

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

Appeal No. 236-00

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: **LEONARD ORTIZ,**

And

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

NATURE OF APPEAL

Appellant, a Deputy Sheriff with the rank of Captain, appeals a disciplinary action by the Agency, wherein he was suspended for 30 days without pay. The Agency suspended the Appellant for his conviction of theft of Denver Sheriff's Union (DSU) funds in the amount of \$4,714, as outlined in the disciplinary letter dated October 17, 2000 [Exhibit 3]. As treasurer of the organization the Appellant had control of the account.

The Appellant first contends that the Agency does not have jurisdiction to discipline the Appellant for alleged misconduct that occurred outside of his duties as a Deputy Sheriff, that the Agency did not have just cause to discipline the Appellant, and that the discipline was too harsh, given the circumstances. He is requesting that the 30-day suspension be reversed, that he be reinstated for the thirty days and awarded full back pay, benefits and all other emoluments.

INTRODUCTION

For purposes of these Findings and Order, Mr. Leonard Ortiz shall be referred to as the "Appellant." The Department of Safety and the Denver Sheriff's Department shall jointly be referred to as the "Agency". The City and County of Denver shall be referred to as the "City". The rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held on February 26th and 27th, 2001, before Michael L. Bieda, hearing officer for the Career Service Board. Appellant was present, and was represented by his attorney, Mr. Douglas Jewell, Esq. The Agency and City were represented by Assistant City Attorney Ms. Mindi L. Wright, Esq., with Director Fred Oliva serving as the advisory witness on behalf of the Agency and City.

The Appellant was called as an adverse witness by the Agency. Carolyn Bignall, Captain Michael Horner and Director Fred Oliva also testified. The Appellant did not call any witnesses on his own behalf.

The following exhibits were admitted into evidence and considered by the hearing officer in this decision: 1, 3, 4, 5, 7, 8, 9, 10, 18 -28, 30, 32, 34 - 37, E, F, I, K, M.

The Agency was permitted to submit a brief in response to the Appellant's closing arguments on the issue of whether the Agency had jurisdiction to discipline the Appellant for conduct that Appellant contends was done off duty and out of the scope and course of his employment. The Appellant was permitted to file a response brief on these issues. The Hearing Officer has duly considered these briefs in this decision.

ISSUES ON APPEAL

Whether the Agency has jurisdiction and authority to impose discipline on the Appellant for the misconduct alleged.

Whether the Agency proved by a preponderance of the evidence that the Appellant violated CSR §§ 16-50 A. (3), (9), (20); and §§16-51 A. (5); and Denver Sheriff Departmental Rules and Regulations 300.10, 300.11, 300.19, and 300.20.

If so, whether the Agency had just cause to discipline the Appellant, and whether the disciplinary action taken by the Agency, namely a 30 day suspension, was reasonably related to the seriousness of the offense, considering all of the circumstances.

HEARING OFFICER JURISDICTION

On September 18, 2000 the Appellant was notified that disciplinary action was being contemplated against him [Exhibit 1]. A predisciplinary meeting was held on October 5, 2000. A notification of disciplinary action was hand delivered to the Appellant on October 18, 2000 [Exhibit 3]. The Appellant filed his appeal with the Career Service Hearing Office on October 26, 2000.

Based upon these facts the Hearing Officer finds that this appeal has been timely filed, and that under CSR §§ 19-10 (b) and 19-27¹, the Hearing Officer has jurisdiction and

¹ CSR §19-10(b) provides:

Actions Subject to Appeal

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

* * *

- b) Actions of an appointing authority: Any action of an appointing authority resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career

authority to affirm, reverse or modify the disciplinary actions of the Agency giving rise to this proceeding. The Hearing Officer further determines that the Appellant was afforded the predisciplinary meeting as set forth by the United States Supreme Court in Cleveland Board of Education v. Loudermill, et al., 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 53 U.S. L.W. 4306 (1985) and required by Career Service Rule §16-30².

FINDINGS OF FACT

1. The Appellant has been an employee of the Agency for approximately 13 years, starting at the rank of Deputy Sheriff, promoted to Sergeant and rising to his present rank of Captain. As such he is a Career Service employee with career status. He had approximately 4 years of law enforcement experience prior to working for the Agency.
2. In order to become a Deputy Sheriff with the Denver Sheriff's Department, the Appellant had to successfully complete the Sheriff's Academy. Upon completion of the Academy, Appellant took an oath to support the Constitutions of the United States and the State of Colorado. He also swore to faithfully discharge the duties of his office to the best of his ability.
3. As a Captain, the Appellant exercises general supervision over subordinate supervisors and deputy sheriffs. As a Captain he: (1) directs the coordination of prisoner activity at the county jail; (2) delegates responsibilities over work activities of sergeants; (3) monitors employee performance; (4) documents employee performance and evaluates employees for their PEPR (performance evaluations); (5) receives and mediates employee grievances; (6) gives written reprimands; (7) recommends disciplinary actions; and (8) represents the department at various activities. Appellant's duties also include providing leadership, guidance and direction to his subordinates.

Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

* * *

CSR §19-27 provides:

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

* * *

² CSR 16-30 provides:

Pre-disciplinary Notification of Contemplation of Suspension, Involuntary Demotion or Dismissal and Notice of Pre-disciplinary Meeting.

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. A pre-disciplinary meeting is not required for verbal warnings or written reprimands.

* * *

4. The Denver Sheriff's Union ["DSU"] is a nonprofit corporation organized under the laws of the State of Colorado. Its purposes are contained in its Articles of Incorporation, [Exhibit 8]. As a labor union it provides a number of union type services and benefits to the members of the Denver Sheriff's Department. Its membership is comprised of other deputies and one of its primary purposes is to advocate on behalf of its members.³
5. The evidence established that the Appellant was the treasurer of DSU from April of 1997 through October of 1998. An internal audit by the union showed that during this period, Appellant received approximately \$4,255.50 in funds that were "irregular" [Exhibit 32]. These included funds to Appellant on several occasions for "vacation reimbursement", "dues reimbursement" and "Vegas Reimbursement". Some of the transactions were by check and were included in the check register. However, the Appellant also made three separate transactions on December 28 1997 in the sum of \$2,500, by telephonic transfer from the union account into his personal checking account. Other than the bank statement, there was no record of these three transactions.
6. The union requires two signatures on all checks. However, by making the telephonic transfers, the Appellant was able to avoid this requirement.
7. The Union discovered these transfers by calling the bank and determining the Appellant to be the owner of the account to which the funds were transferred.
8. Another transaction involved Appellant reimbursing himself from the union treasury for some "G8 Pins" in the amount of \$3,000. The Appellant kept no invoice of the transaction. During the audit, the vendor was contacted and provided an invoice showing the cost of the pins was actually \$2,635.50. The inference was that the Appellant had, without authorization, pocketed the difference.
9. On April 24, 2000 the Appellant plead guilty to and was convicted of Theft, a class

³ Article 3.1 entitled "Purposes and Powers" provides:

3.1 Purpose. The purpose and objective of this union is to bring the members of the Denver Sheriff Department together in a closer bond of fellowship; to promote and maintain an organization for the mutual advancement and welfare of its members by all proper, suitable and lawful means; to exchange and disseminate information among its members as to improvements and advancements; to increase the efficiency of the members and the department by aiding in the improvement of all rules and regulations governing the officers of the Department; and to provide legal defense and representation to its members in connection with any civil, criminal, administrative or disciplinary action arising out of or related to incidents occurring in the scope of employment of the member as a Career Service Employee and in the reasonable performance of his or her duties as a Deputy Sheriff or the City and County of Denver.

II misdemeanor under the Colorado Criminal Code. He was sentenced to 30 days in jail, suspended and was ordered to pay restitution in the amount of \$4,714 plus court costs of \$91.00. Appellant plead guilty to the charge in Denver County Court, Case No. 00M1159, Courtroom 316R [Exhibit 5].

10. In the criminal case the Appellant stipulated that there was a factual basis for the conviction. It related to his duties as treasurer of the Denver Sheriff's Union (DSU) between April 1997 and October 1998 [Exhibit 5]. Appellant diverted certain monies that belonged to the union for his own personal use. Specifically, Appellant diverted the following funds: (1) he electronically transferred two thousand five hundred dollars (\$2,500) from the Denver Sheriff's Union account into his own personal bank account via several telephone transfers. To his partner in a privately owned badge company, Dave Arnold, Appellant gave one thousand two hundred dollars (\$1,200) belonging to the union. Appellant wrote checks to himself totaling six hundred and fifty dollars (\$650). He also purchased service pins for the union members to commemorate their participation in the security of the "summit of eight" held in Denver for which he wrote a check for three thousand dollars to himself. The invoice was only for two thousand, six hundred, thirty-five dollars and fifty cents (\$2,635.50). Appellant converted to his own use the difference of three hundred forty six dollars (\$346).
11. Director Oliva is the Director of Corrections, however in the scheme of the Department of Safety his position amounts to the head of the Denver Sheriff's Department. He is also the appointing authority for the Denver Sheriff's Department. As such, he is the individual charged with final authority on all disciplinary matters. Director Oliva has been with the Denver Sheriff's Department for approximately thirty-four (34) years. During his tenure with the department, Director Oliva has held the positions of Deputy Sheriff, Sergeant, Captain, Major, and Division Chief before his appointment as Director.
12. In this case Director Oliva reviewed all of the information available before determining that a 30-day suspension was appropriate. He also consulted with the other members of the management team. They all recommended termination. Nevertheless, Oliva determined that suspension was a more appropriate discipline in these circumstances. He indicated that he considered the Appellant's excellent service record, his outstanding performance evaluations, and the fact that the Agency had invested considerable resources in training the Appellant. He testified that he felt that it was in the best interests of the Agency to suspend rather than dismiss the Appellant.
13. As a Captain, the Appellant's duties were to supervise those lower in rank, including sergeants and deputies. A Captain is a mid level supervisor in the Department. In the case of the Appellant, he is a "watch commander", and as such he is responsible for the operation of the jail, including the safety of inmates.

He is responsible for the care, custody and transportation of inmates. He is responsible for the direct supervision of inmates.

14. He is also responsible for the safety of sheriff's deputies. As Captain, Appellant is responsible for strictly enforcing the policies and procedures related to the running of the jail as required by state laws. Captains are watch commanders or heads of special units or sections. They must perform administrative duties and command supervisory deputies for shifts or special units. Captains are in temporary charge of areas in the absence of administrative supervisors, and may be given special assignments in which they work and report directly to a higher authority. Appellant was assigned to a general duty Captain's post in the Denver County Jail.
15. Appellant's duties included the supervision of 5 sergeants and 40 deputies. He also monitors employee performance including the preparation of performance evaluations (PEPR's). He also must mediate grievances and has the authority to give verbal and written reprimands to other deputies and sergeants. Captains perform supervisory work directing subordinate supervisors on an assigned shift or in a specialized unit within the department. Captains have personal accountability for carrying out an assigned function within established guidelines and are expected to resolve problems that may arise in the normal course of work. Since Captains are within the supervisory chain of the Denver Sheriff's Department, they must exhibit traits of leadership, guidance, integrity, and honesty. Specifically, fellow officers must respect a Captain and be able to trust and have confidence in a Captain's ability to perform the duties of his job and in his ability to make decisions that may effect them.
16. Captains must also establish their credibility among the inmate population in order to maintain control over the jail.
17. Director Oliva testified and the Hearing Officer finds that Oliva lost trust and confidence in the Appellant as a result of his conviction. Furthermore, the conviction also affected the trust and confidence of the deputies over which Appellant supervised. The respect and trust of fellow deputies for each other and their supervisors is vital to the effective management of the Department.
18. Oliva testified and the Hearing Officer finds that the trust of the officers in the department is also vital to public confidence and moral.
19. Director Oliva's testified and the Hearing Officer finds that the conviction of a crime by a Captain severely impacts that Captain's ability to perform the duties and responsibilities of his position. A Captain must have the respect of his deputies and other co-workers as well as the inmates in order to maintain control and provide a safe environment for all individuals to coexist. A Captain must set a high example to all subordinates and inmates. A Captain's credibility with his peers and

subordinates is also vital. In the case of the Appellant, his conviction for theft has significantly affected his ability to perform in these areas.

Prior Discipline and Warnings

There is no evidence of prior discipline of the Appellant.

DISCUSSIONS AND CONCLUSIONS OF LAW

Applicable Rules, Executive Orders, Departmental Policies and Regulations

At the time of Appellant's discipline, the following Career Service Rules, Ordinances, Executive Orders and Departmental Policies were in effect:

§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.

§16-10 Purpose

The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance.

§16-20 Progressive Discipline

- 1) In order of increasing severity, the disciplinary actions which an appointing authority or designee may take against an employee for violation of career service rules, the Charter of the City and County of Denver, or the Revised Municipal code of the City and County of Denver include:
 - a) Verbal reprimand, which must be accompanied by a notation in the supervisor's file and the agency's file on the employee;

- b) Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority;
 - c) Suspension without pay, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority;
 - d) Involuntary demotion, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority.
 - e) Dismissal, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority.
- 2) Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed.
- 3) In those cases when the discipline deemed appropriate is suspension without pay of an overtime-exempt employee, the suspension shall be for at least a whole workweek or multiples of whole workweeks.

§16-50 Discipline and Termination

A. Causes for dismissal.

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

* * *

- 3) Dishonesty, including but not limited to: altering or falsifying official records or examinations; accepting, soliciting, or making a bribe; lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours; using

official position or authority for personal profit or advantage, including kickbacks; or any other act of dishonesty not specifically listed in this paragraph.

* * *

- 9) Conviction of a crime which impacts the individual's ability to perform the duties and responsibilities of the job.

* * *

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

§16-51 Causes for progressive Discipline

- A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore this is not an exclusive list.

* * *

- (5) Failure to observe departmental regulations.

Department rules:

300.00-399.99 - GENERAL WORK RELATED CONDUCT OR BEHAVIOR

300.10 Deputy Sheriffs and employees will not indulge in immoral, indecent or disorderly conduct that would impair their orderly performance of duties or cause the public to lose confidence in the Department.

300.11 Deputy Sheriffs and employees shall not become involved in activities involving violations of the law. Flagrant or repeated violations of State Statutes or Ordinances shall constitute

grounds for disciplinary action or dismissal.

300.19 Deputy Sheriffs and employees shall not violate any lawful rule, duty, procedure or order.

300.20 Deputy Sheriffs and employees shall not indulge in any conduct which is contrary to Career service Authority Rules and Regulations.

[Exhibit 18]

Analysis of Agency evidence

The City Charter, C5.25 (4), CSR §§2-104 and 2-10 (b) (4) require the Hearing Officer to determine the relevant facts in this matter "de novo". This has been determined by the Courts to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. Turner v. Rossmiller, 35 Co. A. 329, 532 P. 2d 751 (Colo. Ct. of App., 1975).

Jurisdiction to impose discipline

The Appellant challenges the application to him of the various Career Service and departmental rules on the basis that Appellant's theft occurred while he was engaged in an alleged off duty activity, namely that of treasurer of the DSU. As such, the Appellant argues that he is not subject to discipline.

There is no question that the Appellant was convicted of the crime of Theft, a class II misdemeanor, and received a thirty day suspended jail sentence. He was also ordered to pay restitution in the amount of \$4,714. Assuming arguendo that the theft occurred off duty, under Career Service Rules CSR §16-50 A (9), in order to be disciplined, the conviction must "impact" the individual's ability to perform the duties and responsibilities of the job. Notwithstanding this rule, the Colorado Court of Appeals has indicated that if the private conduct of a police officer has the effect of impairing the operation or efficiency of the department, and such result is reasonably foreseeable (by the disciplined officer) that the conduct is subject to discipline. Puzick v. City of Colorado Springs, 680 P.2d 1283 (Colo. App. 1983). In that case the Colorado Court of Appeals upheld a suspension of a police officer for improper conduct involving a consensual off-duty sexual encounter with a probationary patrolwoman. In affirming the discipline, the court found that the officer's conduct was not a constitutionally protected activity and that he should have known that the conduct could have an adverse effect on the operation of the police department.

In a later case, the same Colorado court stated that "any inquiry into private conduct (of a police officer) must bear a rational connection to the officer's position as a

public servant." Harris v. City of Colorado Springs, 867 P. 2d 217 (Colo. App. 1993).⁴ The court further defined the phrase "relating to the performance of official duties" to mean more than matters taking place on duty; it extends to matters of and concerning an individual's fitness for public service.

In Harris the court of appeals affirmed the dismissal of a police officer for refusing to obey the police chief's order to take a polygraph examination in connection with an internal affairs investigation. In doing so the court necessarily addressed the off duty conduct which was the subject of the investigation. The court found that the disciplined officer's off duty driving conduct of "horsing around" with an on duty officer "bore heavily and directly on his fitness as a police officer to enforce traffic laws of the state." The conduct included driving at excessive speeds at night, engaging in eluding-type driving, and accelerating around cars in different lanes of traffic. The disciplined officer also admitted that he had been drinking.

Finally, in one of the leading cases in Colorado on this issue the Colorado Supreme Court addressed the off duty conduct of an employee other than a police officer in The City of Colorado Springs v. Givan, 897 P.2d 753 (Colo. 1995). In that case the city's Personnel Policies and Procedures Manual (PPPM) provided that the city reserved the right to discipline an employee for a conviction of criminal law which rendered the employee "unfit to perform their job, brings disrepute upon, and/or compromises the integrity of the City." The employee, an electronic working foreman in the water division of the city's utilities department, was convicted of felony incest. The Colorado Supreme Court upheld the standards contained in the PPPM and found that there was sufficient evidence to support the dismissal under the PPPM by the head of the water department and the City Manager. Surprisingly, the Colorado Supreme Court did not cite with approval or disapproval either of the two earlier Court of Appeals cases, Puzick or Harris.

Clearly the Colorado courts agree that the off duty conduct of a public employee, especially a police officer, is subject to scrutiny and discipline if prohibited by the governmental body's rules, and if it affects the employee's ability to perform their job, or brings disrepute upon the employer. If the private conduct bears a rational connection to the officer's position as a public servant or if it has the effect of impairing the operation or efficiency of the department and if that effect or connection is reasonably

⁴ The Colorado Court of Appeals cited Gardner v. Broderick, 392 U.S. 273, 277, 88 s. Ct. 1913, 1917, 20 L. Ed. 2d 1082, 1086 (1968) as authority for the higher standard of conduct to which a police officer may be held. The Gardner court stated that a police officer "is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer." The issues in Gardner involved the question of whether a policeman may be dismissed from employment for refusing to waive the privilege against self-incrimination in an internal investigation by the department. While the standards set out in Gardner were noted in the context of the self-incrimination issue, this higher duty has also been relied upon generally as a basis for imposing discipline for off duty misconduct.

foreseeable by the employee, it will also be upheld.

In the case at bar the City rules require that the conviction of a crime by an employee in some way impact the individual's ability to perform the duties and responsibilities of the position. This standard is at least as stringent on the City as those articulated by the courts. Thus, the standard set forth by CSR §16-50 A (9) in this case is congruent with those set forth by the Colorado Courts. It is therefore enforceable and confers the necessary jurisdiction upon the Agency to impose discipline for its violation.

The Appellant also challenges CSR §16-50 A (3) [dishonesty] on the grounds that the prohibited dishonesty applies only to acts related to official duties, positions, and records. The rule itself first gives examples of specific acts of dishonesty that might be committed in the course of employment, and then concludes with a broad prohibition against "any other act of dishonesty not specifically listed in this paragraph." The plain meaning of this phrase would include all acts of dishonesty, whether or not they are committed in the course of one's official duties. The Hearing Officer agrees with the Appellant that under the *Givan* and *Harris* holdings, in order to support discipline, the theft committed by the Appellant if not on duty would have to be shown to bear a rational connection to the officer's position as a public servant or to have the effect of impairing the operation or efficiency of the department.

With regard to the alleged violation by the Appellant of the various departmental rules and regulations, rule 300.10 specifically requires that the prohibited immoral or indecent conduct "impair [the employees] orderly performance of duties or cause the public to lose confidence in the department." Again, a requirement similar to those previously approved in *Givan* and *Harris*.

Rules 300.11, 300.19, and 300.20, do not specifically require the prohibited conduct to bear a connection to the employee's position. Since the conduct in this case occurred off duty, a showing of a rational connection to the Appellant's position must be shown in order to sustain a violation of these sections. If so, the rules are enforceable as to the off duty conduct of Appellant.

Sufficiency of Proof

It is well accepted that generally the party advancing a position or claim has the burden of proving that position. In civil proceedings, including administrative hearings, that burden is by a "preponderance of the evidence". To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not. (See Colorado Civil Jury Instructions, 3:1).⁵ The weight of evidence is not necessarily

⁵ The notes on use of Instruction 3:1 state: Generally, in all civil cases, "the burden of proof shall be by a preponderance of the evidence," except as to claims for exemplary damages for which the facts

determined by the number of witnesses testifying to a particular fact. (See Colorado Civil Jury Instructions, 3:5)⁶

In the case at bar, Appellant challenges the sufficiency of the evidence supporting the Agency's determination that Appellant's off duty conduct is subject to discipline. The basis of the Appellant's challenge is twofold: 1) that the record is void of "any facts" showing negative impact; and although not explicitly stated, 2) that the testimony of Director Oliva standing alone, is insufficient to support a finding that the conviction impacted Appellant's ability to perform his duties.

Taking these contentions in order, Director Oliva testified at length as to the duties and responsibilities of a Captain in the Denver Sheriff's Department. He also testified about the impact of the conviction on the Appellant's ability to perform the duties and responsibilities of his job. He testified that the Captain's conduct should be "beyond reproach". That a Captain is an example to his peers, his subordinates and to the inmates. A Captain must rise to the occasion in an emergency. He must make responsible decisions affecting the safety of fellow officers, inmates and even the public. A Captain must be able to enforce discipline to both other officers and inmates.

Director Oliva further testified and the Hearing Officer finds that the conviction of theft by a high-ranking officer such as a Captain would have a negative effect on the trust and confidence by the Captain's peers or subordinates. That in turn, according to Oliva, would create an "inability in the performance of his duties." He testified that a theft conviction by a Captain is a liability to the department because he represents the entire department. He wears a uniform like every other member of the department. The Director testified that a Captain's integrity must be "unquestioned." He testified that the conviction is detrimental to his ability to supervise. He also testified that the discipline was necessary to send a signal to the department that such conduct would not be tolerated.

He also testified and the Hearing Officer finds that it affected the morale of the Sheriff's department and particularly the officers. The Director indicated that the Appellant had breached his trust to his fellow officers and as a result it was a "serious situation." He testified that the conviction undermined the already fragile public confidence in the department. He testified that the public paints uniformed officers with "the same brush" implying that the dishonesty of Captain Ortiz causes problems for the rest of the department when dealing with the public. This in turn causes problems for the individual officers. Director Oliva also testified that it was the department's name

supporting such relief must be proved "beyond a reasonable doubt." § 13-25-127, C.R.S.

⁶ The content of this instruction was approved as an instruction in *Swaim v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3 P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (E. Cleary 3 ded. 1984).

and reputation that was adversely affected.

Director Oliva testified that the conviction created a problem for Appellant to discipline somebody else in the future. Because of a lack of confidence in him, other officers may be reluctant to relay information to Appellant relating to discipline. Oliva testified that other officers might not report violations out of concern that the Appellant would "look the other way" in case of wrongdoing by another officer or inmate.

The Director testified that the conviction also affected Oliva's own confidence in his Captain. Oliva testified that particularly in this case, the conviction of theft indicates dishonesty, untrustworthiness, lack of integrity, and lack of accountability. He testified that there may be some officer that will not respect him because he is a thief, and he is dishonest. Appellant will have to work to earn back their respect and trust.

From this testimony, it is clear that there is in fact a substantial amount of evidence submitted that supports the impact requirement. It is true that there is no testimony from other officers or inmates as to the impact of the conviction on them. There is no testimony by members of the media or the public. However, there is also no evidence offered by the Appellant that contradicts Oliva's testimony. The Director's testimony that his own confidence in the Appellant is shaken is direct evidence. The fact that the Director is concerned about the Appellant's ability to supervise other officers, sergeants and inmates is not opinion. Oliva has lost confidence in Appellant's ability to lead the other deputies. That alone is sufficient to demonstrate a negative impact on Appellant's ability to do his job. That alone is sufficient to affect the efficient operation of the department. That alone is sufficient to meet not only the requirements of CSR §19-50 A (9) but also the standards articulated in *Givan* and *Harris*. The Hearing Officer concludes that there is in fact substantial and un rebutted evidence by the Agency in support of the proposition that Appellant's conviction of theft had a negative impact on the Appellant's ability to perform his job, that the efficiency of the department was adversely affected, and that the conviction brought disrepute upon the entire department.

The second contention by Appellant involves the sufficiency of the evidence admitted. A portion of Oliva's testimony was in effect opinion testimony on the probable effect of the Appellant's conviction and dishonesty on the department and the Appellant's ability to carry out his duties. This opinion testimony was given without objection. The Appellant did not require Oliva to be qualified as an expert on the operation of the department. The testimony was opinion, nevertheless.

The Colorado courts have long recognized that opinion testimony from an expert may be treated the same as any other testimony. (See Colorado Civil Jury Instructions 3:15).⁷ For purposes of proof, there is no difference between direct evidence,

⁷ The Instruction states: "A witness qualified as an expert by education, training, or experience may state

circumstantial and opinion. Apparently the Appellant would require the City to call deputies, inmates, media and members of the public to testify that the Appellant's conviction for theft actually and directly affected his ability to perform his job, affected the department's ability to function efficiently, or otherwise brings disrepute on the department. However, the Director has testified that in his opinion all of these things have occurred as a result of the conviction. That testimony is unrefuted. Not only that but the opinion is given by the highest-ranking member of the department, with 34 years of experience, whose testimony in this case is totally credible, and who himself is beyond reproach. The individual who, in the face of recommendations by his management team to terminate Appellant, decided on a suspension instead gives it further credibility and demonstrates a lack of bias against Appellant. Finally, Director Oliva's testimony is totally consistent with common sense.

In this regard the Givan opinion, supra, is instructive. In that case the employee was convicted of felony incest. The Department Head determined that Givan was unfit to perform his job due to his conviction. Without citing any direct evidence, the Department Head opined that: "if he were returned to work he would bring disrepute upon his fellow city employees by reputation and would compromise the integrity of the city since his soundness of moral principle and character have been found lacking." Later a hearing was held before the City manager where 15 witnesses were called including managers who gave opinion testimony. The City Manager then upheld the conclusions of the Department Head.

The Colorado Supreme Court upheld these findings. In doing so the court not only accepted but also placed great weight on the opinions of Givan's managers as to the effect of the conviction on other employees, the effect on workplace morale and Givan's ability to supervise others. They testified that they were "concerned" that subordinates would lose respect for Givan and that it would be difficult for him to impose discipline and that it would affect in the future his fitness to perform his job. The opinions of other managers were also accepted as to the adverse effect of the conviction on the integrity of the City. The court noted with approval the City's according "more weight to the opinions of those who had management experience than those who did not."

The opinions of managers that were given such weight and approval by the Supreme Court in Givan are not distinguishable from the opinions of Director Oliva. Accordingly, the Hearing Officer finds and adopts in total the testimony and opinions of Director Oliva as factual. The Hearing Officer concludes that the evidence established

opinions. You should judge expert testimony just as you would judge any other testimony. You may accept it or reject it, in whole or in part. You should give the testimony the importance you think it deserves, considering the witness's qualifications, the reasons for the opinions, and all of the other evidence in the case."

by a preponderance of the evidence, that Appellant's conviction of theft had a negative impact on the Appellant's ability to perform his job, that the efficiency of the department was adversely affected, and that the conviction brought disrepute and disrespect by the public upon the entire department.

Appellant has not raised or addressed the foreseeability of his theft on the ability to perform his function or the efficiency of the department. Nevertheless, Career Service Rules prohibit dishonesty. The department rules and regulations prohibit immoral or indecent conduct or other activities involving violation of the law. The Appellant has been in law enforcement approximately seventeen years, thirteen of which were with the Denver Sheriff's Department. He is well familiar with the requirements of the position as outlined by Director Oliva. He is well aware of the need for honesty, integrity, and credibility in his position. The Hearing Officer finds and concludes that a reasonable person in Appellant's position could reasonably foresee the negative impact of a conviction of theft of union funds (in the amount of over four thousand dollars) on their ability to supervise other deputies and jail inmates. That negative impact would obviously also have negative impacts on the efficiency of the department and the public's perception of the department. Accordingly, the negative effect or connection between these and the Appellant's conviction were obvious to the Appellant.

Violation of Department Regulations

§16-50 A (3). The Hearing Officer concludes that the Appellant has violated this rule by engaging in an act of dishonesty.

§16-50 A (9). The Hearing Officer concludes that the Appellant has violated this rule by receiving a conviction for the crime of Theft, a class II misdemeanor and receiving a suspended thirty day jail sentence. This conviction has impacted his ability to perform the duties and responsibilities of his position as Captain of the Denver Sheriff's Department.

§16-50 A (20) The Hearing Officer finds that Appellant's conduct is adequately addressed under other Career Service Rules. Accordingly, violation for this rule is dismissed.

§16-51 A (5). The Hearing Officer concludes that the Appellant has violated the following departmental rules and regulations:

300.10.

The theft of funds from a sheriff's union fund constitutes immoral conduct. As previously discussed, it also impairs Appellant's orderly performance of his duties and has caused the public to lose confidence in the Department. Accordingly, Appellant is found to have violated this provision.

300.11.

Appellant's theft constitutes a flagrant and repeated violation of the law. While the conviction itself was for only one count of theft, the underlying conduct involved numerous continuing acts of dishonesty over a period in excess of one year. The Appellant has introduced evidence that is intended to somehow mitigate or explain the theft, in the form of a letter from Venita Ruybal to Director Oliva. [Exhibit K]. This letter attempts to legitimize or explain the theft. This explanation cannot negate the theft conviction. The time to present this information was either to the prosecutor or to the jury if a trial had been held. Instead the Appellant plead guilty to theft. Appellant's explanation after the fact does not negate or mitigate that.

300.19. And 300.20

The Appellant, as a member of the Sheriff's Department, has already been found to violate other Career Service and Departmental Rules Regulations. These two rules simply prohibit the violation of other rules or duties and have no other substance. As such they are duplicative of the other rules and add nothing to the charges. Accordingly, violations for these rules are dismissed.

Justness of Discipline

CSR §16-10 states:

The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. **The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record.** The appointing authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance. (Emphasis added).

The disciplinary action taken must be a consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

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

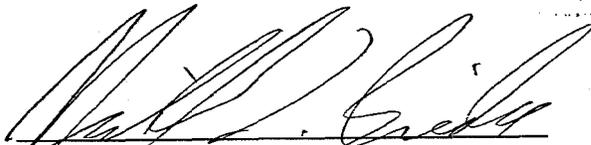
The conviction of theft of a substantial amount of funds from the Union fund is a very serious matter. It directly affects other members of the department. The funds

belonged to other members of the department. It brings other members of the department into disrepute and disrespect. It reflects poorly on the entire department. There is the danger that the public will associate the Appellant's dishonesty to other members of the department thereby further impairing the efficiency of the department. Director Oliva has taken considerable professional risk by allowing Appellant the opportunity to redeem himself. Under the circumstances, a much harsher penalty would be reasonable and justifiable. The Director's decision to give Appellant another chance is within his discretion and cannot be said to be arbitrary or capricious. The thirty-day suspension is imminently reasonable and will therefore not be disturbed.

ORDER

The action of the Agency of suspending the Appellant, Leonard Ortiz for thirty (30) days is hereby AFFIRMED. The letter of suspension shall be modified to delete those rules and regulations that have been dismissed as set forth elsewhere in this decision.

Dated this 15th day of
May 2001.



Michael L. Bieda
Hearing Officer for the
Career Service Board

Q:\biedam\FINDINGS OF FACT & ORDER\Leonard Ortiz 136-00.doc