do not meet the criterion of professional guidance using psychological methods. Merriam-Webster online dictionary, definition of counseling (Jan. 8, 2008). Appellant left AB in the locked center unsupervised and unprotected for at least 30 minutes. His opinions also failed to comfort AB, as shown when AB began to cry and tell him she didn't believe she was worth very much. He continued to press his opinions for another 45 minutes, despite his knowledge that AB had just been released from a psychiatric hospitalization after a suicide attempt a mere two weeks before. Appellant's statement that he intended to counsel AB was not believable, since Appellant knew AB was still under the care of qualified mental health professionals.

Appellant also justified his presence at the center by stating he believed AB was suicidal. [Exh. 18-4, 18-7, 18-8; testimony of Appellant.] His action in leaving her alone in the center was inconsistent with this stated justification. It is also contrary to Appellant's own testimony that AB was not agitated when they spoke before the center closed, and that he didn't think she was suicidal at any time during their discussion that day. Either he exercised poor judgment in leaving her alone in the center in the face of her mental state, or his characterization of her as suicidal was an attempt to justify his actions.

Appellant told the predisciplinary committee that he decided to stay at the center because he believed it “would not have looked good [for] a younger woman and an older man” to be seen at a coffee shop or other public place. [Exh. 18-8.] Appellant refused to admit it would look more suspicious for him to meet with an underage female in a locked center than to meet with her in a public place to continue their conversation. That is inconsistent with his prior actions in taking AB to the movies on May 10<sup>th</sup>. In both instances, Appellant testified he had permission from AB’s mother to meet with AB. However, on May 15<sup>th</sup>, Appellant suggested AB wait for him and then talk at the center to avoid comments about the propriety of such a meeting. That places Appellant’s reputation above concerns about AB’s safety, if, as Appellant testified, he believed AB was suicidal. Further, Appellant knew their after-hours presence at the center violated Agency policy and could lead to lawsuits against the city, as it had in the past for injuries occurring after closure.

In contrast, EF’s eyewitness testimony was consistent with the statements and testimony of CD and JK. CD’s observations of her daughter were bolstered by her training and experience as a lead social worker for the city involved in child safety issues, and her testimony that she trusted Appellant enough to list him in AB’s safety plan two weeks before May 15<sup>th</sup>. CD testified she had been in denial about problems in Appellant’s relationship with AB before an intoxicated AB told her she had been “drinking with Armando” on May 15th. Appellant admitted that his previous relationship with AB’s family was positive.

JK did not appear to have a motive to lie or exaggerate, since he was not accused of any improper behavior, and his romantic relationship with AB ended in July 2007. JK appeared by subpoena, and answered questions candidly, admitting on cross-examination that on occasion he and AB drank alcoholic beverages when together.

Appellant’s testimony, on the other hand, is intended to challenge the loss of his long-term employment with the city, and his livelihood. That loss presents a powerful motive to offer testimony in his own favor. I conclude that Appellant allowed AB to drink and become intoxicated in his presence, and that Appellant also drank alcoholic beverages at that time. As a result, Appellant violated D.R.M.C. § 34-46 by endangering the health of a minor.

F. CSR § 16-60 Z: Conduct bringing disrepute on or compromising the integrity of the City

To sustain violation of this rule, the Agency must prove Appellant’s conduct hindered the agency’s mission, or negatively affected the structure or means by which the agency achieves its mission, or endangered the integrity of the City. In re Hill, CSA 14-07, 7 (6/8/07).

The evidence established that AB’s family became aware that Appellant, a

trusted Recreation Coordinator at their neighborhood recreation center, drank alcoholic beverages with AB, a minor female, two weeks after a suicide attempt involving alcohol. As a result, the family decided to make no further use of the center. There was some evidence that CD communicated this information to some center employees, and was met with a negative reaction. The evidence is sufficient to support a finding that Appellant's conduct has hindered the Agency's mission to deliver recreational services to city residents, and endangered the City's reputation for the integrity of its employees.

## 2. Penalty

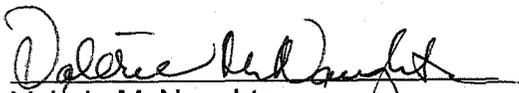
Mr. Barney testified that termination was the only penalty he determined appropriate if the claims made by AB's family proved founded, since they established that Appellant created an unsafe environment for a minor employee in a trust relationship with Appellant over a month-long period. Mr. Barney determined that Appellant had not been honest during the investigation, and the consequences of his misconduct endangered a vulnerable adolescent employed by the Agency. Mr. Barney did not consider Appellant's minor past discipline in aggravation, but rather determined that the misconduct was so severe and harmful to the minor that immediate termination was warranted, without progressive discipline.

Based on the evidence that Appellant endangered the health of a minor on the three cited dates, resulting in great harm to the minor, I find that the discipline of termination was not outside the discipline that could be imposed by a reasonable administrator, and was consistent with the principles of progressive discipline. C.S.R. § 16-50. In addition, the Agency's appointing authority properly designated Michael Barney to impose discipline under Career Service Rule § 16-70.

## V. ORDER

The Agency's termination imposed on August 3, 2007 is AFFIRMED.

Dated this 9<sup>th</sup> day of January, 2008.

  
Valerie McNaughton  
Career Service Hearing Officer