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

Appeal No. 301-01

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: **MICHAEL C. STACH**,

And

Agency: Department of Parks and Recreation, and the City and County of Denver, a municipal corporation.

NATURE OF APPEAL

The Appellant, Mr. Michael C. Stach, ("Appellant" or "Stach") has challenged his dismissal from his position as a Painter I with the Department of Parks and Recreation (the "Agency"), for the City and County of Denver. The Agency dismissed the Appellant due to two alleged incidents of drug and alcohol use while on the job. In support of its assertion that it may impose discipline on Appellant, the Agency contends that Appellant is guilty of gross neglect of duty, being under the effects of alcohol or drugs while on duty, violation of Executive Order 94, failure to meet established standards of performance, failure to observe departmental regulations, carelessness, unauthorized operation or use of any vehicles or machinery, and conduct not otherwise specifically identified.

The Appellant generally admits the conduct alleged, but claims that he is entitled to a chance at rehabilitation under the provisions of Executive Order 94 and therefore the dismissal should be modified to a suspension with rehabilitation.

INTRODUCTION

The City and County of Denver shall be referred to as the "City". The rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held before Michael L. Bieda, Hearing Officer for the Career Service Board. Appellant was present, and was represented by his attorney, Mr. Leonard A. Martinez, Esq. The Agency and City were represented by

Assistant City Attorney Mr. Robert Wolf, Esq., with Mr. Juan Marsh serving as the advisory witness on behalf of the Agency and City.

The following witnesses were called and testified at hearing: Mr. Howard Anthony Ferrelli; Ms. Marilyn M. Deno, Health Care Partner III, of Denver Health and Hospital Authority; Dr. Stephen Hessl, M.D. of the Denver Health and Hospital Authority; Mr. Sid Schwarz, Superintendent, Department of Parks and recreation; Mr. Juan Marsh, Senior Agency Personnel Analyst, Department of Parks and recreation; Gloria Mestas, Senior Safety and Loss Analyst, Department of Parks and recreation; and the Appellant, Mr. Jay Connely.

Exhibits 1-16, A, and D were admitted into evidence by stipulation and were considered in this decision.

ISSUES ON APPEAL

- Whether the Agency proved by a preponderance of the evidence that the Appellant violated various provisions of the Career Service Rules.

- If so, whether the disciplinary action taken by the Agency, namely dismissal, was reasonably related to the seriousness of the offense(s), considering all of the circumstances, as required by Career Service Rules.

- Whether Appellant should be given an opportunity at rehabilitation under Executive Order 94 instead of dismissal.

JURISDICTION

The alleged conduct that gave rise to this disciplinary action occurred on May 8, 2001 and June 4, 2001. The Appellant was notified of the Agency's contemplation of disciplinary action on June 14, 2001. A predisciplinary meeting was held on June 22, 2001. Appellant was advised of the disciplinary action being taken against him by a letter dated July 3, 2001. The Appellant filed his appeal with the Career Service Hearing Office on July 9, 2001. Neither party has contested the jurisdiction of the Hearing Office to hear and decide this appeal.

Based upon these facts the Hearing Officer finds that this appeal has been timely filed, and that under CSR §§ 19-10 (b) and 19-27, the Hearing Officer has jurisdiction and authority to affirm, reverse or modify the actions of the Agency giving rise to this proceeding.[1] The Hearing Officer further determines that the Appellant was

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[1] CSR §19-10(b) provides:

> Actions Subject to Appeal
> An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.
> * * *

afforded a Pre-disciplinary meeting as set forth by the United States Supreme Court in *Cleveland Board of Education v. Loudermill*, et al., 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 53 U.S. L.W. 4306 (1985) and as required by Career Service Rule §16-30.[2]

RELEVANT FACTS

Prior Discipline, Warnings and Performance Record.

The Appellant has not been previously disciplined. His performance evaluations were not introduced into the record.

Background facts

Stach's immediate supervisor is Mr. Jerry Tennyson. Appellant claims that he has no second level supervisor.

On May 8, 2001 during working hours, a concerned citizen, Mr. Anthony Ferrelli spotted the Appellant at a neighborhood bar with the City vehicle assigned to him parked outside the bar. The citizen first observed the city vehicle at 8:00 in the morning parked outside the bar. The vehicle remained there until approximately 10:00 a.m. Mr. Ferrelli reported the incident to the city authorities. The city vehicle was later traced as being assigned to the Appellant. The citizen provided a detailed description of the driver, which matched that of the Appellant. The Appellant admits being at the bar while on duty, but denies that he was drinking that day.

On June 4, 2001 a Facilities Superintendent, Mr. Sid Schwarz, again found the

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b) Actions of an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.
* * *

CSR §19-27 provides:

> The Hearings Officer shall issue a decision in writing affirming modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.
> * * *

[2] CSR §16-30 provides:

> Pre-disciplinary Notification of Contemplation of Suspension, Involuntary Demotion or Dismissal and Notice of Pre-disciplinary Meeting.
>
> When required.
>
> Before an employee with career status is suspended, involuntarily demoted or dismissed, the appointing authority or designee shall hold a pre-disciplinary meeting. A pre-disciplinary meeting is not required for verbal warnings or written reprimands.
> * * *

Appellant at the same neighborhood bar, again with Appellant's assigned city vehicle parked outside. This occurred during working hours on a Monday, a workday, at approximately 10:30 a.m. Schwarz then contacted Safety Office representatives Gloria Mestas and Jerry Quintana. The three of them then contacted the Appellant in the bar. He was asked to relinquish the keys to the city vehicle and was then taken to the Denver Health Medical Center Occupational Health and Safety Clinic for a drug and alcohol test. Appellant tested positive for both alcohol, with a Blood Alcohol level of .082, and drugs, with a positive reading for cocaine, 1378 ng/ml and marijuana, 36 ng/ml.

Appellant does not deny being at the bar on this date, nor that he was using alcohol. He claims the drugs were ingested over the weekend when he was not on duty.

Unfortunately, Appellant has taken no action on his own to address his drug and alcohol problems since his dismissal in June. He has not enrolled in or apparently even explored a rehabilitation program. At the time of hearing he indicated that he would be willing to enter treatment as part of reinstatement, but made no acknowledgment that he was in need of such treatment regardless of the status of his employment.

DISCUSSION AND CONCLUSIONS OF LAW

Mr. Stach had twenty-seven years of service with the City at the time of his discipline and was therefore a Career Service Employee. Under Career Service rules he may not be disciplined or suspended without just cause.[3]

Appellant is accused of violating the following Career Service Rules, Executive Orders, or Departmental Rules and Regulations:

§16-50 Discipline and Termination

A. Causes for dismissal.

> The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.
>
> 1) Gross negligence or willful neglect of duty.

[3] CSR §5-62 provides:
Employees in Career Status
An employee in career status
1) may be disciplined or dismissed only for cause, in accordance with Rule 16, DISCIPLINE.

* * *

4) Being under the influence, subject to the effects of, or impaired by alcohol or an illegal drug; while on duty; while performing city/agency business; while in a city/agency facility; or while operating city/agency vehicle/equipment. Consumption of alcohol or an illegal drug; while on duty; in a city agency facility; on city/agency property; while operating city/agency vehicle/equipment; or while performing city/agency business.

5) Using, selling, purchasing, being subject to the effects of, transferring or possessing an illegal drug; while on City and County property; while in a city/agency facility; while on city/agency equipment or in a city/agency vehicle; or while on duty.

* * *

18) Conduct which violates an executive order which has been adopted by the Career Service Board.[4]

* * *

20) Conduct not specifically identified herein may also be cause for dismissal.

CSR §16-51 Causes for progressive Discipline

The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all

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[4] Appellant is alleged to have violated the following Executive Order 94:

Alcohol and Other Drug Policy for City an County of Denver Employees, states in part:

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

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

potential grounds for disciplinary action; therefore this is not an exclusive list.

(2) Failure to meet established standards of performance including either qualitative or quantitative standards.[5]

* * *

(5) Failure to observe departmental regulations.[6]

(6) Carelessness in performance of duties and responsibilities.

(7) Unauthorized operation or use of any vehicles, machines, or equipment of the City and County.

* * *

(11) Conduct not specifically identified herein may also be cause for progressive discipline.

Analysis of Agency Evidence

The City Charter, C5.25 (4) and CSR 2-104, and 2-10 (b) (4) requires the Hearing Officer to determine the facts in this matter "*de novo*". The Colorado Courts have held that this requires an independent fact-finding hearing considering evidence submitted at the *de novo* hearing and a resolution of factual disputes. *Turner v.*

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[5] Appellant is alleged to have violated the following standards:

Priority I - Safety

"Zero incidents where employee's actions endangered the health and well being of him or herself; fellow employees, the public or any combination thereof. . ."

Priority I - Fellow Work Rules

"Must comply with Executive Orders; Career Service, Department, Division and work group rules, policies and procedures. Not more than 1 minor violation per evaluation period for an effective rating . . ."

[6] Appellant is alleged to have violated the following departmental regulations:

Parks and Recreation Personnel Policy No. 1-8, Scope of Departmental policies, specifically adopts Mayors' Executive Orders as departmental policy, and Parks & Recreation Personnel Policy 1-18, Zero Tolerance, states in part:

"Parks and Recreation is a zero tolerance workplace, meaning that no use or possession of drugs and no alcohol intoxication is tolerated on the job. . . . we cannot and will not jeopardize that public trust by exposing citizens to impaired or intoxicated employees."

Rossmiller, 35 Co. A. 329, 532 P. 2d 751 (Colo. Ct. of App., 1975).

It is well established that the party advancing a position or claim has the burden of proving that position. In civil proceedings, including administrative hearings such as this, that burden is by a "preponderance of the evidence". To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not (See Colorado Civil Jury Instructions, 3:1).[7] The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (See Colorado Civil Jury Instructions, 3:5).[8]

The Agency claims in its letter of dismissal that Stach violated numerous Career Service Rules as outlined above. The Agency then has the burden of proving the allegations contained in the letter by a preponderance of the evidence.

The Appellant does not deny his conduct, and by implication admits that he has violated Career Service Rules. Accordingly the Hearing finds and concludes that the evidence is sufficient to support a finding that the Appellant has violated Career Service Rules and that the Agency had just cause for imposing discipline on the Appellant. Specifically, the Hearing Officer finds and concludes that Appellant did in fact violate the following Career Service Rules:

Gross negligence or willful neglect of duty.

On two separate occasions, On May 8, and again on June 4, the Appellant spent over two hours in a bar during working hours. He had no legitimate city business there and was therefor neglecting his duties as a painter. Whatever those duties might have been they did not include spending over four hours at a neighborhood bar. He was there on his own accord and therefore his conduct was willful. This conduct constitutes willful neglect of duty in violation of Career Service Rules CSR §16-50 A (1).

Under the influence of alcohol or illegal drugs while on duty or operating a city vehicle.

Appellant denies being under the influence on May 8. There is little or no evidence to support a conclusion that he was under influence on that day. However, the evidence is uncontroverted that on June 4th, the Appellant was under the influence of both alcohol and drugs while on duty. His blood alcohol (BA) was a .082. In some states a .08 BA is sufficient to be considered to be under the influence or impaired for purposes of operating a motor vehicle. Appellant does not contest that

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[7] The notes on use of Instruction 3:1 state: Generally, in all civil cases, "the burden of proof shall be by a preponderance of the evidence, . . ." citing C.R.S. § 13-25-127.

[8] The content of this instruction was approved as an instruction in *Swaim v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3 P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (E. Cleary 3 ded. 1984).

he was under the influence of alcohol on the morning of June 4th. The weight of the evidence suggests that but for the intervention of Mr. Schwarz and the Safety Officers, he would have gotten in his city vehicle and driven to another location, after having consumed a considerable amount of alcohol. This conduct is sufficient for the Hearing Officer to conclude that Appellant was intoxicated while on the job and further that such intoxication would have exposed citizens to an impaired employee.

The Hearing Officer notes that the levels of the metabolites were quite high, especially the cocaine (1378 ng/ml). The Appellant claims that the cocaine and marijuana were ingested over the weekend, but offers no other evidence that he was not still under their effects on Monday morning, June 4th. Given the high levels in his system, the Hearing Officer finds that the weight of the evidence suggests that Appellant was under the effects of those illegal drugs. He operated a city vehicle on the morning of June 4th while under the effects of those illegal drugs. Accordingly, the Hearing Officer finds, based upon the totality of the evidence that the Appellant was also under the effects of the illegal drugs while on the job and while operating a city vehicle.

The totality of the evidence also suggests that the Appellant was under the influence of both alcohol and illegal drugs while on duty. On the morning of June 4 he had driven the city owned vehicle to the bar while under the effects of illegal drugs. Had a supervisor not contacted him, he undoubtedly again would have gone on to drive it elsewhere, now under the influence of alcohol as well as the drugs. That conduct jeopardized the trust and safety of the public, in violation of Career Service Rules, CSR §§16-50 A (4), (5) and 18, Executive Order 94, Safety Standards of Performance, and Departmental Regulations, CSR §16-51 A (2)

Carelessness in performance of duties and responsibilities.

There is no evidence as to Appellant's actual performance of his specific duties. Indeed, there is no evidence as to what are his specific duties. This is a different charge than willful neglect of his duties. Neglect would be in the nature of a total lack of performance, while carelessness would require evidence performance of a specific responsibility that was done without due care. There is insufficient evidence to support a finding that Appellant was careless in this regard, and therefore the charge of violating CSR §16-51 A (6) is dismissed with prejudice.

Unauthorized operation or use of any vehicles, & Conduct not specifically identified.

Specific provisions of CSR §§16-50 and 16-51 cover Appellant's misconduct. The "catchall" provisions of Rule 16 exist for the rare instances when an employee engages in an activity that the Career Service Board did not anticipate but which might nevertheless constitute grounds for discipline. Here the grounds for Appellant's discipline rest on specifically defined provisions of the Career Service Rules. The "catch-all" provisions are therefore duplicative, inapposite and are hereby

dismissed with prejudice. Likewise with the provision prohibiting the unauthorized use of a city vehicle. Here the lack of authorization rests on Appellant's state of being under the effects of illegal drugs and alcohol, which are also distinct violations. This charge is therefore duplicative and is dismissed with prejudice.

Summary of Violations

Upon full consideration of all of the statements, testimony and exhibits, the Hearing Officer finds and concludes that Appellant's conduct violated the following Career Service Rules, Executive Orders, Departmental Rules and Regulations:

CSR §16-50 A (1), (4), (5) and (18);
CSR §16-51 A (2), and (5);
Executive Order 94;
Priority I Safety;
Priority I Follow Work Rules;
Departmental Regulation Personnel Policy No. 1-8.

Justness of Discipline

CSR §16-10 states:

> The purpose of discipline is to correct inappropriate behavior or performance. 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.** The appointing authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance. (Emphasis added).
>
> The disciplinary action taken must be a consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

Thus, while the Hearing Officer may defer to the discipline imposed by the Agency, he is required to make an independent, *de novo* finding and determination as to the reasonableness of the discipline to be imposed, consistent with Career Service Rules.

The gravamen of the Appellant's defense is that he should be allowed to maintain his employment while participating in a rehabilitation program. He relies upon Executive Order 94 [Exhibit A] in this regard. The pertinent portion of the Order states:

> VII Disciplinary Action
>
> Use of drugs or alcohol in violation of this policy **shall result in dismissal**, even for a first offense for:

* * *

- Violators who have endangered the lives of others, or foreseeably could have endangered the lives of others, or [Emphasis added]

* * *

For all other violations of this policy, the appointing authority, in lieu of dismissal and in conjunction with a lesser disciplinary action, **shall offer a treatment agreement** to the employee. The employee shall be dismissed unless he/she enters into the offered agreement in conjunction with a lesser disciplinary action for assessment of the employee's alcohol or drug abuse problem(s), for treatment per the treatment plan developer, and for random breath/blood/urine testing. Substance abuse professionals of the Office of Employee Assistance, or such other substance abuse professional(s) as may be designated by the employee's appointing authority, shall conduct the assessment and referral and they shall create a treatment plan. Each such agreement shall be in writing and reviewed by the City Attorney's Office. No employee shall be offered more than one such agreement by the City, during their employment with the City. [Emphasis added]

* * *

A reasonable interpretation of this order is that an employee is entitled to be offered a treatment agreement in lieu of dismissal if they do not fall into one of the other categories of offender. In this case, the issue is whether Appellant's conduct was such as to have "endangered the lives of others, or foreseeably could have endangered the lives of others." If so, then the language of Executive Order 94 mandates dismissal ["shall result in dismissal"]. If Appellant's conduct was not endangering, then the order mandates that the employee be offered a treatment agreement ["shall offer a treatment agreement to the employee."]

The Order is not discretionary. There is little room for interpretation. In Appellant's case, he was under the influence of alcohol and drugs while on the job and while he had control of and responsibility for a city owned vehicle. He was the driver of that vehicle. Had Schwarz not contacted him, Stach would have undoubtedly driven the vehicle while under the influence of drugs and alcohol. He had already driven it to the bar on the morning of June 4th while under the effects of illegal drugs, cocaine and marijuana. Having done so he endangered the lives of others, citizens and employees alike, and is therefore subject to mandatory dismissal under Executive Order 94. The conduct is serious and warrants dismissal under CSR §16-10.

Appellant's insistence that he is "entitled" to rehabilitation as a condition of employment is disappointing. His situation would be more sympathetic had he taken

affirmative steps on his own in the past 2 months to address his problem. Instead he waits for the Agency to solve it for him. Having failed to accept responsibility for either his condition or its remedy leaves the Hearing Officer no discretion but to uphold the Executive Order and therefore the action of the Agency.

ORDER

For the foregoing reasons, the action of the Agency of dismissing the Appellant, Michael Stach, from his employment as a Painter I with the Department of Parks and Recreation, is hereby AFFIRMED.

Dated this 3rd day of
October 2001.

Michael L. Bieda
Hearing Officer for the
Career Service Board

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