Denver Police Officer James Medina arrested Seryina Trujillo. He transported Ms. Trujillo to Police District Two Headquarters where he placed her in a holding cell. While in a holding cell, a prisoner is not permitted to retain her shoes or belt. Officer Medina attempted to take Ms. Trujillo’s shoes and belt. She resisted. The two engaged in a scuffle which lasted several minutes. At one point during the altercation, Officer Medina placed his knee on Ms. Trujillo’s chest causing her to visibly go limp and slump to the floor.

After removing Ms. Trujillo’s belt and shoes, Officer Medina exited the cell. A short time later, Officer Medina returned to the cell and engaged Ms. Trujillo with a raised voice, asking her

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1 The incident in question was captured on video and the video was made part of the record in this appeal.
why she tried to bite him\(^2\), advising her that he was going to file additional charges against her, and telling her “don’t cry now” and “Tell it to God.”

Police management looked into these interactions between Officer Medina and Ms. Trujillo only because another officer informed a detective that something might have happened in the cell. Officer Medina, it turned out, did not file a Use of Force Report concerning the incident and did not seek medical attention for Ms. Trujillo despite her obvious slump to the floor after he had applied pressure to her with his knee.\(^3\)

Eventually, the Chief of Police, acting through his Conduct Review Officer, Commander Michael Battista, determined that Officer Medina’s conduct violated three Departmental rules. First, it was determined that Officer’s Medina’s actions in the cell violated RR-306 prohibiting use of Inappropriate Force.\(^4\) Next it was determined that Officer Medina’s conduct violated RR-102.1 (Duty To Obey Departmental Rules) as it pertained to OMS 105.02(1) (Duty to Report Use of Force) and OMS 105.02(2) (Duty To Request Medical Attention). Finally, the Chief determined that Officer Medina’s “tell it to God” and “don’t cry now” comments, as well as his escalation of the encounter in the holding cell, violated RR-105 (Conduct Prejudicial).

For these rules violations, The Chief recommended a punishment of 30 suspended days for the RR-102.1 violations, thirty suspended days for the RR-105 violation\(^5\) and discharge for the RR-306 violation to be held in abeyance for two years contingent upon Officer Medina committing no further rules violations determined to be of a Matrix Category D classification or higher. The Chief notified Officer Medina of his recommendation and gave Officer Medina the option of

\(^2\) There is no evidence in the record that Ms. Trujillo actually bit Officer Medina.
\(^3\) Five days after the incident, Officer Medina did file a follow-up report to his original arrest report which generally described the incident in the holding cell, but which omitted the amount of force he used to subdue Ms. Trujillo and further omitted the fact that during his use of force, Ms. Trujillo had slumped off the bench to the ground.
\(^4\) It was also determined that this conduct was punitive in nature.
\(^5\) These two recommended penalties would be served consecutively.
accepting the recommended discipline. Officer Medina requested twenty-four hours to consider the offer.

Officer Medina rejected the Chief’s offer. This set into motion the process of the bringing of formal charges and the scheduling of a Chief’s Hearing. This formal disciplinary process, as set out by the Denver City Charter, is as follows:

§ 9.4.14 - Disciplinary procedures.

Except for the dismissal of any probationary member, the procedure for discipline other than a reprimand of any member of the Classified Service shall be as follows:

(A) The Chief of Police and the Chief of the Fire Department shall, within their respective commands, initiate disciplinary action by a written command ordering the specific disciplinary action, which written command shall be submitted to the Manager of Safety for approval, together with a written specification of charges and a written report, setting forth the evidence of and reasons for such charges, which written report shall include a summary of the disciplinary record of the person charged. The written report shall also include that the member of the Classified Service affected thereby was given oral or written notice of the charges against him or her, an explanation of the evidence supporting those charges and an opportunity to respond to the charges prior to the imposition of the discipline. This pre-disciplinary meeting may be held by either the Chief or his or her designee.

(B) The Manager of Safety shall, within fifteen calendar (15) days of the date of the Chief's order, approve, modify or disapprove the written order of disciplinary action. The Manager shall take such action by a written departmental order which shall take effect immediately. In the absence of the Manager of Safety, such departmental order may be issued by a Deputy Manager.

The formal charges brought by the Chief included the allegations of violations of RR-306, RR-102.1 and RR-105. The Chief, in the formal charges, also recommended the imposition of the same penalties which he initially offered to Officer Medina.

A Chief’s Hearing is part of the pre-deprivation process to which an officer is entitled per the U.S. Supreme Court’s decision in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). At the hearing, Officer Medina, who had received prior
written notice of the charges and an explanation of the evidence supporting those charges (Exhibit 1, Bates 134-148) was permitted to speak to the charges. While Officer Medina did not personally take advantage of this opportunity, his attorney, who was attending the hearing with him, did.

After the Hearing, the Chief forwarded his recommendations to the Office of the Executive Director of Safety. Deputy Director of Safety Jess Vigil (DDOS), acting on behalf of the Executive Director, considered the Chief’s recommendations and accepted them, except as to the issue of the penalty to be imposed. DDOS Vigil did not agree with the Chief that the appropriate penalty for the RR-306 violation was discharge to be held in abeyance for two years. Instead, DDOS Vigil issued, pursuant to the Department’s Disciplinary Matrix, the Matrix-presumptive penalty of discharge.

Officer Medina appealed his discipline to a Hearing Officer. After an evidentiary hearing, the Hearing Officer held there was sufficient evidence in the record for the DDOS to have properly determined that Officer Medina’s actions did, in fact, amount to violations of RR-102.1, RR-105 and RR-306. She also determined that the penalties imposed for the RR-102.1 and RR-105 violations (two thirty-day suspensions to be served consecutively) were appropriate. Finally, she determined the imposition of the penalty of discharge, where the Chief had only recommended the penalty of discharge held in abeyance, violated Officer Medina’s Due Process rights. Accordingly, she modified the DDOS’s discharge order, reducing Officer Medina’s punishment down to the Chief’s recommended penalty of discharge held in abeyance for two years subject to Officer Medina not engaging in Matrix category D or higher misconduct during that two year period.

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6 DDOS Vigil did agree with the penalty recommendations for the RR-102.1 violations and the RR-105 violation.
The DDOS has appealed that portion of the Hearing Officer’s decision reducing the imposed penalty of discharge. Officer Medina has cross-appealed claiming the Hearing Officer erred in finding him guilty of any type of misconduct.

First, we reject in its totality, Officer Medina’s appeal. Officer Medina claims that the Hearing Officer erred in determining that he violated departmental rules and regulations, that is, that she erred in failing to find the DDOS’s determination of rules violations to be clearly erroneous. In her decision at paragraphs 24 through 26, as well as her factual findings as stated in paragraphs 7 through 11 of her decision, we find substantial evidence in the record satisfying us that the DDOS and the Hearing Officer were not clearly erroneous in sustaining the charged rules violations.

We agree with the DDOS and the Hearing Officer that Officer Medina’s use of force on Ms. Trujillo was inappropriate where, given the circumstances, Officer Medina had options other than force available to him (such as enlisting the assistance of another officer), that is, he did not need to go “hands on” with Ms. Trujillo when he did in the manner in which he did. As the Hearing Officer found, it was Officer Medina who escalated the situation in the holding cell, turning it into a physical altercation.

According to the Hearing Officer, the video of the incident clearly showed Ms. Trujillo slumping to the floor when Officer Medina used his knee to apply pressure to her body. We agree with the Hearing Officer that regardless of whether Ms. Trujillo actually lost consciousness, her physical response resulting from the application of Officer Medina’s knee to her body required

7 It is unclear precisely where on Ms. Trujillo’s body Officer Medina applied pressure with his knee. In the Hearing Officer’s decision, p. 3, par. 7(e), she holds that Officer Medina placed his knee on Ms. Trujillo’s chest. At page 6, paragraph 26 of her decision, however, the Hearing Officer credits the Department’s assessment of the totality of the circumstances in arriving at the conclusion that inappropriate force was used by Officer Medina. That assessment, however, determined that Officer Medina applied pressure with the lower part of his leg to the neck of Ms. Trujillo (not the chest), and that pressure to the neck is not a technique contained in the Department’s Arrest and Control Techniques Manual and was disproportionate and inappropriate. (Hearing Officer Decision, pp. 3-4, pars. 11 and 14)
Officer Medina to seek medical attention for her – something he did not do. We believe the Hearing officer did not err when she held that the DDOS was not clearly erroneous in finding that Officer Medina’s actions violated RR-306 and RR-102.1.  

Officer Medina has also argued that the Hearing Officer failed to consider evidence of comparable discipline and that the existence of these other cases demonstrate that the punishment he received is excessive. While the record reflects that Officer Medina had admitted into evidence numerous cases of past discipline of other officers, nowhere in his brief does he point to even a single case, and explain how that case is sufficiently similar to his own so as to warrant reduction of his discipline based on comparability. Similarly, nowhere in his brief does Officer Medina demonstrate that his discipline was outside of a reasonable range of disciplinary alternatives so as to satisfy the requirements our Rule 12, Section 11(D)(4)(b) for a reduction of penalties based on comparability.

That assessment also determined that: Officer Medina's conduct was punitive in nature; Ms. Trujillo did not pose an immediate threat to Officer Medina's safety nor was she a flight risk; Officer Medina's use of his leg on Ms. Trujillo's neck could have caused serious bodily injury and was disproportionate to the legitimate objective of attempting to remove her belt and shoes; Ms. Trujillo’s appearance of having lost consciousness constituted an "obvious injury" triggering a duty on the part of Officer Medina to have called for medical attention and to have notified a supervisor; and that Officer Medina's use of his leg on Ms. Trujillo was "analogous" to the carotid compression technique and presented the same danger.

8 We agree with Officer Medina that the Hearing Officer failed to make any findings or conclusions concerning the RR-105 charge. We cannot discern from her decision whether that charge is supported by the record. We would normally remand the matter back to the Hearing Officer for additional findings and conclusions. Given the remainder of our decision below, however, we find the matter to be moot and remand, therefore, unnecessary.

9 Per Section 9.4.15(F)(d) the Commission may review a hearing officer’s decision where “the discipline affirmed or imposed by the Hearing Officer is inconsistent with discipline received by other members of the department under similar circumstances.”
comparability.\textsuperscript{10} We will not search the record, like a pig hunting for truffles\textsuperscript{11}, for evidentiary nuggets supporting Officer Medina’s undeveloped argument.

Turning to the issue of the appeal filed by the DDOS, we agree with the DDOS that the Hearing Officer erred in finding that due process violations necessitated her reducing the imposed penalty of discharge to the penalty proposed by the Chief. First, we hold the Hearing Officer erred in finding that the pre-deprivation process afforded Officer Medina was so lacking as to amount to a violation of his due process rights. The Hearing Officer reached this conclusion based on the fact that the disciplinary recommendation to the Executive Director of Safety (from the Chief’s Office) did not include a recommendation for discharge – that is, according to the Hearing Officer, the possibility that Officer Medina could be discharged for his misconduct was never “on the table”;\textsuperscript{12} and this failure to advise specifically that discharge was a possibility amounted to inadequate notice, violating Officer Medina’s right to due process. This is an incorrect reading of the law.

Pre-deprivation process requires only, “(1) ‘oral or written notice [to the employee] of the charges against him’; (2) ‘an explanation of the employer's evidence’; and (3) ‘an opportunity [for the employee] to present his side of the story.’” \textit{Riggins v. Goodman}, 1108 572 F.3d 1101, 1108 (10th Cir. 2009), citing, \textit{Montgomery v. City of Ardmore}, 365 F.3d 926, 936 (10th Cir.2004) (“The

\textsuperscript{10} At page 13 of his brief, Officer Medina references the allegedly problematic “cross-deputization” the Hearing Officer found at page 11 (bottom paragraph) of her decision. But no such cross-deputization or cross-appointment (Id., first full paragraph) ever occurred. The Hearing Officer has mischaracterized the disciplinary process. For example, Commander Battista did not “delegate” to DDOS Vigil the initiation of discipline, as described by the Hearing Officer at page 11, paragraph 2 of her decision. DDOS Vigil did not submit a disciplinary recommendation to himself, as the Hearing Officer claims on page 11, paragraph 3 of her decision. What the Hearing Officer failed to grasp, and what occurred in this case, was that the Chief’s Office made a disciplinary recommendation to the Office of the Executive Director of Safety, and the DDOS, acting on behalf of the Executive Director and pursuant to the power vested in that Office by the Charter, properly exercised his discretion by modifying the Chief’s disciplinary recommendation; the DDOS having the final say on the issue of punishment and issuing the final order of disciplinary action. This is precisely the process contemplated by the Charter.

\textsuperscript{11} \textit{United States v. Dunkel}, 927 F.2d 955, 956 (7th Cir.1991) (“Judges are not like pigs, hunting for truffles buried in briefs.”).

\textsuperscript{12} Hearing Officer Decision, p. 10, bottom paragraph.
requirements of due process are… (1) oral or written notice of the charges, (2) an explanation of the evidence, and (3) an opportunity to respond.”); Gomez v. Looft, 2007 WL 1059007, Civil Action No. 06-cv-01701-WDM-MEH (D. Colo. 2007) at *2 (“Plaintiff received a written letter regarding possible disciplinary action, a meeting in which he was represented by a union representative and an opportunity to give his side of the story, and the opportunity to submit additional information. Procedural due process requirements were satisfied.”)\(^\text{13}\)

Due Process, does not, however, require notice of specific penalties to which an employee may be subjected. Farrell v. Dep't of the Interior, 314 F.3d 584, 593 (D.C. Cir.2002) (“[T]here is no constitutional requirement that an agency provide advance notice of the possible range of penalties. Due process does not require that an agency post the specific penalties to which an employee could be subject for any particular violation.”).

We hold that Officer Medina received all the pre-deprivation process he was due. There is no dispute that he was given notice of all the charges being brought against him, a full explanation of the evidence supporting those charges, and an opportunity to respond to those charges. The fact that the possibility of discharge might not have been proposed by the Chief, prior to the DDOS issuing discipline, did not deprive Officer Medina of his right to due process.

In any event, we find it unreasonable and counter-factual for the Hearing Officer to have held that Officer Medina was unaware of the possibility of his misconduct resulting in his discharge. Officer Medina was on notice that a violation of RR-306 could be classified by the

\(^{13}\) As discussed above, per the City Charter, the Chief of Police makes a disciplinary recommendation to the Director of Safety, and the Director of Safety makes the final disciplinary decision. The Tenth Circuit Court of Appeals, in Riggins v. Goodman, supra, 365 F.3d at 1111, has confirmed the constitutional adequacy of such a system. (“A policy like the one here that allows for supervisors to make an initial recommendation to terminate based on certain charges, and to have a superior approve of that initial recommendation, provides more, not fewer, protections for public employees. However one characterizes them, the City's policies build in substantial protections for employees prior to the loss of jobs or benefits.”)
disciplinary decision-maker anywhere from a Matrix Category D violation to a Matrix Category F violation, with the Category F violation carrying with it a presumptive penalty of discharge (Exhibit 10, Appendix F, p.7).

Officer Medina was also on notice that the Chief of Police did not have the final say on disciplinary matters and that the ultimate decision-maker on his discipline would be the Office of the Executive Director of Safety. In addition, Officer Medina was on notice, by operation of the City Charter, that the Executive Director of Safety had the authority to “approve, modify or disapprove” the Chief’s order of discipline (Charter Section 9.4.14(B), supra). In sum, we hold that while the constitutional requirements of pre-deprivation due process do not include the right to be informed of potential penalties, Officer Medina was on notice, both actual and constructive\textsuperscript{14}, that he could have been subject to discharge for his misconduct.

The Hearing Officer also found that Officer Medina’s due process rights, in this case, a right to fundamental fairness, were violated by the DDOS imposing discipline in contravention of the terms of the City Charter.\textsuperscript{15} First, we hold that even if the DDOS failed to follow the Charter, that failure, without more, does not give rise to a due process violation. It is settled law that a failure to follow established guidelines, “does not in and of itself implicate constitutional due process concerns.” \textit{Tonkovich v. Kansas Bd. of Regents}, 159 F.3d 504, 522 (10th Cir.1998); \textit{Trotter v. Regents of University of New Mexico}, 219 F.3d 1179, 1185 (10\textsuperscript{th} Cir. 2000); \textit{Dineen v. City and County of Denver}, 2013 WL 2378665, Civil Action No. 12–cv–03282–RBJ–KLM (D. Colo. 2013).

\textsuperscript{14} Individuals dealing with the City are charged with knowing the structural limitations imposed on City officials by the City’s Charter and ordinances. See \textit{Colo. Springs Fire Fighters Ass'n v. City of Colo. Springs}, 784 P.2d 766, 773–74 (Colo.1989); see also \textit{Shaw v. Sargent Sch. Dist. No. RE–33–J ex rel. Bd. of Educ.}, 21 P.3d 446, 449–50 (Colo.Ct.App.2001). As discussed above, Section 9.4.14 of the City Charter makes it clear that the Chief’s role in issuing discipline is advisory to that of the Executive Director of Safety, who has the final word on the imposition of discipline of members of the Classified Service.

\textsuperscript{15} Hearing Officer Decision, p. 10.
at *5 (“[T]he City's mere failure to follow its own personnel rules, ordinances, and/or City Charter does not, by itself, give rise to a due process violation.”)\textsuperscript{16}

We further note that in referring to the concept of fundamental fairness, the Hearing Officer is invoking the theory of substantive due process (as opposed to procedural due process). \textit{See}, \textit{e.g.}, \textit{U.S. v. Lilly}, 983 F.2d 300, 309 (1st Cir. 1992) (“A substantive due process violation occurs when government conduct violated fundamental fairness and is shocking to the universal sense of justice.”); \textit{Masters v. Gilmore}, 663 F.Supp.2d 1027, 1045-46 (D. Colo. 2009) (“substantive due process violations have been recognized where a criminal trial lacks fundamental fairness to a degree that shocks the conscience.”). As indicated by the authority referenced above, for there to be a violation of an individual’s right to substantive due process, government action must shock the conscience or be shocking to the universal sense of justice. \textit{Id.} We hold that the DDOS’s action in assessing the Matrix presumptive penalty of discharge for Officer Medina’s use of inappropriate force was not fundamentally unfair, was in no way shocking and did not deprive Officer Medina of his right to substantive due process.

In support of her finding that Officer Medina’s due process rights had been violated, the Hearing Officer determined: there was a conflict between the Police Department’s Operations Manual and the City Charter; the City Charter would control in such a conflict; and that the City Charter did not allow the DDOS to increase the Chief’s recommended penalty. The Hearing Officer believed that DPD Operations Manual Section 503.01(8)(e) (which states that):

\begin{quote}
In accordance with the Denver City Charter section 9.4.14(b), The Executive Director of safety shall approve, modify or disapprove the written order of
\end{quote}

\textsuperscript{16} Officer Medina, at pages 11 and 12 of his brief, argues that his due process rights were violated because the Chief’s designee, rather than the Chief himself initiated the disciplinary process. As the above-cited cases indicate, even if this procedure violated the terms of the Charter (and we do not believe it does) that would not lead to a due process violation and, indeed, we do not see how the participation of the Chief’s Conduct Review Officer (Commander Battista) diminished or affected in any way the constitutionally adequate process Officer Medina was afforded.
discipline and shall issue a written departmental order. As to each specification, the Executive Director of Safety shall have the option of accepting the penalty recommendation of the Chief of Police or of increasing or decreasing the recommended penalty.

is in conflict with Denver City Charter Section 9.4.14(B) which states:

The Manager of Safety shall, within fifteen calendar (15) days of the date of the Chief's order, approve, modify or disapprove the written order of disciplinary action. The Manager shall take such action by a written departmental order which shall take effect immediately. In the absence of the Manager of Safety, such departmental order may be issued by a Deputy Manager.

The Hearing Officer found the conflict to be created by the language of the OMS provision which states that the Director of Safety can increase or decrease the Chief’s recommended penalty; while the Charter only gave the Director of Safety the right to approve, disapprove or modify the Chief’s recommendation.

We disagree with the Hearing Officer when she holds that the meaning of the word “modify,” as found in Section 9.4.14(B) of the Charter does not plainly imply the ability to increase the Chief’s recommended penalty. We hold that the description or explanation of Charter Section 9.4.14(B) found in OMS 503.01(8)(e) is fair and accurate. We hold that where Charter Section 9.4.14(B) gives the Executive Director of Safety the right to “modify” the Chief’s recommended discipline, it means that the Executive Director may decrease or increase the Chief’s discipline. We hold, therefore, there is no conflict between OMS 503.01(8)(e) and Charter Section 9.4.14(B).

We believe that the language of Section 9.4.15 of the Charter demonstrates support for this interpretation of the Charter section questioned. Specifically, Charter Section 9.4.15(F) deals with this Commission’s ability to review disciplinary appeals. The last sentence of this Charter provision states:

The Commission may affirm, reverse or modify the Hearing Officer's decision provided that the Commission shall not have the authority to impose a level of
discipline more severe than that imposed by the Hearing Officer or the Manager of Safety. (emphasis supplied)

The Executive Director of Safety may “modify” the Chief’s discipline and this Commission may “modify” a hearing officer’s decision. The drafters of the Charter, however, did not wish to grant the Commission the authority to increase a penalty imposed by the Hearing Officer or the Executive Director of Safety, so they specifically added language prohibiting the Commission from doing so. If, however, the drafters of the Charter had intended for the word “modify” when applied to a penalty to mean “decrease but not increase,” then there would have been no need to add the language to 9.4.15(F) specifically prohibiting the Commission from increasing penalties; and the “provided that ...” language would be mere surplusage. Obviously, the drafters intended to give the Executive Director of Safety the right to increase penalties when they afforded the right to modify the Chief’s recommendation. It is just as obvious that they did not wish to grant this right to the Commission, but that the mere use of the word “modify” would not accomplish this purpose; because the use of the word “modify” meant, to the drafters of the Charter, to decrease or increase. Consequently, the DDOS did not violate the terms of the Charter when he increased the penalty recommended by the Chief of Police.

In addition, were the Hearing Officer’s interpretation of the Charter to be correct, it would mean that the Chief of Police (or the Fire Chief) would have control over discipline of members of the Classified Service. The Chief’s recommendations would circumscribe the ability of the Executive Director of Safety to act in disciplinary matters. This cannot be the case. Charter Section 2.6.1 creates the Department of Safety, “which shall have, subject to the supervision and control of the Mayor, full charge and control of the departments of sheriff, fire and police.” Charter Section 2.6.2 provides for a Manager of Safety (now the Executive Director) who “shall be the officer in full charge of said department, subject to the supervision and control of the Mayor.” If
the Police or Fire Chief can limit the actions of the Manager, the Manager is not in “full charge.” The Hearing Officer’s interpretation of the Charter which limits the ability of the Executive Director to increase a Chief’s recommended discipline is contrary to the express terms and intent of the Charter.

The Hearing Officer also appears to find a due process violation in her belief that the DDOS acted as “judge, jury and executioner.”\textsuperscript{17} This argument assumes that an officer who is subject to discipline is entitled to an impartial decision-maker\textsuperscript{18} at the pre-deprivation stage. Assuming the existence of an impartial decision-maker being available for post deprivation process (as exists in our system), this assumption would be incorrect. \textit{Crocker v. Fluvanna County Bd. of Pub. Welfare}, 859 F.2d 14, 17 (4th Cir.1988) (“[t]he pretermination hearing required by \textit{Loudermill} \textit{[is]} not required to be held before an impartial decision maker.”); \textit{Walker v. City of Berkeley}, 951 F.2d 182, 184 (9th Cir.1991) (impartial decision maker is not required at the pre-termination stage “so long as the decision maker at the post-termination hearing is impartial.”); \textit{Schaper v. City of Huntsville}, 813 F.2d 709, 715–16 (5th Cir.1987) (“[I]n the case of an employment termination case, ‘due process [does not] require the state to provide an impartial decision maker at the pre-termination hearing. The state is obligated only to make available “the means by which [the employee] can receive redress for the deprivations.”’). Accord, \textit{Riggins v. Goodman}, \textit{supra}, 572 F.3d at 1114.

The Hearing Officer, however, seems to be under the impression that because the burden of proof at the officer’s post-deprivation hearing is now on the officer, she is no longer an impartial

\textsuperscript{17} Hearing Officer Decision, p. 11, first full paragraph.

\textsuperscript{18} We do not intend to convey, nor do we believe that the DDOS was biased against Office Medina when issuing his disciplinary order. We only mean to indicate that the due process requirement of an impartial decision-maker is in the post-deprivation stage of the process afforded the Officer.
decision-maker. See, e.g., Hearing Officer Decision, p. 9, “Hearing Officers are no longer ‘neutral referees’ in any sense of the word.”). We believe the Hearing Officer is incorrect on this very important issue. The Hearing Officer, even under our Rule 12, still holds the critical function of being a neutral fact finder, and a neutral decision-maker as to whether the Officer met his burden of proving the Executive Director’s actions to have been clearly erroneous. The fact that the burden of proof has been shifted from management to the officer, in and of itself, does not have due process implications. So long as the officer was given the opportunity to present evidence, confront witnesses and have a neutral arbiter determine whether he has met his burden of proof (and adequate pre-deprivation process as was provided to Officer Medina), due process has been satisfied. See, Benavidez v. City of Albuquerque, 101 F.3d 620 (10th Cir. 1996) where the Tenth Circuit Court of Appeals held there to be no due process violation where the burden of proof at employees’ post deprivation hearing was on the employee and employees were afforded pre and post termination process similar to the pre and post deprivation process afforded Officer Medina.

In sum, we hold the Executive Director of Safety has the final say on disciplinary matters. The Chief of Police (or Fire) does nothing more than make recommendations to the Executive Director. While the Executive Director is bound to consider those recommendations, ultimately, the Executive Director has the right to accept, reject, decrease or increase the recommended punishment, and impose the discipline he or she determines to be appropriate under the circumstances. We further find that the pre and post deprivation process afforded Officer Medina was constitutionally adequate. His right to due process was not violated at any stage of the disciplinary proceedings.

The Hearing Officer’s decision is REVERSED as to the appropriate penalty for Officer Medina’s misconduct. We reinstate the penalty of discharge originally imposed by the DDOS for
Officer Medina’s violation of RR-306. Based on this ruling, we believe the determinations concerning the other rules violations which resulted in imposed discipline less than discharge to be moot. 19

Filed the 15th day of March, 2016.

For the Civil Service Commission,

By: Earl E. Peterson, Executive Director

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19 The DDOS has also appealed an evidentiary issue which arose at hearing. Specifically, the DDOS takes issue with the Hearing Officer having admitted into evidence testimony of Officer’s Medina’s prior attorney (Mr. Olson) concerning settlement discussions he had with the DDOS. While a ruling on this issue is not necessary for our decision today, we find it appropriate to reinforce our prior holding that such settlement discussions are inadmissible in our hearings. See, *In re Vanover*, 13 CSC 03A, p. 13. The Hearing Officer erred when she accepted the testimony of Mr. Olson into this record. The DDOS has also alleged in his brief that the Hearing Officer was biased in favor of Officer Medina and against Commission Rule 12. We believe this “bias” is not true bias, but rather a reflection of the Hearing Officer’s fundamental misunderstandings of the Charter and due process requirements.
CERTIFICATE OF SERVICE

I hereby certify that this 15th day of March, 2016, I have electronically served the foregoing DECISION AND FINAL ORDER, in Case No. 15 CSC 03A, Jess Vigil v. James Medina {P99072}, by arranging that a true and correct copy of the same be sent by email to the following attorneys of record at the email addresses listed:

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