

**CIVIL SERVICE COMMISSION, CITY AND COUNTY OF DENVER, COLORADO
Case No. 11 CSC 03 and 11 CSC 04**

In the matter of:

**Devin Sparks (07068)
Officer in the Classified Service of the Denver Police Department**

Petitioner.

and

In the matter of:

**Randy T. Murr (95106)
Officer in the Classified Service of the Denver Police Department**

Petitioner.

DECISION AND ORDER ON SUMMARY JUDGMENT

On June 6, 2011, Petitioners Devin Sparks and Randy Murr moved for summary judgment in the above-referenced disciplinary matters with the filing of Petitioners' Motion for Summary Judgment. On June 23, 2011, Respondents, the Manager of Safety and the City and County of Denver, objected to Petitioners' Motion for Summary Judgment as set forth in Respondents' Response to Petitioners' Motion for Summary Judgment. On June 29, 2011, with leave of the panel of hearing officers, Petitioners filed their Reply in Support of Motion for Summary Judgment. On Respondents' motion, the undersigned panel of Hearing Officers agreed to hear oral argument on Petitioners' Motion for Summary Judgment and heard oral argument on August 22,

2011. The undersigned panel of Hearing Officers rules as follows on Petitioners' Motion for Summary Judgment:

FACTUAL FINDINGS

The panel of Hearing Officers makes the following findings as to undisputed issues of material fact for purposes of summary judgment in the above-captioned matters.

Devin Sparks 11 CSC 03

1. On July 19, 2010, the Manager of Safety approved the Order of Discipline directed to Petitioner Devin Sparks. (Petitioners' Exhibit B).
2. Manager of Safety Perea fined Petitioner Devin Sparks the loss of twenty-four (24) hours for violation of RR-102.1 of the Operations Manual, Duty to Obey Department Rules and Mayoral Executive Orders, as it pertains to Operations Manual Section 109.01(2) a.1., Quality Requirements to be assessed as eight (8) hours each in periods 10, 11, and 12, 2010. (Petitioners' Exhibit B).
3. Petitioner Devin Sparks received copies of the Order and Command of Disciplinary Action on July 20, 2010. (Petitioners' Exhibit B).
4. The Department Order of Disciplinary Action advised Petitioner Devin Sparks that pursuant to Denver City Charter § 9.4.15(A), Petitioner had ten days from receipt of the Order to file an appeal with the Civil Service Commission. (Petitioners' Exhibit B).
5. Petitioner Devin Sparks did not appeal Manager of Safety Perea's July 19, 2010, Order of Discipline.

6. On August 19, 2010, Manager of Safety Perea issued an Order Rescinding Department Order of Disciplinary Action for the Departmental Order of Disciplinary Action issued on July 20, 2010, for Petitioner Devin Sparks. (Petitioners' Exhibit F).
7. The August 19, 2010, Order for Petitioner Devin Sparks states "[t]hat pursuant to the authority vested in me by the Charter of the City and County of Denver, the Departmental Order of Disciplinary Action issued on July 20, 2010 (copy attached), is hereby rescinded." (Petitioners' Exhibit F).
8. On March 25, 2011, under a new Departmental Order of Disciplinary Action, Manager of Safety Garcia dismissed Petitioner Devin Sparks for violation of RR112.2, Commission of a Deceptive Act and suspended Sparks without pay for thirty (30) days for violation of RR-306, Inappropriate Force with the dismissal being effective immediately. (Petitioners' Exhibit C to Petitioner Devin Sparks Appeal and Petition for Review of Disciplinary Action).
9. On April 4, 2011, (as modified on April 6, 2011), Petitioner Devin Sparks filed a disciplinary appeal of the March 25, 2011, Departmental Order of Disciplinary Action. (Petitioner Devin Sparks Appeal and Petition for Review of Disciplinary Action).
10. Petitioner Devin Sparks sought a temporary restraining order against the City and County of Denver in *Sparks v. City & County of Denver*, Case No. 11 CV 2082, to stop the new discipline, which the court denied. A copy of the hearing transcript before Judge Catherine Lemon appears as Respondents' Ex. 3.

Randy Murr 11 CSC 04

11. On July 19, 2010, the Manager of Safety approved the Order of Discipline directed to Petitioner Randy Murr. (Petitioners' Exhibit A).
12. Manager of Safety Perea suspended Petitioner Randy Murr without pay for three (3) days for a violation of RR-102.1 of the Operations Manual, Duty to Obey Department Rules and Mayoral Executive Orders, as it pertains to Operations Manual Section 109.01(2) a.1., Quality Requirements to begin on September 5, 2010, through September 7, 2010. (Petitioners' Exhibit A).
13. Petitioner Randy Murr received copies of the Order and Command of Disciplinary Action on July 20, 2010. (Petitioners' Exhibit A).
14. Petitioner Randy Murr was advised that pursuant to Denver City Charter § 9.4.15(A), Petitioner had ten days from receipt of the Order to file an appeal with the Civil Service Commission. (Petitioners' Exhibit A).
15. Petitioner Randy Murr did not appeal Manager of Safety Perea's July 19, 2010, Order of Discipline.
16. On August 19, 2010, Manager of Safety Perea issued an Order Rescinding Department Order of Disciplinary Action for the Departmental Order of Disciplinary Action issued on July 20, 2010, for Petitioner Randy Murr. (Petitioners' Exhibit E).
17. The August 19, 2010, Order for Petitioner Randy Murr states "[t]hat pursuant to the authority vested in me by the Charter of the City and County of Denver, the Departmental Order of Disciplinary Action issued on July 20, 2010 (copy attached), is hereby rescinded." (Petitioners' Exhibit E).

18. On March 25, 2011, under a new Departmental Order of Disciplinary Action, Manager of Safety Garcia dismissed Petitioner Randy Murr for violation of RR112.2, Commission of a Deceptive Act with the dismissal being effective immediately. (Petitioners' Exhibit C to Petitioner Randy Murr Appeal and Petition for Review of Disciplinary Action).
19. On April 4, 2011, (as modified on April 6, 2011), Petitioner Randy Murr filed a disciplinary appeal of the March 25, 2011, Departmental Order of Disciplinary Action. (Petitioner Randy Murr Appeal and Petition for Review of Disciplinary Action).

ISSUES PRESENTED

The issues presented and addressed by the panel of Hearing Officers are as follows:

1. Whether the Civil Service Commission Hearing Officers have the authority to resolve a disciplinary appeal on a motion for summary judgment;
2. If so, have Petitioners shown that there is no genuine issue as to any material fact and that the Petitioners, as the moving parties, are entitled to a judgment as a matter of law on the issues raised in Petitioners' Motion for Summary Judgment;
3. Whether the Civil Service Commission Hearing Officers have jurisdiction to determine whether the Manager of Safety possessed jurisdiction to rescind the initial orders of discipline after the ten day time period for appeal to the Commission had lapsed;

4. Whether the Manager of Safety possessed jurisdiction to rescind the initial orders of discipline issued to the Petitioners and subsequently to issue new orders of discipline after the ten day time period for appeal to the Commission had lapsed.

FINDINGS AND CONCLUSIONS

1. The Civil Service Commission Hearing Officers have the authority to resolve a disciplinary appeal on a motion for summary judgment.

Petitioners seek to resolve their disciplinary appeals via motion without an evidentiary hearing before the Civil Service Commission Hearing Officers.

Respondents assert that as a threshold matter the Hearing Officers must deny Petitioners' Motion for Summary Judgment because the Civil Service Commission Rules do not authorize the use of dispositive motions in lieu of an evidentiary hearing.

However, the Civil Service Commission Rules contemplate the filing of motions in disciplinary appeals pending before the Commission Hearing Officers. For example, Rule 12, Sec. 6.D. sets forth the procedures for the filing of motions and briefs before a hearing officer. This includes "any pre-hearing statements, motions, briefs, and other documents filed outside of a hearing." Rule 12, Sec.6.D.1. Additionally, Rule 12, Sec. 6.G establishes the rules for responses to motions. See *also* Rule 12, Sec.7.E.1. Nothing in the language of the Civil Service Commission Rules limits the type of motions that a party may file including dispositive motions such as a motion to dismiss or a motion for summary judgment.

In other matters pending before the Civil Service Commission, parties utilized dispositive motions under similar circumstances. For example, in *The Matter of Eric Sellers*, 10 CSC 04 (2010), Respondents filed a dispositive motion seeking to dismiss

Petitioner Sellers's appeal without an evidentiary hearing claiming that the Civil Service Commission lacked jurisdiction to hear Sellers's appeal. In *The Matter of James Ward*, 99 CSC 02 (1999), the Hearing Officer resolved the disciplinary appeal on stipulated facts and dispositive cross-motions for summary judgment issuing an "Order on Cross-Motions for Summary Judgment" to resolve the "pure issues of law which obviated the necessity of an evidentiary hearing." *Ward* at 1.

Finally, judicial economy favors the use of summary judgment where there are no issues of disputed material fact and only pure legal issues remain for the hearing officer's consideration.

Therefore, this panel finds that Civil Service Hearing Officers have the authority to resolve a disciplinary appeal on a dispositive motion under Rule 12, Sec.6.D.

2. Petitioners have shown that there is no genuine issue as to any material fact.

On a motion for summary judgment, Petitioners as the movants, have the burden of showing that there is no genuine issue as to any material fact and thus there only remain pure legal issues for the panel's consideration. Petitioners have met that burden in this case. This matter seeks a ruling on issues of jurisdiction relating to whether the Manager of Safety had the authority to rescind an earlier discipline and issue a new discipline after the time for appeal had lapsed. If the Manager of Safety lacks such authority, then the new discipline is not properly before the Civil Service Commission Hearing Officers, and there is no need for the Hearing Officers to hold a *de novo* hearing on the merits of the new discipline or determine the appropriate level of discipline for the violations alleged.

The only material facts needed to resolve the legal issues are undisputed as contained *infra*, in the Factual Findings for Sparks and Murr at ¶¶ 1-19. Thus, given the lack of a genuine issue as to any material fact, summary judgment is appropriate.

3. The Civil Service Commission Hearing Officers have jurisdiction to determine whether the Manager of Safety possessed jurisdiction to rescind the initial orders of discipline after the ten day time period for appeal to the Commission had lapsed.

Civil Service Commission Rule 12 and the City and County of Denver Charter, Art. IX Pt.4 §15 authorize a member of the Classified Service to appeal disciplinary actions to the Civil Service Commission. If appealed, the Hearing Officer first reviews the discipline and then the Commission. Rule 12 and the Charter create an administrative appeals process for members of the Classified Service and provide the procedural framework for the proper handling of disciplinary actions. The members must exhaust these administrative procedures and raise all pertinent objections to the discipline with the Civil Service Commission, first for a Hearing Officer's review, before proceeding to court. *See e.g., State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998).

Prior to the appeal in this matter, Petitioner Sparks filed a motion for temporary restraining order against Respondents. (Respondents' Ex. 3). Judge Lemon denied Petitioner Sparks's motion and indicated that for purposes of jurisdiction, the Court must wait for the exhaustion of administrative remedies for the conclusion of the executive branch administrative process before intervening in the matter. (Respondents' Ex. 3 at p. 2, ll. 4-8). Thus, Judge Lemon determined that the Civil Service Commission must first hear Petitioner's objection to the disciplinary orders.

Therefore, Petitioners' jurisdictional issues, which arise out of the disciplinary process for members of the Classified Service, are properly before the panel of Hearing Officers for review due to the requirement of exhaustion of administrative remedies before the Civil Service Commission.

4. The Manager of Safety lacked jurisdiction to rescind the initial orders of discipline issued to the Petitioners and subsequently to issue new orders of discipline after the ten day time period for appeal to the Commission had lapsed.

In the instant appeals both Petitioners received the Manager of Safety's Order and Command of Disciplinary Action on July 20, 2010, issued on July 19, 2010. Pursuant to the City and County of Denver Charter Art. IX Pt.4 § 15(A) and Civil Service Commission Rule 12, Sec. 3.B.2, Petitioners had ten days from receipt of the Manager of Safety's Order to file appeals with the Civil Service Commission. Thus, Petitioners had to file their respective appeals on or before July 30, 2010. However, neither Petitioner appealed the Manager of Safety's Order. Therefore, on July 30, 2010, the respective disciplinary orders became final and binding on the officers.

On August 19, 2010, thirty days after the issuance of the disciplinary orders, the Manager of Safety rescinded Petitioners' disciplinary orders. Then on March 25, 2011, the Manager of Safety issued Petitioners new disciplinary orders that terminated both Petitioners.

When the Manager of Safety issues an order of discipline, the Order becomes final and effective immediately. City and County of Denver Charter, Art. IX Pt.4 § 14. No explicit grant of authority exists allowing the Manager of Safety to rescind a final order, and Respondents have not cited to any such authority. Once the time to appeal the disciplinary orders passed on July 30, 2010, Petitioners' disciplinary orders became

final. The Department of Safety lacked authority to rescind or modify those final and effective orders absent explicit authority allowing for such rescission or modification. Jurisdiction then rested with the Civil Service Commission, not with the Department of Safety, which relinquished jurisdiction over disciplinary orders after the lapsing of the appeal period. Once Petitioners' disciplinary orders became final after the appeal period lapsed, the Manager of Safety lost his authority to rescind the disciplinary orders imposed on Petitioners.

Administrative agencies such as the Department of Safety generally have no jurisdiction to set aside a final decision once the aggrieved party has either appealed the decision or the time to appeal has passed. *Colorado State Board of Medical Examiners v. Lopez-Samayoa*, 887 P.2d 8 (Colo. 1994) (the Board was without jurisdiction to change the substance of the first order once the aggrieved party had filed his notice of appeal from the first order); *State v. City of Akron*, 584 N.E.2d 724, 725 (Ohio 1992) ("An agency retains jurisdiction to set aside its own decision until a party appeals or the time to file an appeal has passed."); see also *The Matter of Eric Sellers*, 10 CSC 04 (2010) (the Manager of Safety is without jurisdiction to rescind or modify the final order of discipline once Petitioner began serving his suspension and formally appealed his discipline).

The Respondents have not shown that the Denver City and County Charter or the Civil Service Commission Rules contains any language establishing the Manager of Safety's authority to rescind the final discipline imposed once the time to file an appeal with the Civil Service Commission has lapsed. Absent explicit language providing for a Department of Safety right to rescind, any such rescission is an *ultra vires* action. The

undersigned panel of Hearing Officers finds that neither the Charter nor the Rules provides that the Manager of Safety may unilaterally rescind the final discipline imposed once the time to file an appeal with the Civil Service Commission has lapsed.

Therefore, the undersigned panel of Hearing Officers finds that the Manager of Safety lacked the authority to rescind Petitioners' disciplinary orders and issue new discipline once the time period for appeal had lapsed. As such, the August 19, 2010, rescission orders and the March 25, 2011, disciplinary orders are void *ab initio*.

For the above-stated reasons, the undersigned panel of Hearing Officers **GRANTS** Petitioners' Motion for Summary Judgment and **ORDERS** as follows:

1. The July 19, 2010, disciplinary order for Petitioner Sparks shall be reinstated as Petitioner's final disciplinary order;
2. The July 19, 2010, disciplinary order for Petitioner Murr shall be reinstated as Petitioner's final disciplinary order;
3. The August 19, 2010, rescission order for Petitioner Sparks shall be vacated;
4. The August 19, 2010, rescission order for Petitioner Murr shall be vacated;
5. The March 25, 2011, disciplinary order for Petitioner Sparks shall be vacated;
6. The March 25, 2011, disciplinary order for Petitioner Murr shall be vacated.
7. Petitioner Sparks shall be reinstated to his position with appropriate back pay, seniority and other lost benefits; and
8. Petitioner Murr shall be reinstated to his position with appropriate back pay, seniority and other lost benefits.

The panel of Hearing Officers further **ORDERS** that a hearing before the panel shall be held to determine the appropriate back pay, seniority and other lost benefits to

be awarded to Petitioners subject to any issues relating to mitigation. The setting of a date for the hearing shall occur within ten (10) days of this Order. A Final Order in these matters shall be entered after the resolution of the appropriate remedies in light of the panel's Decision and Order on Summary Judgment.

Dated this 6th day of September, 2011
Littleton, Colorado

/s/ Susan J. Eckert

Susan J. Eckert
Chief Hearing Officer

/s/ Lawrence B. Leff

Lawrence B. Leff
Hearing Officer

/s/ Rhonda Rhodes

Rhonda Rhodes
Hearing Officer