HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 127-08

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

THOMAS CULLEN, Appellant,

vs.

DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on February 25 and 27, 2009 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing, and was represented by Jeff Town, Esq. The Agency was represented by Assistant City Attorney Robert Wolf, and Sgt. Chris Brown served as its advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE CASE

On Nov. 19, 2008, Appellant Thomas Cullen filed this direct appeal challenging his Nov. 5, 2008 termination from his position as Deputy Sheriff with the Sheriff's Department within the Denver Department of Safety.

Agency Exhibits 1 – 6, 8 – 10, 13 - 15, 17 – 22, 26 and 30 – 36 were admitted during the hearing. Appellant's Exhibits A and B were also admitted. A protective order was granted without objection as to all medical records of Appellant admitted into evidence.

II. ISSUES

The issues in this appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR), and

2) Did the Agency establish that termination was within the range of penalties that could be imposed upon Appellant by a reasonable administrator for the violations proven under the rules?

III. FINDINGS OF FACT

Appellant Thomas Cullen was hired as a Deputy Sheriff for the Denver Sheriff's Department in 1988. On March 1, 2007, he entered into a two-year Stipulation and Agreement for Participation in a Substance Abuse Treatment/Education Plan (Stipulation). [Exh. 13.] The Stipulation was part of a settlement agreement, along with a 60-day suspension, that resolved then-pending disciplinary and disqualification actions.[1]

On July 15, 2008, at 5:23 p.m., City of Westminster police officers responded to a domestic disturbance call at Appellant's home, which he shares with Maria Elisa Montero. Ms. Montero called the police to request assistance because Appellant had been on a drinking binge since Thursday, and had drunk "a good portion of a large size bottle of vodka" that day. She took his keys and wallet so he wouldn't drive, and told the officer that Appellant was on a work contract with his employer, the Denver Sheriff's Department, which prohibited him from drinking. She told the police that "[w]hen she attempted to call the IA unit, Thomas [Cullen] grabbed the phone from her hand, and she thought he had broken the phone." [Exh. 10-2 to -3.]

Appellant admitted to the officers that he "had a few [drinks] the night before and a couple today." He stated he wanted Ms. Montero arrested for kidnapping because she had taken his keys away from him. When Officer Spottke informed him she knew he was on a work contract, he replied, "[w]hat do you want me to do?" The officers determined that the altercation was not physical, but that Appellant was too intoxicated to care for himself. He was transported to Washington House Detoxification Center, and released at 9:45 a.m. the next day. [Testimony of Officer Cheri Spottke; Exhs. 10, 31.]

Appellant testified that he called in sick at 3:45 a.m. on July 15th because of a migraine, and started drinking at four a.m. to ease the pain. He stated it was the first time he had anything to drink since signing the Stipulation in March 2007. He admitted at hearing that he had six to twelve beers and some vodka throughout the day. The pain went away at about three p.m. When Ms. Montero came home from work around five p.m., she confronted him angrily about being on a singles website, and told him she was going to call the police because he had been drinking. Ms. Montero was aware Appellant was on a work contract related to his drinking, as they were together since he went through the settlement process leading to the Stipulation.

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[1] The disciplinary matter arose from Appellant's May 17, 2005 arrest for impersonating a peace officer and driving under the influence of alcohol. The disqualification action was the subject of CSA Appeal No. 165-04, and was based on Appellant's use of numerous hours of leave. [Exh. 21.]

Ms. Montero then took his keys and wallet to prevent him from driving. [Testimony of Appellant.]

When the police arrived, Appellant was agitated at first because he believed Ms. Montero was "using the work contract as a weapon." He then cooperated with the police by providing them the information they requested. "I knew the city would come after me on the Stip. And I knew they were going to fire me." When asked if he knew that because he knew the city would assume he violated the agreement, Appellant answered, "[t]hat's correct." However, Appellant testified he believed that his obligation to abstain from alcohol ended after he completed the Minimal Treatment Plan on March 10, 2008. On cross-examination, Appellant was asked to explain why the Stipulation would require random testing for alcohol after he completed his Treatment Plan if he didn't need to abstain from alcohol, Appellant replied, "[t]he way the contract reads, it doesn't say I have to pass." [Testimony of Appellant; Exh. B-9.]

Appellant further testified that he told Washington House intake staff that he suffered from migraines, and was on Maxalt medication to control them. In contrast, Washington House records show that Appellant denied any health problems or having taken any medication. The records also reflect that Appellant stated these were the first drinks he had for three years, and that he had his last drink at 5 p.m. that evening. Appellant told intake that he did not know why he drank, he "just felt like it." [Exh. 31-4, -5, -12.] Appellant's shift the next day, July 16th, started at 5:41 a.m., but he was not released until 9:45 a.m. Appellant called in sick that day, and that leave was approved. [Appellant's testimony; Exh. 31-3.]

The Department's Internal Affairs Bureau interviewed Appellant regarding this matter on Aug. 19, 2008. He told the interviewer that July 15th was his first drink since the March 2007 Stipulation, and expressed his belief that he only had to abstain from alcohol until the end of treatment, which he dated as February 2008. After treatment ended, he believed he only had to submit to random testing for alcohol. Appellant admitted that he had six or seven beers and four to five vodka drinks between four a.m. and five p.m. on July 15th. Later in the interview, Appellant stated he only had one vodka drink. [Testimony of Sgt. Chris Brown, Exh. 34.]

At the Sept. 23, 2008 pre-disciplinary meeting, Appellant again stated that his July 15th drinks were his first since signing the Stipulation, and that he only took them because of the pain. He also said the Stipulation did not require him to forgo alcohol use after he completed his treatment plan. [Exh. 35.]

Ms. Montero testified that she became angry on July 15th when she came home from work and noticed Appellant's computer was logged onto a singles website. She woke Appellant up and asked him to explain. When he denied knowing anything about the site, she told him to leave the house, which she owns, and refused to give him his wallet unless he would return her house key. She denied that she took Appellant's car keys that evening, or that she refused to let him leave. Ms. Montero also testified that she did not notice any signs that Appellant had been drinking that

day. Later during her testimony, she admitted he "could have" drank a large size bottle of vodka that day. "I was very angry. I don't remember what I said that day" to the officers. Ms. Montero admitted she knew Appellant was under a contract not to drink on July 15th, and stated she informed Officer Spottke of that fact. [Testimony of Ms. Montero.]

Capt. Robert Kricke of the Department's Internal Affairs Bureau testified that he returned a call from Ms. Montero on Jan. 17, 2008, and recorded their conversation with her permission. [Exh. 26.] He told her he had been trying to bring Appellant in for a breath test to monitor his compliance with the terms of the Stipulation. Ms. Montero told him that Appellant had been drinking for four months since he went off probation with Douglas County, and that Antabuse does not prevent him from drinking. She added that Appellant drinks at home from Friday nights to Sundays, and dries out on Mondays. Ms. Montero stated that Appellant was drinking this past week on Monday, Tuesday and Wednesday, and she saw him drinking that morning, a Thursday. She told him that she had also reported his drinking to Frank Gale, another departmental employee. Ms. Montero advised Capt. Kricke that Appellant warned her Internal Affairs would ask her to let them in the house, but asked her not do it.

During that phone call, Ms. Montero told Capt. Kricke that Appellant may say she is lying to retaliate against him for finding him on internet dating sites, but said she had proof of his drinking in the form of liquor store bills, because she herself was not a drinker. When Capt. Kricke asked her if she had anything else to add, Ms. Montero stated, "I don't know how else to detach him from drinking, because he's so smart." She explained that he uses his migraines to avoid getting tested for alcohol use. Ms. Montero further told Capt. Kricke that Appellant told her if she said anything to anyone, she would be destroying his life and his work, and he would destroy her. [Testimony of Capt. Kricke; Exh. 26.] Capt. Kricke later received a copy of Appellant's December credit card statement in a six-page fax from Jefferson County Education Center, Ms. Montero's employer, which showed $136.08 in purchases from Sheridan Liquor during that month. [Exh. 30.]

On Feb. 14, 2008, Capt. Kricke interviewed Appellant to investigate his use of alcohol under the Stipulation. Appellant told Capt. Kricke that he went to liquor stores to buy whatever alcohol Ms. Montero wanted, including beer, vodka and Jack Daniels, but that he did not drink it. He stated he drank only coke or iced tea when he went to bars. Appellant said he missed only one dosage of Antabuse, and his EAP counselor told him that was not a big deal. When asked about his failure to answer the phone or doorbell when Internal Affairs tried to contact him to get him tested, Appellant said that he does not answer the door if he has a migraine, and that he isn't getting his phone messages from his girlfriend. [Exh. 33.]

In her testimony, Ms. Montero denied talking to Capt. Kricke in January 2008. She stated he called her on her cell phone, but she did not answer. Ms. Montero denied telling Capt. Kricke that Appellant had been drinking for the past four months since completing his probation, or that he drank on Fridays, Saturdays and Sundays

and dried out on Mondays. She testified that she did not recall whether she sent Appellant's December 2007 credit card bill to Capt. Kricke, since it was so long ago. When shown a copy of the faxed bill from the Jefferson County Education Center, where she works, Ms. Montero stated that her sister also works at the Center, and that she may have faxed it to Internal Affairs. [Testimony of Ms. Montero.]

Appellant testified that he told Capt. Kricke in September 2007 that Ms. Montero may accuse him of drinking. Appellant asked Capt. Kricke to have him tested in the event that she does make that accusation. He stated that Ms. Montero gets mad at him as often as twice a month over his use of internet singles sites, and throws his clothes and car keys on the lawn. After she calms down, they talk things through, but "she's still this way." When asked why her story changed during her testimony, Appellant replied, "[s]he wasn't mad at me yesterday." [2] [Testimony of Appellant.]

Deputy Manager of Safety Mary Malatesta issued the termination letter after reviewing the entire file, including Appellant's employment and disciplinary histories, all documents related to Appellant's Stipulation and Minimal Treatment Plan, the investigative files, and Appellant's statements at the pre-disciplinary meeting. She also viewed the videos and listened to the audio recordings of all statements by witnesses and Appellant. Ms. Malatesta made the following disciplinary findings:

1. Appellant violated CSR § 16-60 E when he lied to his superiors by stating that 1) he was not required to abstain from alcohol for the duration of the Stipulation, and 2) July 15th was the only time after signing the Stipulation that he had taken an alcoholic drink.

2. Based on the same two statements as above, Appellant violated CSR § 16-60 L by failing to observe Sheriff Department Rule 200.4, which prohibits Deputy Sheriffs from departing from the truth or knowingly making misleading statements.

3. Appellant violated CSR § 16-60 L by failing to observe Sheriff Department Rule 300.7, which prohibits Deputy Sheriffs from drinking alcohol while off duty "to such an extent as to render them unfit to report for duty or unfit to perform their duties" based on his use of alcohol on July 15th and subsequent failure to report for duty on July 16th.

4. Appellant also violated 16-60 L by failing to comply with the Sheriff Department guiding principles of judgment, integrity and accountability based upon his avoidance of Internal Affairs to prevent submittal to testing for alcohol use.

5. Appellant violated CSR § 15-60 by his off-duty use of alcohol "that adversely affects an employee's job performance or the City" by being incapable of reporting to work because of alcohol use on July 15th and 16th.

[2] Ms. Montero actually testified on Feb. 25, 2009, two days before Appellant's testimony.

6. Appellant violated CSR § 16-60 Y by his noncompliance with Mayor's Executive Order 94 based on his failure to comply with his Stipulation.

7. Appellant violated CSR § 16-60 Z by hindering the ability of the Agency to perform its mission by drinking to excess on July 15th, causing his inability to report to work on July 16th. Appellant also damaged the reputation of the City by causing Westminster police officers to contact him on a domestic dispute while he was intoxicated, and to learn he was on a work contract prohibiting him from drinking.

Ms. Malatesta determined that Appellant's violation of Executive Order 94 alone required Appellant's termination. "If it is determined after appropriate predisciplinary meeting that any of the following situations apply, the employee shall be dismissed even for the first offense for the following conduct . . . 8. The employee has violated the Stipulation and Agreement." Executive Order 94, ¶ IV. A. Ms. Malatesta also relied on the above violations in determining that Appellant's conduct rendered him unfit for service as a Deputy Sheriff. She noted he was subjected to five previous disciplinary actions from 2004 to 2008 ranging from verbal reprimands to a sixty-day suspension. [Exhs. 18 – 22.] The termination letter was issued on Nov. 5, 2008, and this timely appeal followed. [Exh. 1.]

IV. ANALYSIS

The Agency bears the burden to prove that the imposition of discipline was appropriate under the Career Service Rules, and that the level imposed was within the range that could be issued by a reasonable administrator.

A. CSR § 16-60 E: Dishonesty

A statement made in a disciplinary proceeding may lead to separate discipline under CSR § 16-60 E if it is false and known to be so by the employee. In re Dessureau, CSA 59-07 (1/16/08). "Misleading or untrue statements undermine the efforts of an agency to determine the truth in the investigation, and weaken the trust needed between the agency and its employees." In re Galindo, CSA 39-08, 10 (9/5/08).

The Agency based its finding of dishonesty on two statements made by Appellant during the Internal Affairs interview held Aug. 19, 2008 that: 1) July 15th was his only use of alcohol since he signed the Stipulation in March 1, 2007, and 2) he believed he was released from the obligation to refrain from alcohol after successfully completing his Minimal Treatment Plan.

1) Was Appellant's statement that he abstained from alcohol before July 15th truthful?

As to the first statement, the Agency presented a recording of a January 2008 telephone call between Appellant's girlfriend, Ms. Montero, in which she stated that

Appellant had been drinking since September 2007. She later faxed Appellant's most recent credit card statements to Capt. Kricke, showing purchases at liquor stores and charges from bars. [Exh. 26.] Ms. Montero told Capt. Kricke that the bills proved Appellant was drinking, because she herself did not drink. She added, "I don't know how else to detach him from drinking." Ms. Montero denied in her testimony that she talked to Capt. Kricke at all, and did not remember faxing the bill to him. The recording of the phone conversation, corroborated by Capt. Kricke's testimony, conclusively proved that Ms. Montero told him Appellant was drinking during the term of the Stipulation, even before he completed his Treatment Plan. This statement contradicted Ms. Montero's testimony a year later during this appeal of his termination.

Appellant argues in response that Ms. Montero was often angry at him for his use of internet dating sites, and she would thereafter threaten to call Internal Affairs to say that he had been drinking. Appellant admitted at hearing that Ms. Montero did not accuse him of drinking during her testimony because "she wasn't mad at me yesterday." [3]

At hearing, Ms. Montero said that Appellant did not drink at home, and uses alcohol only for cooking. She added that she may have bought the alcohol reflected on the credit card statement herself, since she sometimes signs his name to credit charges using his card. In contrast, Ms. Montero told Capt. Kricke in January that she did not drink, and furnished the bill as proof of Appellant's drinking. When asked if she told Capt. Kricke that Appellant had been drinking for the past four months, Ms. Montero replied, "No way. He was on Antabuse."

I conclude that Ms. Montero was being truthful on Jan. 17th when she made a detailed report to Capt. Kricke of Appellant's drinking habits for the four months before the call. The clear evidence of the recorded phone call is a contemporaneous record of Ms. Montero's memory of events affecting her life during that period. Her stated motivation "to detach Appellant from drinking" contradicts Appellant's testimony that Ms. Montero was driven by anger with him. Further, Capt. Kricke testified that Ms. Montero herself initiated the call to him. This is consistent with Ms. Montero's admission that Capt. Kricke called her on her cell phone, a number that would be hard to obtain without a previous call from that phone or a voluntary disclosure of the number from the cell phone owner.

The Agency also introduced the testimony of Westminster Police Officer Cheri Spottke, who stated that Ms. Montero told her on July 15th that Appellant had been binge-drinking since Thursday, July 10th. The police report records that Appellant told her on July 15th, "I had a few last night, and a couple today." [Exh. 10-3.] Officer Spottke made a written report of her conversations with the parties, and testified consistently with her report. Her objectivity and credibility are not in question. Officer Spottke's narrative is entitled to substantial weight as an official narrative made as a

[3] Ms. Montero actually testified on Feb. 25, 2009, two days before Appellant's statement.

part of her duties a few hours after her interview with Ms. Montero and Appellant. Ms. Montero admitted that she did not recall exactly what she said that night because it was long ago, and she was angry at the time. Appellant's blood alcohol level an hour after the encounter with the police was .179, which is two times the legal limit for driving under the influence of alcohol. The testimony of Appellant and Ms. Montero is subject to attack based on the financial interests of the parties in obtaining back pay and restoring Appellant to his job, relief that could be granted if the termination is reversed in this appeal.

In addition, Ms. Montero's testimony was contradicted in other respects by her statements that day to the police, as well as the testimony and statements of both Appellant and Officer Spottke, indicating that her testimony is less reliable than other evidence on this issue. At hearing, Ms. Montero denied she took Appellant's car keys. However, that night, she told Officer Spottke that she "took his keys and wallet so he would not drive." [Exh. 10-2.] Appellant testified to that same fact, and told the officer that he wanted Ms. Montero arrested for kidnapping because she took his keys. [Exh. 10-3.] Officer Spottke confirmed Appellant's version of events during her testimony.

At hearing, Ms. Montero also denied noticing that Appellant had been drinking. On cross-examination, however, she admitted he could have had a large size bottle of vodka that day. Ms. Montero admitted that she made the call to the police. Officer Spottke reported and testified that the call was made because of an intoxicated party. Officer Esslinger reported that Ms. Montero was outside crying when he came to the house, and told him her boyfriend was inside and very intoxicated. [Exh. 10-8.] Ms. Montero told Officer Spottke that Appellant was been on a drinking binge since Thursday, and had drunk most of a large bottle of vodka. [Exh. 10-2.] Appellant was observed by Officer Cavender to be too intoxicated to care for himself. [Exh. 10-5.] His blood alcohol level was .179 an hour after the initial contact, when Officer Clarke observed an odor of alcohol on Appellant's breath, and red, watery eyes. [Exhs. 10-7, 31-11.]

The reliable contemporaneous evidence is consistent: Appellant was observably drunk, Ms. Montero reported his intoxication to the police, and Appellant later tested at almost two times the legal limit. Further, Appellant admitted to Internal Affairs that he had ten to twelve alcoholic drinks during the course of the day. During his testimony, he admitted to having six to twelve beers plus vodka that day. Under these circumstances, it is unlikely that Ms. Montero would have failed to observe his intoxicated condition. Moreover, both Ms. Montero and Officer Spottke testified that Ms. Montero told the latter on July 15th that Appellant was on a work contract not to drink. [Exh. 10-2.] There would have been no reason for Ms. Montero to mention that fact unless alcohol was an issue at that time. In fact, Ms. Montero's only stated reason for calling the police was that he grabbed the phone from her hand when she attempted to call Internal Affairs to report a violation of his work contract not to drink. She later denied there was a physical altercation, and confirmed there was no damage to the phone. Her testimony is inconsistent with the weight of the credible evidence supporting her initial statement to the police, in which she reported that

Appellant had been on a drinking binge since Thursday of the previous week.

The issue of whether Appellant drank before July 15th requires an analysis of the credibility of witnesses. Appellant and Ms. Montero were the only eyewitnesses on this issue. Appellant consistently denied such use, with one exception: in his statement to the police on the evening of July 15th, he admitted having a few drinks on July 14th. Ms. Montero, on the other hand, made statements inconsistent with her phone call on Jan. 17th to Capt. Kricke, and her statement to Officer Spottke on July 15th. Based on my finding that Ms. Montero was truthful in both those statements, I conclude that the most reliable evidence indicates that Appellant was not truthful when he stated at the August Internal Affairs interview that he had not drunk liquor before July 15.

2) Was Appellant dishonest in his statement that he believed he was not required by the Stipulation to abstain from alcohol after completion of the Treatment Plan?

Next, it must be determined whether Appellant was dishonest when he stated that he believed he did not need to abstain from alcohol for the full term of the Stipulation.

Executive Order 94 permits the city to enter into a Stipulation and Agreement with an employee for a first violation of the city's alcohol and drub policy. Executive Order 94, ¶ IV, B. Appellant signed his Stipulation on March 1, 2007, under the terms of which he accepted a sixty-day suspension and treatment for alcohol abuse under the supervisor of the Mayor's Office of Employee Assistance [MOEA] and a later-designated treatment provider. The Stipulation required compliance with the substance abuse plan approved by the MOEA as a condition of continued employment. The Stipulation states that a substance abuse plan may include a Minimal Treatment/Education Plan, a Substance Abuse Treatment (SAT) program, and any additional requirements imposed by the selected treatment provider. The minimum term of the Stipulation is 24 months for the date of execution. [Exh. 13.]

On April 6, 2007, Appellant and his Employee Assistance Counselor Peter M. Knutson signed the Stipulation's Minimal Treatment Plan, a typed form with hand-written completions. Under the category Primary Treatment, the following additions were made: Abstention from Alcohol Required Yes √ No __ Duration *for the term of Stipulation and Agreement.* [Checkmark and words in italics are hand-written.] [Exh. 14-1.]

The Treatment Plan also required several additional conditions during four successive two- or three-month periods, as shown in Attachments A – D of the Plan. After Appellant successfully completed the terms governing each period, the conditions of treatment were scaled back. Appellant's required twice-weekly attendance at Chemical Dependency Treatment Group was gradually reduced to twice a month, and Antabuse was discontinued on Jan. 31, 2008. [Exh. 14-2 to -5.]

Appellant concedes that his Stipulation was in effect from March 2007 to March 2009, and that he was obligated by that agreement to undergo random drug and alcohol testing throughout that period. [Exh. 13, 13-3.] Appellant admits signing both the Stipulation and the Treatment Plan required by the Stipulation. He argues however that 1) the Stipulation itself did not specifically require his abstention from alcohol, 2) only the Treatment Plan required abstention from alcohol, 3) he was released from all obligations under the Treatment Plan on March 10, 2009, and therefore 4) his drinking on July 15th did not violation the Stipulation.

Resolution of this issue requires a determination of the reasonable meaning of the Stipulation, and whether Appellant showed by his actions or statements that he believed he was free from the obligation to abstain from alcohol.

Appellant is correct that the six-page Stipulation does not specifically state he must avoid consumption of alcohol for its 24-month term. However, the Stipulation requires him to comply with a treatment plan developed by the MOEA. That plan required Appellant to abstain from alcohol "for the term of the Stipulation and Agreement." The terms of the Treatment Plan were not incorporated into the Stipulation for an obvious reason: treatment plans must be individualized to allow each employee to obtain maximum benefit from treatment, in accordance with the intent of Executive Order 94 to maintain a safe and healthy environment for city employees and the public. Compliance with the Treatment Plan was a specified and required term of the Stipulation. Appellant had actual notice that he was prohibited from any use of alcohol based on the hand-written words on his Minimal Treatment Plan directly over his signature.

Moreover, his argument that the Stipulation did not require him to test negative on his random breath or blood tests is directly contradicted by the Supplemental Disclosure Statement, which advised him that a positive test for alcohol constitutes non-compliance with the Treatment Plan, and is grounds for disciplinary action including termination. [Exh. 15-2.]

Next, it must be determined whether Appellant's actions or statements indicate he knew he was required to abstain from alcohol after successful completion of the Treatment Plan.

Both Ms. Montero and Appellant testified that she knew he was on a work contract not to drink on July 15th. Ms. Montero threatened to call Internal Affairs to report his drinking. Appellant responded by grabbing the phone out of her hands with such force that she believed it was broken, and called Westminster Police Department. Ms. Montero informed Officer Spottke that Appellant was a Deputy Sheriff "on a work contract where he is not supposed to be drinking." When Officer Spottke informed Appellant that she knew he was on a work contract, he asked, "[w]hat do you want me to do?" [Exh. 10-2 to -3.] At hearing, Appellant presented his migraine as the reason for his drinking. However, when asked by Washington House

intake staff, he denied any medical condition or taking any medication, and told them he "just felt like it:" when asked why he was drinking.

The most persuasive evidence on this issue is Appellant's testimony that he was agitated on July 15th because Ms. Montero attempted to call Internal Affairs to report his drinking. If he actually believed he was under no obligation to avoid alcohol, Appellant would have no basis for such agitation, or his testimony that Ms. Montero was "using the contract as a weapon." Most tellingly, Appellant testified that he "knew the city would come after me on the Stip", because he knew the city would consider his drinking a violation of the Stipulation.

I find that the only reasonable interpretation of the Stipulation, its amendments and the Treatment Plan required under its terms is that Appellant was required to abstain from alcohol until at least March 2009. I also find that Appellant knew that obligation existed on July 15th, and falsely told Internal Affairs he believed otherwise. I conclude that Appellant's denial that the Stipulation prohibited alcohol use in July 2008 was dishonest. The Agency thus proved a violation of CSR § 16-60 E by virtue of both Appellant's denial that he drank before July 15th, and his denial of his continued contractual duty to refrain from alcohol.

B. CSR § 16-60 L: Failure to observe Sheriff Department Rules

The Agency also based its disciplinary action on its conclusion that Appellant violated three Sheriff Department Rules. First, it alleges a violation of § 200.4, which requires that "Deputy Sheriffs and employees shall not depart from the truth, knowingly make misleading statement or falsify any report, record, testimony or work related communications. [Exh. 17-4.]

For the same reasons as set forth in the above analysis of the dishonesty allegation, I conclude that the Agency established Appellant departed from the truth in his statement to Internal Affairs that he had not indulged in alcohol before July 15th, and that he believed the Stipulation did not require him to abstain from alcohol.

Second, the Agency alleges that Appellant violated Sheriff Department Rule § 300.7, which states, "Deputy Sheriffs and employees shall not drink alcoholic beverages while off duty to such an extent as to render them unfit to report for duty or unfit to perform their duties." [Exh. 17-4.] The Agency bases this allegation on Appellant's failure to report for work on July 16th at 5:41 a.m., the start of his shift, because he was not released from the detoxification center until 9:45 a.m.

Appellant argues that he was not intoxicated at 5:41 a.m., as shown by Washington House records that his blood alcohol level was .017 at 4:04 a.m. [Exh. 31-10.] The rule is violated by any alcoholic use that renders Appellant unfit for duty. While Appellant's inability to report was a direct consequence of his excessive drinking the day before, the evidence does not support a conclusion that Appellant was unfit for

duty at 5:41 a.m. because of his drinking, as required to prove a violation of the rule. I therefore find that the Agency failed to prove Appellant violated Rule 300.7.

Third, the Agency claims Appellant violated its guiding principles of judgment, integrity and accountability by avoiding random alcohol testing. The Agency presented the evidence of Ms. Montero's January statement to Capt. Kricke in support of this allegation. However, the pre-disciplinary letter failed to provide any notice that the avoidance of testing was one of the disciplinary bases being considered. Further, the documents from the treatment provider show that Appellant complied with all terms of the treatment plan as of March 10, 2008, which included random testing. The Agency failed to prove Appellant avoided testing or otherwise violated the Department's guiding principles.

C. CSR § 15-60, Code of Conduct: Off-duty use of alcohol

Termination was also based on a claimed violation of the § 15-60 C, prohibiting off-duty use of alcohol that adversely affects job performance. Appellant admitted he drank between seven and thirteen drinks on July 15th. The evidence shows that he engaged in a domestic dispute that evening, and was taken by the police to a detoxification center based on his inability to care for himself. Appellant was not released from detoxification until four hours after the start of his shift. The Agency has proven that Appellant's off-duty alcohol use caused his inability to report for work on July 16th. Appellant's absence adversely affected his ability to perform his duties on that day. Therefore, the Agency proved Appellant violated § 15-60.

D. CSR § 16-60 Y: Violation of Executive Order 94

The Agency claims that Appellant's use of alcohol on July 15th violated the terms of his Stipulation, and therefore violated Executive Order 94, ¶ IV. 8. In various statements and his testimony, Appellant admitted drinking between seven and thirteen drinks on July 15th. The Stipulation required that Appellant abstain from alcohol for the term of the Stipulation, which was in effect until at least March 2009. Executive Order 94 requires termination "even for the first offense" if an employee violates his Stipulation. Therefore, the Agency proved Appellant violated Executive Order 94, and thus established a violation of CSR § 16-60 Y.

E. CSA § 16-60 Z: Conduct prejudicial to Agency or damaging City reputation

The Agency supports this allegation by evidence that Appellant's intoxication on July 15th hindered its mission by causing Appellant's absence on July 16th. Absent any evidence that Appellant's duties were not performed on July 16th, a single day's absence by one employee does not prove the absent employee hindered the Agency's mission within the meaning of this rule.

The Agency also asserts that Appellant's behavior on July 15th damaged the City's reputation. It presented the testimony of Officer Spottke that she believed

Appellant's intoxication reflected badly on all law enforcement officers, including the Denver Sheriff's Department. Appellant's status as a Denver Sheriff was included in Westminster's July 15th dispatch call to its patrol vehicles. Four Westminster officers responded to the scene and observed Appellant's intoxicated condition.

In view of the Agency's law enforcement mission, the fact that Appellant's intoxication caused police to be dispatched to his home adversely affected the Department's reputation in the eyes of the four responding officers, the dispatcher, and other officers who heard the radio call. In addition, the four officers learned upon their arrival that Appellant had been drinking in violation of his work contract. The existence of a work contract indicates that Appellant had committed previous violations of rules related to alcohol use, further adversely affecting the reputation of the Department. The Agency established that Appellant damaged the reputation of the Department by his intoxication and publication of that fact to Westminster police on July 15, 2008.

F. Appropriateness of termination as penalty

The Agency proved Appellant violated Executive Order 94 by violation of his Stipulation. Executive Order 94 requires termination for a first offense. In addition, the Agency proved Appellant was dishonest in his statements to Internal Affairs, violated a departmental rule requiring honesty, failed to comply with the CSA Code of Conduct, and damaged the reputation of the City in violation of § 16-60 Z. Appellant's continued lack of candor and failure to acknowledge that his behavior violated city and departmental rules renders it unlikely that any lesser form of discipline would correct the established misconduct. Appellant's past discipline includes five disciplinary actions over the previous four years, ranging from verbal reprimands to a 60-day suspension. The suspension and Stipulation arose from his arrest and imprisonment for driving under the influence of alcohol and impersonating a police officer while under a previous termination action. Since past serious discipline did not improve this pattern of conduct, termination is within the range of appropriate penalties that can be imposed by a reasonable administration, and is an appropriate penalty as a matter of progressive discipline under CSR § 16-20.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency action dated November 5, 2008 is AFFIRMED.

DATED this 13th day of April, 2009.

Valerie McNaughton
Career Service Hearing Officer