

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

Appeal No. 71-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

THOMAS CULLEN III, Appellant,

Agency: DEPARTMENT OF PUBLIC SAFETY, DENVER SHERIFF DEPARTMENT,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

This matter is before Hearing Officer Joanna Lee Kaye through briefs by the parties, upon their mutual agreement to stipulate to the facts and evidence in this case. Assistant City Attorney Christopher M. A. Lujan filed briefs on behalf of the Department of Public Safety, Denver Sheriff Department (Agency). Reid J. Elkus, Esq., Hamilton and Faatz, P.C., filed briefs on behalf of Thomas Cullen III (Appellant). The parties stipulated to the admission of Agency Exhibits 1 through 19, and Appellant's Exhibits A through C.

MATTER APPEALED

Appellant, a Deputy Sheriff employed by the Agency, appeals the Agency's decision to place him on involuntary administrative leave without pay (LWOP) following his arrest for alleged acts of domestic violence, and subsequent restraining order prohibiting him from possessing a firearm, which is a requirement of his duties.

For the reasons set forth below, the Agency's action is REVERSED.

ISSUES

1. Who bears the burden of proof, where the Agency asserts the action was administrative, and Appellant asserts it was a disciplinary action.
2. Whether the action impacted Appellant's pay, status or tenure giving rise to due-process protections under the governing case law and the CSR rules.
3. Whether Appellant has shown that the Agency's administrative action was arbitrary, capricious and/or contrary to rule or law.

PRELIMINARY MATTERS

1. The Hearing Officer has jurisdiction over this case.

The Hearing Officer finds she has jurisdiction to hear this case as a grievance alleging violations of the CSR rules pursuant to CSR 19-10 d), which states:

Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- ...d) Grievances resulting in rules violations: Any grievance which results in an alleged violation of the Career Service Charter Amendment, or ordinances relating to the Career Service, or the Career Service Personnel Rules...

2. Any facts not included in the stipulation are disregarded.

The hearing in this case was vacated upon agreement by both parties that the facts are undisputed, and that the only remaining issues are those of law. Appellant set forth the below facts in its Opening Brief filed 11/13/03 (pp. 1-2). This is the same list of stipulated facts in the Agency's Exhibit 20 attached to its Motion for Summary Judgment or Closing Arguments in the Alternative filed 11/12/03 (hereafter "Agency's Opening Brief"). However, the Agency's brief alleged additional facts relevant to the reasons for Appellant's arrest (p. 2) that were not included in the stipulation. Appellant strenuously objected to this in his Response Brief (pp. 2-3). He argued he did not stipulate to these additional facts, and that their inclusion further tends to underscore a pattern by the Agency to disregard Appellant's constitutional right to a presumption of innocence.

The Agency has not disputed Appellant's allegation that he did not stipulate to these additional facts. Furthermore, they are not relevant to a determination in an administrative action, and appear to be offered to justify some negative action against Appellant. The facts in question are rendered irrelevant by the Agency's own assertion that this action was administrative and not disciplinary in nature. Therefore, the Hearing Officer has disregarded the unstipulated facts in the Agency's Opening Brief (p. 2).

FINDINGS OF FACT

The parties stipulated to the following facts.

1. Appellant has been employed by the Agency as Deputy Sheriff since 1988.
2. It is a necessary requirement of the position of Deputy Sheriff to carry a firearm.

3. Appellant was arrested on March 30, 2003 and placed into custody for menacing and criminal mischief involving an alleged act of domestic violence against his wife.
4. On April 1, 2003 Appellant was released on bond. As a stipulation for his release, the Arapahoe County Court entered a restraining order prohibiting Appellant from possessing a firearm or other weapon.
5. On or about April 1, 2003, Appellant was taken off the duty roster of the Denver Sheriff Department and placed on LWOP under CSR 11 for a period of seven days pending the outcome of his criminal charges, or modification of the restraining order. During this period, Appellant was ordered to take either compensatory or vacation leave without his consent or agreement, and without a pre-disciplinary meeting.
6. Appellant did not have the restraining order amended within the seven-day time frame as ordered by the Agency in Captain Horner's letter dated April 10, 2003.
7. On April 21, 2003, on behalf of the Agency, Captain Horner ordered the extension of Appellant's LWOP until May 9, 2003 so Appellant would have sufficient time to have the restraining order modified.
8. The restraining order was modified on April 22, 2003 allowing Appellant to possess and control a firearm during his working hours at the Agency.
9. Appellant was scheduled to return to work on April 23, 2003, but did not return until April 24. Appellant worked 3.83 hours that day.
10. As of January 31, 2003 Appellant's sick leave balance was 11.36 hours and his vacation leave was 20.5 hours.
11. As of February 28, 2003 Appellant's sick leave balance was 8 hours and his vacation leave was 23.47 hours. Appellant's compensatory time balance was 15.48 hours.
12. As of March 31, 2003 Appellant's sick leave balance was 8 hours and his vacation leave was 12.25 hours.
13. As of April 30, 2003 Appellant's sick leave balance was 6.43 hours and his vacation leave was 9 hours.
14. As of May 31, 2003 Appellant's sick leave balance was 8 hours, his vacation leave was 12.25 hours, and his compensatory time balance was 5.73 hours.
15. As of June 30, 2003 Appellant's sick leave balance was 8 hours, and his vacation leave was 12.25 hours.

The Hearing Officer further finds as follows based on the stipulated exhibits:

16. Appellant's total LWOP time was 125.73 hours (Appellant's Exhibit C).
17. Appellant timely grieved and appealed the Agency's action.

DISCUSSION

1. Burden of Proof.

The burden of proof is typically on the "proponent of the order." The "proponent of an order" is the person who brings the action in question. Velasquez v. Dept. of Higher Education, ___ P. 3d ___, WL 22097754 (Colo. App. 2003). Although in disciplinary actions the burden of proof is on the Agency to show cause for an action against an employee, a technical disqualification or other administrative action is not specific to an employee's conduct or performance. Id.; Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

There is a presumption of "validity and regularity" in administrative actions. See, Garner v. Colo. State Dept. of Personnel, 835 P.2d 527 (Colo. App. 1992); The "proponent" of a challenge to an administrative action bears the burden to prove the administrative action was *not* valid or regular. Id.; see *also*, Kinchen, *above*. The proponent must prove that the Agency's action was arbitrary, capricious and/or contrary to rule or law. See, Renteria v. Colo. State Dept. of Personnel, 811 P.2d 797 (Colo. 1991).

In Lawley v. Dept. of Higher Education, 36 P.3d 1239 (Colo. 2001), the Colorado Supreme Court specifically restated that the arbitrary or capricious exercise of discretion by an administrative agency can arise in only three ways:

"(a) By neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it. (b) By failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion. (c) By exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable [persons] fairly and honestly considering the evidence must reach contrary conclusions."

Lawley, *above* at pp. 37-38, *quoting* Van DeVeght v. Board of County Comm'rs, 98 Colo. 161, 55 P.2d 703 (1936).

In this case, Appellant posits that the Agency's placing him on involuntary LWOP for 125.73 hours, while he sought a modification of his restraining order, was a *de-facto* suspension, and is therefore really a pretext for discipline. He argues that the burden of proof should be on the Agency to show cause for the disciplinary action.

The Agency asserts it took this action under CSR 11-10, which states as follows in relevant part:

Leave is any authorized absence during regularly scheduled work hours that has been approved by proper authority. The following types of leave are officially established and shall be in effect unless otherwise provided by ordinance:

... 7) Leave Without Pay...

The Agency asserts that an action under this rule is administrative in nature, placing the burden on Appellant to rebut the presumption of validity by showing the action was arbitrary, capricious, or contrary to rule or law.

The Hearing Officer finds that the burden of proof in this case lies with Appellant for two reasons. First, the Agency has pursued this action from an administrative standpoint from the beginning. As set forth in the above case law, the presumption of validity in administrative actions places the burden on Appellant, to prove his assertion that the action was a pretext to avoid the regulatory due-process protections afforded under the CSR rules.

Second, while a suspension is a disciplinary action requiring the Agency to show cause, this was only one of the theories Appellant argues. Appellant alternatively asserts that this should have been handled as a disqualification. However, disqualification is a non-disciplinary administrative action, again creating a presumption of validity in the Agency's action.

Therefore, the burden of proof is on Appellant to show by a preponderance of the evidence that the Agency's action was arbitrary, capricious, or contrary to rule or law.

2.. The Agency's Motion for Summary Judgment is Denied.

The Agency argues that it is entitled to Summary Judgment in its favor. Summary Judgment is an extreme remedy that is only appropriate when there are no genuine issues of material fact and the moving party (the Agency in this case) is entitled to judgment as a matter of law. See, Vu, Inc. v. Pac. Ocean Marketplace, Inc., 36 P.3d 165; (Colo. App. 2001); Lazy Dog Ranch v. Telluray Ranch Corp., 948 P.2d 74; (Colo. App. 1997). For the reasons set forth below, the Hearing Officer concludes the Agency is not entitled to a judgment in its favor as a matter of law. The Agency's Motion is therefore denied.¹

¹ In addition, although the Agency argues there are no genuine issues of material fact and it agreed to stipulate to the facts in this case, it included facts not stipulated by Appellant in its Opening Brief. The Agency's argument that it is entitled to judgment in its favor relies in part on Appellant's own bad behavior. The additional facts in the Agency's Opening Brief are material to this issue. Since these facts were not stipulated, the Hearing Officer cannot conclude there are no genuine issues of material fact in dispute.

3. Appellant has shown that the Agency's action was arbitrary, capricious and contrary to rule and law.

a. *The Agency's action impacted Appellant's pay, giving rise to the due process protections of a pre-deprivation proceeding.*

The Hearing Officer concludes that depriving Appellant of 125.73 hours of pay gives rise to his due process right to a pre-deprivation proceeding for the following reasons.

Procedural due process imposes constraints on governmental decisions that deprive individuals of "property interests" as defined in the Due Process Clause of the Fourteenth Amendment. Mathews v. Eldridge, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). An employee has a property interest to continued employment, requiring due process to be provided before any action is taken affecting the employee's pay, status or tenure. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985); see, Kinchen (above).

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

The United States Supreme Court's ruling in Gilbert v. Homar, 520 U.S. 924 (1997) establishes that unpaid suspensions give rise to due-process protections. In that case, a university police officer was arrested on August 26, 1992 at the home of a friend he was visiting at the time of the raid. The officer was charged with a drug-related felony. The Agency summarily placed him on unpaid suspension without any pre-deprivation proceedings pursuant to a state Executive Order, 4 Pa. Code § 7.173 (1997), mandating suspension without pay upon the filing of felony charges against an employee. The criminal charges were dismissed on September 1, 1992. However, the university continued with its own investigation. It determined to follow through with disciplinary action, and held a prompt post-deprivation meeting with the employee. Effective September 23, 1992 (less than a month after the suspension) the university elected to demote the officer to the position of groundskeeper with back pay to the date of September 1.

The employee filed suit, arguing that his suspension without any prior hearing violated his due process rights. The United States Supreme Court disagreed, and explained as follows:

This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause... (Citations omitted.)

Id. at 930. The Supreme Court continued, saying:

[I]n determining what process is due, account must be taken of "the *length*" and "*finality* of the deprivation." (*Citation omitted.*) ...respondent faced only a *temporary suspension* without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination)...

Id. at 932 (*emphasis in original.*) Thus, the Supreme Court found that the absence of pre-deprivation proceedings was not a violation of due process only because the agency's rules provided for *an investigation and a prompt post-deprivation meeting* on the incident giving rise to the summary suspension.² The agency's rules further required a restoration of pay lost for the suspension in the event the employee is exonerated.

The Agency argues that this case is neither a disqualification nor a disciplinary action because it initiated neither of these pre-deprivation proceedings. However, the Agency's failure to undertake such proceedings does not determine the legal nature of the action. On the contrary, it is the nature of the action which determines the necessity of the proceedings. Based on the Supreme Court's reasoning in Gilbert v. Homar, the Hearing Officer concludes that the impact on Appellant's pay gives rise to due process protections he is afforded under the CSR rules. (See, Board of Regents v. Roth, *above*). Yet here, Appellant was denied any comparable process, nor was the pay he lost ever restored. The Agency further cannot claim that the deficiencies in its procedures are cured by this appeal to the Hearings Office, given the nine-month lag from the time of Appellant's deprivation to the time of this hearing. The Hearing Officer concludes that in the absence of any prompt due process as required by the United States Supreme Court in Gilbert v. Homar, Appellant's due-process rights were violated.

The Agency further responds that it gave Appellant the option of taking time from his leave bank to cover the period in question. The Agency alleges it was Appellant's fault he did not have enough time in his leave bank. The Hearing Officer is not persuaded that the Agency has a right to compel an employee to use up time he is

² Notably, the Supreme Court continued that "the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him." Id. at 932. However, it is apparent in that case that there were no agency rules requiring the officer to be placed on paid leave pending exhaustion of pre-deprivation proceedings, as is the case in the CSR rules. On the contrary, there was an Executive Order under which a state employee was *automatically to be suspended without pay* "as soon as practicable after [being] formally charged with . . . a felony." Id. at 933, *citing* 4 Pa. Code § 7.173 (1997). Despite that the suspension was permitted under this rule, the Supreme Court found the suspension without a pre-deprivation hearing was not a violation of the officer's due-process rights only because of the prompt post-deprivation proceeding. The Court then remanded the case for a determination whether the officer's post-deprivation proceeding within one month was sufficiently "prompt" to satisfy his due-process rights, given the charges against him were dismissed seventeen days before the post-deprivation hearing. Finally, it is important to acknowledge that the officer's suspension in Gilbert v. Homar was admittedly disciplinary in nature, whereas the Agency in this case maintains its action was purely administrative.

entitled to accumulate and use for personal purposes, in order to cover compulsory leave without pay imposed by the Agency without any pre-deprivation proceedings. Even assuming such an action is permissible, the Agency knew Appellant did not have enough leave time accumulated, and therefore knew its offer was academic and impracticable. Further, there is nothing in the stipulated findings to substantiate the Agency's assertion that it was Appellant's fault he had insufficient leave time to cover the suspension. The Hearing Officer is unwilling to indulge negative inferences about why Appellant had insufficient leave to cover nearly a three-week period, particularly where the controlling case law shows this scenario is one requiring pre-deprivation (or prompt post-deprivation) proceedings.

b. The Agency's explanation that Appellant was disqualified requires that it undertake the pre-disqualification process.

The Agency first argues that it took the action because Appellant was rendered "disqualified" by the restraining order prohibiting him from carrying a weapon. Under the CSR rules, there must be a pre-deprivation hearing before an employee can be "disqualified." Those rules are as follows in relevant part:

Section 14-20 Disqualification

14-21 General

An employee shall be separated without fault, hereinafter called disqualification, if a legal... impairment or incapacity, occurring or discovered after appointment, prevents satisfactory performance of the essential functions of the position...

14-22 Grounds for Disqualification

An employee shall be disqualified if any of the following conditions occur:

- ...C. Licensure, certification and other legal requirements: When laws require a license, certification, or other authorization by a federal, state or local governmental entity to perform the duties of a position and the employee does not have the required authorization.

14-23 Procedure

The appointing authority shall follow the procedures for pre-disciplinary meetings before taking any action on the disqualification...

In turn, the procedures required for predisciplinary (and pre-disqualification) meetings are as follows:

Section 16-30 Pre-Disciplinary Notification of Contemplation of Suspension, Involuntary Demotion or Dismissal and Notice of Pre-disciplinary Meeting

- A. 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...

B. The purposes of the pre-disciplinary meeting include the following:

- 1) To allow the employee to correct any errors in the agency's information or facts upon which it proposes to take disciplinary action; and
- 2) To allow the employee to tell his or her side of the story and present any mitigating information as to why the disciplinary action should not be taken.

...D. Employee must be given seven (7) calendar days notice of the pre-disciplinary meeting...

E. ...The notice of contemplation of disciplinary action and pre-disciplinary meeting shall contain the following.

1. That disciplinary action is contemplated;
2. The specific conduct or omission committed by the employee which the agency believes is in violation of... applicable legal authority;
3. The purpose of the pre-disciplinary meeting as described in Section 16-30 (b)...;
4. The date, time and location of the pre-disciplinary meeting;
5. That the employee is entitled to have a representative of his or her own choosing present at the meeting...

Section 16-40 Disciplinary Action Following Pre-disciplinary Meeting

A. When Taken: Disciplinary action based on the pre-disciplinary meeting and other pertinent information obtained by the appointing authority or designee shall be taken within fifteen (15) calendar days after the meeting...

B. Written Notice of Disciplinary Decision.

A written notice of the disciplinary decision and the reasons for the disciplinary action being taken shall be given to the employee...

Finally, CSR 14-23 provides the following option regarding leave for an employee unable to perform his or her duties while under contemplation of disqualification:

[A]n employee shall be relieved immediately of any duties requiring a license, certification, or other legal authorization if the employee lacks such license, certification, or other legal authorization. *This change in duties shall in no way affect the employee's pay or classification prior to the completion of the disqualification proceedings.*

(Emphasis added.) Only after these procedures are exhausted can the Agency take an action affecting an employee's pay. Yet in this case, the Agency's action deprived Appellant of 125.73 hours of pay, without the required pre-deprivation proceedings.

The Hearing Officer is mindful that it is undisputed the restraining order rendered Appellant disqualified because he could not carry a weapon. This might make the requirement to undertake disqualification proceedings appear superfluous. However,

under the rules and case law, once those proceedings have been created they are mandatory. See, Matthews v. Eldridge (above); Board of Regents v. Roth (above). Agencies cannot exercise their discretion and choose when to follow the rules and when not to. Moreover, the disqualification rules expressly contemplate the loss of licensure, certification or other legal requirements "without fault." See, CSR 14-21. Notice and an opportunity to respond gives the employee a chance to correct the alleged deficiency *without regard to fault*, before the disqualification becomes official, without loss of pay, status or tenure.

c. The Agency's argument that Appellant was disqualified by his own bad act makes the Agency's action disciplinary in nature, requiring a pre-disciplinary proceeding.

The Agency claims that it was not required to engage in the disqualification proceedings because Appellant's was disqualified by his "own alleged criminal conduct." Agency's Exhibit 14; see, Agency's Opening Brief (pp. 4, 8). The Agency further asserts that Appellant "was unavailable for work *due to his own actions*" (p. 15) and that "awarding that Appellant paid time off...would essentially reward Appellant *for his bad behavior*" (p. 16) (*emphasis added*).

This argument must fail for two reasons. First, employees are entitled to pre-deprivation proceedings whether or not they are "at fault." Second, the Agency's justification is specific to Appellant's behavior or performance. Under CSR 16-10, "The purpose of discipline is to correct inappropriate behavior or performance." In admitting Appellant's "bad behavior" was the justification for its failure to follow the required pre-deprivation proceedings, the Agency tacitly admits it has already judged Appellant guilty of the allegations forming the basis of the criminal charges.

It is a fundamental tenet of the due-process protections afforded under the Fourteenth Amendment that the accused is entitled to a presumption of innocence. The Agency cannot use Appellant's alleged inappropriate behavior to justify an action against his pay, and in the same breath claim the action is not disciplinary in nature. The Agency's action is punitive by its own explanation, requiring that it undertake pre-disciplinary proceedings. Those proceedings are as follows:

CSR 5-62 Employees in Career Status

An employee in career status

- 1) may be disciplined or dismissed only for cause, in accordance with Rule 16, Discipline...

* * * * *

Section 16-10 Purpose

...The disciplinary action taken must be consistent with this rule...

Section 16-20 Progressive Discipline

1) ...the disciplinary actions which an appointing authority or designee may take against an employee...include:

...c) Suspension without pay...

16-55 Investigatory Leave With Pay

A. An appointing authority may place an employee on investigatory leave *with pay* pending an investigation of a possible rule violation or failure to meet standards of performance when it is determined by the appointing authority or designee that it is in the best interest of the City...

(*Emphasis added*). Finally, once again the Agency must follow all the procedures set forth under CSR 16-30 and 16-40 (*above*), including notification to the employee that the Agency is contemplating disciplinary action, a pre-disciplinary meeting to give the employee an opportunity to respond to the charges, and notification of the Agency's decision. Only when these procedures are exhausted can the Agency take an action affecting Appellant's pay.

While the Agency has an interest in removing temporarily disqualified employees from duty to protect those employees and the public at large, the CSR rules set forth above clearly require pre-deprivation proceedings before the Agency can take an action with such a significant impact to Appellant's pay. The Agency's argument that it can erase due-process requirements by taking the action under CSR 11 must fail. The Agency's own reasoning leads to the conclusion that the action was either a disqualification or a disciplinary proceeding. Either way, the CSR rules and case law require the employee to be placed on paid leave pending the outcome of the pre-deprivation proceedings. Thus, the Agency's interest in removing the employee from duty is served under those rules.

The Hearing Officer concludes that Appellant has rebutted the presumption of validity in the Agency's administrative action. Appellant has shown the action was an attempt to avoid the regulatory due-process protections afforded to CSA employees. The Agency's action was contrary to the CSR rules and governing case law. In addition, to the extent the Agency relied on Appellant's conduct and presumed his guilt as a basis for its action, the Agency failed to use reasonable diligence and care to procure such evidence as it was required by law to consider in exercising its discretion. The action was therefore arbitrary and capricious. See, Lawley (*above*).

CONCLUSIONS OF LAW

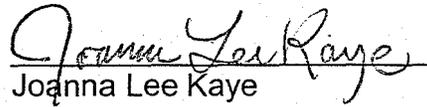
1. The Hearing Officer has jurisdiction to consider this case and render a decision.
2. The burden of proof is on Appellant to show the Agency's action was arbitrary, capricious, or contrary to rule or law.

3. Appellant has shown the Agency's action required due process as afforded under the CSR rules, and the Agency failed to provide the required process.
4. The Agency's action was arbitrary, capricious and contrary to rule and law.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Agency's decision to place Appellant on involuntary LWOP is REVERSED. The Agency is ORDERED to restore 125.73 hours of back pay to Appellant.

Dated this 21st day of January, 2004.


Joanna Lee Kaye
Hearing Officer
Career Service Board