HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal Numbers 30-13 and 32-13,

DEcision

IN THE MATTER OF THE APPEAL OF:

DAVID SHELLEY and CHRISTINE MARTINEZ, Appellants,

vs.

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

I. INTRODUCTION

In this consolidated action, Sergeants David Shelley and Christine Martinez, appeal their suspensions imposed by their employer, the Denver Sheriff's Department (Agency), for alleged violations of specified Career Service Rules, and Agency regulations. A hearing concerning these appeals was conducted by Bruce A. Plotkin, Hearing Officer, on February 10, 11, and 27, 2014. The Agency was represented by Assistant City Attorneys Rick Stubbs and Amy Kingston. Appellant Shelley was represented by Brion Reynolds, Esq. Appellant Martinez was represented by Dan Foster Esq., and Marcy Ongert, Esq., Foster Graham Milstein & Calisher, LLP. Agency exhibits 2, 5-7, 10, 13-16, 18, 27, 28, 31, 32, 42, 44, and 46 were admitted. Appellants' exhibits M, P, Q, R, AA, BB, HH, II, JJ, QQ, and RR were admitted. The following witnesses testified for the Agency: Ms. Kendra Mosal; Sgt. Robert Hitchcock; Chief Elias Diggins; and then-Deputy Manager of Safety Ashley Kilroy. The Appellants testified on their own behalves during their cases-in-chief, and presented the following additional witnesses: Sgt. Jeremy Heinrichs; Major Vanessi Brown; and Major Richard Guerrero.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellants violated any of the following Career Service Rules: 16-60 A., B., L (via Department Order [D.O.] 1100.8; and 2035.1B); and 16-60 Y (via CSR 15-5, 15-60 and Executive Order 94);

B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to suspend Appellant Shelley for four days and to suspend Appellant Martinez for ten days conformed to the purposes of discipline under CSR 16-10.
III. FINDINGS

Appellant Christine Martinez began working as a Deputy Sheriff in the Agency in 1995, and was promoted to Sergeant in 2008. Appellant David Shelley began as a Deputy Sheriff in 2001, and was promoted to Sergeant in 2005. They are assigned to the Denver County Jail, where their primary duties are the care, custody and control of inmates. They are also charged with maintaining familiarity with all Agency rules.

On April 1, 2012, Shelley received a call from Kendra Moscal, the civilian Maintenance Supervisor at the county jail. She requested a fitness for duty check of a maintenance worker (M.W.) who had arrived at work, but had not yet started his shift. Another maintenance worker had called Moscal, who was home and off duty, to tell her “[M.W.]’s drunk again.” Moscal called Shelley to ask him to check on M.W. She told Shelley “I think he’s not fit to do his job.” Shelley had heard rumors about this particular employee having issues with being intoxicated on the job, so he wanted to investigate the employee before he punched in and started work. [Exhibit 17, IA interview with Shelley]. He also vaguely remembered that two officers were required to confirm possible intoxication.

Shelley never had to check on a potentially drunk subordinate before, so he asked Martinez to accompany him because he knew Martinez had observed M.W. in an incident five months earlier. In the prior incident, Moscal called Major Guerrero to ask what to do after M.W.’s co-workers called her to report M.W. was possibly drunk on the job. Guerrero asked Sgt. Heinrichs to investigate. Heinrichs, as Shelley in the present case, had no prior experience or training regarding reasonable suspicion testing. He asked Martinez to accompany him. When they arrived, M.W. denied being intoxicated. He told Heinrichs and Martinez that he was sick, not drunk. He told them he is diabetic, and takes medicine that smells like alcohol on his breath.

Heinrichs had worked as an EMT and was familiar with diabetes medicine and its effects. He knew that insulin could cause ketoacidosis, a condition resulting in an alcohol-like smell emanating from the pores. Nonetheless, Heinrichs believed M.W. was drunk. Martinez was unsure. Heinrichs called Major Guerrero and Major Brown. Each spoke with Martinez, who told them she was unsure if M.W. was intoxicated. Neither major went to the location, but both refused to authorize reasonable suspicion testing because the two on-site officers did not confirm that there was reasonable suspicion of intoxication.

In the present case on April 1, 2012, when Shelley and Martinez arrived at M.W.’s workplace, M.W. was immediately defensive and aggressive. Shelley observed that M.W. had red eyes, and that he stumbled, repeated himself, couldn’t stand still, and fumbled with his keys while trying unsuccessfully to open his locker. He also had a strong odor of alcohol. Shelley, who is diabetic, had no doubt (“in the upper 90’s”) that M.W. was drunk, and was not just exhibiting ketoacidosis.

M.W. complained “It’s my Monday. I’m sick. I’m always sick on my Monday. Why do you people keep messing with me?” M.W. walked by Martinez who smelled
"what I assumed was alcohol, [but] I don't know what it was." [Exhibit 18, IA interview with Martinez]. Martinez nodded to Shelley to indicate she smelled something like alcohol.

Shelley confronted M.W. about the use of alcohol. M.W. said "I don't have to put up with this fucking shit; I'm going home." Shelley said "[M.W.], I smell it, you're drunk." "No, I'm not drunk," replied M.W. "Prove me wrong. We can have you tested," Shelley answered. Shelley offered M.W. a ride to be tested, but M.W. said "fuck it, I don't have to put up with this fucking shit," and abruptly left, leaving all of his personal items behind. Neither Shelley nor Martinez knew what to do that instant. Less than one minute later, they followed M.W. outside, but he was gone. They did not know how M.W. left. The entire episode with M.W. lasted two or three minutes.

Less than five minutes later, Shelley returned to his office and called Major Koonce about the incident. Koonce asked if Shelley gave a direct order for M.W. to remain, or if Shelley had called Denver Police. Shelley replied in the negative to both questions. Koonce asked for M.W.'s license plate number and said she would call police, but Shelley and Martinez did not know if M.W. left in a car.

During his IAB interview, Shelley said he made a procedural mistake by not giving M.W. a direct order, learned from that mistake, and understood that part of discipline is to be corrective. He told the IAB interviewer he (Shelley) should have told M.W., "I'm ordering you to remain on the premises so we can take you and have [you] tested," even though he was sure M.W. would not have complied. Shelley told IA "I should have given the order; that's on me; I'll live and learn." [Shelley testimony]. He also told the interviewer that he subsequently reviewed drug and alcohol testing requirements, and promised the mistake would not be repeated.

The Agency convened separate pre-disciplinary meetings on June 6. Appellants attended their respective meetings with legal counsel. Martinez presented a written statement she had given to the Internal Affairs Bureau during its investigation. The statement denied wrongdoing, explaining that Shelley had taken the lead in the April 1 incident. The statement also explained that she had reported to IA in the prior incident about M.W., but that IA declined to take any action because there was insufficient information. This left Martinez without knowledge about how to handle this type of case.

On June 20, 2013, the Agency issued a notice of a four-day suspension to Shelley and notice of a ten-day suspension to Martinez. Separate appeals were filed timely, and later consolidated.

IV. ANALYSIS

A. Introduction

The central fact issues of this case are (1) whether Shelley and Martinez had reasonable notice of their duty to comply with drug and alcohol safety protocol on April 1, 2012, and, if so, (2) whether they complied with such protocol.
Deputies acquire notice of their duties obligations through reading Agency rules, experience, observation, and repetition. At the same time, the Agency acknowledges it has an obligation to provide ongoing notice and training of its rules. As stated in its disciplinary handbook:

DENVER SHERIFF DEPARTMENT
DISCIPLINE HANDBOOK:
CONDUCT PRINCIPLES AND DISCIPLINARY GUIDELINES

4.4. Education and Training

4.4.1 All successful professional organizations recognize the importance of continuing education and training. The Denver Sheriff Department has long embraced “in-service” training and education as essential to its success as an organization. By providing deputies with the knowledge, skills and abilities needed to effectively and safely perform their duties, the Department will ensure that its deputies can provide effective, safe and ethical service to both the Department and the public.

[Exhibit 46-12].

B. Jurisdiction and Review

Jurisdiction is proper in each case under CSR §19-10A.1.b., as both are direct appeals of a suspension. I am required to conduct a de novo review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

C. Burden and Standard of Proof

The Agency retains the burden of persuasion throughout the case to prove that Appellants violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend them complied with CSR 16-20. The standard by which

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1 See also: D.O. 2520.1: “It is the policy of the Denver Sheriff Department (DSD) to ensure that a training program is initiated and maintained, and that the program includes thorough pre-service, in-service and field training programs that allow staff to competently perform their jobs.” D.O. 2035.1D.9. “Responsibility: A. Training: The Training Academy will ensure that the curriculum of all currently existing classes and any newly developed classes are compliant with this order. B. Management: Ensure that existing procedures and all newly developed orders are in compliance with this order. Ensure that all affected personnel are made aware of this policy. Ensure this policy is reviewed annually for compliance with all federal, state and local laws and standards. Supervisors: All supervisors will ensure that the provisions of this policy are being followed.” [Underlines added; bold type in the original]. [Exhibit 13-4, D.O. 2035.1B, p.4 of 5; DO.2510.28.].

All training hours will be documented, along with progress and suggested changes.” This last rule suggests if training in E.O. 94 and D.O. 2035.1B had been provided to Appellants, as suggested by the Agency, the Agency would have been able to show it.
the Agency must prove its claims is by a preponderance of the evidence.

D. Career Service Rule Violations

1. CSR 16-60 A. Neglect of duty.

To sustain a violation under CSR 16-60 A, the Agency must establish that the Appellants failed to perform a known duty. In re Gomez, CSA 02-12 [5/14/12]. The Agency claimed Appellants both knew but neglected to fulfill their duties under the drug and alcohol testing rules D.O. 2035.1B, E.O. 94, and CSR 15-60. Shelley responded he did the best he could under the circumstances. Martinez denied there was a reasonable basis to issue an order under reasonable suspicion testing requirements. Since there are two parts to prove neglect - notice of a duty plus a failure to perform it - the analysis proceeds according to those criteria.

a. Generally - whether the Appellants knew or should have known their duties under D.O. 2035.1B, and Executive Order 94.

[1] Shelley

The Agency's only proof that Shelley knew or should have known the rules related to drug and alcohol testing was that when he was hired in 2001, he was handed a tome containing all of the Agency's rules and regulations. One of the provisions therein requires all employees to be familiar with E.O. 94, [Exhibit 5-2, #8 Accountability], and another requires familiarity with all Agency rules and regulations. [D.O.1100.1]

Of the first line supervisors and staff who testified, there was a widespread dearth of familiarity with rules and procedures governing drugs and alcohol in the workplace. For example: (1) before the present incident, Shelley never had an occasion to implement those rules since he was hired in 1998, and had no training or experience on the subject during that entire period;2 (2) before the incident with M.W. five months earlier, Martinez had never encountered a need to implement those rules since she began as a deputy in 1995; (3) Moscal did not know what E.O. 94 is, and had only the vaguest notion of how to implement it after being told. To Moscal's credit, she called Major Guerrero, albeit three days after the earlier incident, to ask what she should do if the situation were to arise again, but it is evident she remained unfamiliar with protocol on April 1. She testified she recalled receiving E.O. 94 with a stack of materials at her supervisor orientation, but did not recall any training regarding drug and alcohol protocol then or since. [Moscal cross-exam]; (4) Heinrichs, as Shelley and Martinez, was unfamiliar with drug and alcohol rules, and never encountered a need to implement them before the first incident with M.W; (5) the IAB investigator who interviewed Shelley incorrectly cited the Agency's Drug-Free Workplace rule, and

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2 The closest the Agency came to proving Shelley received prior training in Drug and Alcohol protocol was Sgt. Hitchcock's testimony. He is in charge of the Agency's Training Academy. When he reviewed Exhibit 27, he determined Shelley "should have" received such training in 2008 when Shelley took new sergeant training. Hitchcock, however, wasn't sure if such training was provided. [Hitchcock testimony].
asked Shelley more than once why he did not prevent M.W. from leaving, something that is not permitted either under that rule, E.O. 94, or any other rule. The purpose of these examples is not to criticize the employees, but to point out widespread lack of familiarity with drug and alcohol rules across the Agency.

A duty arises when it is reasonably communicated and therefore known to the employee. In re Rock, CSA 09-10, 5 (10/5/10), citing In re Mounjim, CSA 87-07 (affirmed CSB 1/08/09). There are several ways reasonable communication may be achieved, including: daily use (experience); training, including in-service training [see, e.g. Exhibits 24-2, 24-3], and new sergeants' training [see Exhibit 12]; testing; hand-outs; email notifications; discussion at meetings; or field officer training, which is essentially a mentoring period for newer deputies. However, handing a deputy a large volume of rules on his first day, and, without any other input from the Agency, expecting perfect compliance 4 years later is not a reasonable communication of such rule. It is a question of notice and fairness. For that reason alone, the Agency failed to prove Shelley knew or should reasonably have known his duties under Agency or Career Service rules, Executive Orders, or rules for reasonable suspicion protocol.

(2) Martinez.

While many of the same rulings in Shelley’s case apply to Martinez, there is one important distinction: Martinez' prior encounter with M.W. under nearly-identical circumstances. Martinez' encounter with M.W. informed her there was an unresolved issue over how to implement drug and alcohol protocol as a supervisor. If it was unreasonable for the Agency to expect perfect implementation without notice in her first encounter with M.W., Martinez' position as a supervisor required her to inform herself about what to do the next time, as Shelley did. This obligation derives from the heightened responsibilities of supervisory positions in the Agency. [Diggins testimony]. Without such responsibility, supervisors could continue to repeat the same mistakes with blithe indifference and no negative consequences.

For those reasons, Martinez, unlike Shelley, had or should have had notice of her duty to follow drug and alcohol protocol under D.O. 2035.1B, and E.O. 94. Whether

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3 Note that neither 2011 nor 2012 in-service training included drug/alcohol protocol. Notably, almost every one of the listed topics has been the basis for discipline in the Agency, including ethics violations [In re Gutierrez, CSA 65-11, 12 (8/28/12)], use of firearms [In re Strauch, CSA 31-13 (3/13/14)], handcuffing/use of belly chain [In re Lovinger, CSA 48-13 (4/7/14)], tasers, [In re Lucero, CSA 19-14 (8/13/2004)], use of force, [In re Corathers, CSA 13-11 (7/16/12)], cell extraction [In re Lovinger, CSA 48-13 (4/7/14)], KRONOS, [In re Martinez, CSA 09-12 (8/15/13)], suicide prevention, [In re Lucero, CSA 19-04 (8/13/04)], arrest powers and professional conduct, [In re Strauch, CSA 31-13 (3/13/14)], direct supervision, [In re Lovinger, CSA 48-13 (4/7/14)], and C-4 training [Id.; Strauch, supra]. In light of the foregoing, it would not be unduly burdensome for the Agency to add drug and alcohol protocol to its training, and it would assist the Agency in avoiding similar issues. Based on the number of links between training topics and appeals, it appears the Agency already subscribes to the notion that if it is important enough to be the subject of discipline, it is important enough to provide training. So it should be with drug and alcohol protocols.

4 As discussed below, Shelley substantially, if imperfectly, complied with the requirements of the drug and alcohol rules.
she followed those protocols is the next element of CSR 16-60 A.

b. Whereas the discussion immediately above established, under the first element of Neglect of Duty, whether Shelley and Martinez had notice of their duties regarding drug and alcohol testing, this section analyzes whether they implemented those duties.

Duty to initiate testing under D.O. 2035.1B. The first substantive provision cited by the Agency under this rule states:

When a supervisor has reasonable suspicion that an employee is in violation of this policy or Executive Order 94, after taking the appropriate safety measures, the supervisor should immediately consult with an appropriate member of the Department’s personnel staff in Internal Affairs or with the City Attorney’s Office to determine further actions. However, if immediate consultation is not possible, it is the responsibility of the supervisor to initiate drug and alcohol testing.

[D.O. 2035.1B].

(1) Shelley.

Even assuming Shelley knew or should have known his duty to implement reasonable suspicion protocol under D.O. 2035.1B, the question remains whether he failed to implement it. The first and second (of four) elements of this duty were whether Shelley had reasonable suspicion that M.W. was drunk and, if so, if he took appropriate safety measures. Shelley testified he was certain “in the upper 90s” that M.W. was drunk. Shelley astutely recognized the urgency of the situation: within five minutes, M.W. was going to punch in, possibly unfit to work. Shelley told IA his goal was to ensure M.W. did not work on the clock as a drunk City employee and expose the City to liability. [Shelley testimony]. Thus Shelley found reasonable suspicion and took appropriate measures in hurrying to M.W.’s workplace to prevent a possibly-impaired employee from clocking in.

The third element of this portion of D.O. 2035.I suggests consultation with an appropriate official. Due to the urgency of the situation, immediate consultation was not possible. In addition, the plain language of the rule, “should immediately consult,” implies a non-mandatory suggestion, since the common language of compulsion is “must” or “shall.”

The fourth element of this rule requires a supervisor with reasonable suspicion, but no opportunity for immediate consultation, to initiate reasonable suspicion testing on his own. Therein lays the rub. The requirement to initiate testing on one’s own initiative conflicts irreconcilably with every situation where two on-site supervisors do not concur as to reasonable suspicion. The Agency requires the concurrence of two supervisors before reasonable suspicion testing is authorized. [Heinrichs testimony;]

* E.O. 94 states “When possible, have a second supervisor confirm the specific, contemporaneous
Hitchcock testimony], and Martinez remained unsure if M.W. was drunk. In the prior incident involving M.W., two upper-level supervisors prohibited the on-site supervisors from proceeding with alcohol testing because the on-site supervisors did not concur in finding reasonable suspicion.

Due to this irreconcilable conflict, when on-site supervisor S1 finds reasonable suspicion to initiate reasonable suspicion testing of employee E, but on-site supervisor S2 does not find reasonable suspicion, the failure of S1 to initiate reasonable suspicion testing of E does not violate his duty to initiate drug and alcohol testing under D.O. 2035.1B. For that reasons, Shelley did not violate his duty to initiate alcohol testing of M.W.

(2) Martinez

The circumstances for Sergeant Martinez differed from those of Shelley. For reasons stated above, Martinez had reason to educate herself as to the indicia of intoxication, particularly with regard to M.W. The more difficult aspect of this rule, and indeed, of this case, is whether Martinez should have found reasonable suspicion, without which she had no reason to initiate drug and alcohol testing. Certainly M.W. displayed commonly-recognized indicia of intoxication: unsteady movement; slurred speech; fumbling with an object (keys) in his hand; being uncoordinated (in failing to place a key in its lock); bloodshot eyes, aggressiveness, and smelling of alcohol. However Martinez did not observe some of those indicia, since she was not close to him, except in passing upon her arrival, [Martinez testimony], and she was conflicted as to the basis for the rest of the indicia she observed, due to her prior encounter with M.W. from which she learned that at least some of those remaining indicia could be a manifestations of ketoacidosis. Martinez testified she could not tell if M.W. fumbled with his locker because he was intoxicated or because he was agitated. She was consistent in that claim during the IA investigation as well.

The Agency’s claim, that Martinez should have found M.W. was impaired, would require an onsite supervisor to find reasonable suspicion when certain criteria are present, regardless of the totality of the circumstances. Those circumstances included indicia of ketoacidosis, at least in Martinez’ view. Martinez was credible in stating she was unsure if M.W. was intoxicated or exhibiting symptoms of ketoacidosis. She was untrained in what criteria and under what circumstances to initiate drug and alcohol testing.

For reasons stated above, Martinez bore some responsibility to educate herself as to those criteria. However, even if she had undertaken such an education, it would

articulable observations of the of the employee’s appearance, behavior, speech or body odors.” The Agency apparently transformed that suggestion into a requirement.

While Shelley admitted he made a mistake in not ordering M.W. to submit to testing, this is a rare instance in which an admission does not constitute a violation. See, e.g. In re Stephanie Martinez, CSA 69-05, 10 (1/3/06) (“Her initial apology, during the May 6, 2005 meeting, appears to have been based on her eagerness to accept the accusations against her for no more reason than they were made, instead of pausing to examine the justification for those claims”).
not ensure she would or should find reasonable suspicion in a subsequent incident.

The Agency is not in a position to second-guess an on-site supervisor’s determination of reasonable suspicion when the evidence of impairment is conflicting, as it was in this case, and in the absence of a higher-level supervisor’s on-site opinion. If an agency wishes to penalize, instead of educate, it must provide sufficient criteria to advise a reasonably astute employee what conduct or performance is proscribed.

The problem addressed above is easier to understand by reversing the facts. Assume Martinez fully understood what criteria constitute reasonable suspicion and, using her best judgment, found M.W. was intoxicated, but the Agency subsequently determined she was wrong. Could she then be disciplined? Should she be? Those questions, and the answers to them, reside in the realms of policy, education, and job performance, not in the realm of discipline, at least not initially. What if Martinez continued to “get it wrong” time after time? Perhaps it should then become a subject of discipline. Since Martinez did not have, and was not required to have, reasonable suspicion that M.W. was intoxicated, she did not fail a duty to initiate drug and alcohol testing under D.O. 2035.1B.

c. Duty to state “I order you” under E.O. 94

(1) Shelley

The Agency interpreted E.O. 94 B.1. a. iii (“advise the employee that the supervisor is ordering the employee to go to the testing site for testing”), as requiring the use of the words “I order you.” [Exhibits 5-6: 6-2]. However, Sgt. Hitchcock, who was the IAB investigator in the present case, ordered M.W. to submit to testing in the earlier incident and did not use those words. Hitchcock testified he directed M.W. to submit to testing but did not use the words “I order you” or “I direct you.” [Hitchcock cross-exam.] Hitchcock believed those words were unnecessary to initiate a direct order. [Id.] Shelley credibly testified he was trained to expect that “anything that comes out of my mouth in the form of a request, suggestion, or order, should be construed as a direct order.” He added that if he were forced to say the words “I order you...” before every command, he “would be saying [it] all day long.” [Shelley testimony].

More convincingly, in its contemplation of discipline letter to M.W., the Agency found M.W. failed to obey Shelley’s order to submit to reasonable suspicion testing.

Sergeant Shelley indicated to you that you were going to be tested in response to his observations and that you replied that you were not drunk;

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7 There is certainly reason to believe Shelley’s opinion should have prevailed. He was certain “in the high 90s” that M.W. was drunk. His training informed him that M.W. was not simply exhibiting symptoms of ketoacidosis. But Martinez was unsure of the distinction and did not have Shelley’s background. It would render irrelevant the Agency policy of concurrence if the officer who is “more sure” should prevail. This problem returns to an issue of training. See the paragraph above which follows this note number for further discussion.
you said that you didn’t have anything to prove and you were going home sick. Your statement indicated a refusal to cooperate with the reasonable suspicion testing. Sergeant Shelley attempted to secure a ride for you; however, you left the facility against the instructions of Sergeant Shelley. [emphasis added].

[Exhibit JJ-8].

The Agency may not have it both ways, i.e. declaring M.W. disobeyed a direct order from Shelley, while declaring that Shelley failed to issue that same order for purposes of disciplining Shelley. For that reason, the Agency failed to prove, by a preponderance of the evidence, that Shelley violated E.O. 94 by failing to issue a directive to M.W. to report for testing.

In addition, Martinez, as the second supervisor on scene, did not find reasonable suspicion to order M.W. to be tested. The evidence established that the Agency requires two supervisors to affirm reasonable suspicion before either may order a subordinate to submit to testing. [Hitchcock testimony; Martinez testimony]. Thus, Shelley cannot be faulted for failing to do what Agency policy prevented him from doing.

(2) Martinez

Martinez was provided a copy of E.O. 94 when she was first hired in 1995. [Exhibit 25.] As in its claim against Shelley, the Agency was unable to provide any evidence that it provided any mention of E.O. 94, let alone training, to Martinez since her date of hire in 1995, [See Exhibits 24-37], despite an update of E.O. 94 in 2002, [Exhibit 14-1], and an update memorandum in 2004. [http://govorcl02/Executive_Order/XO_index3.html] [last viewed 4/10/14].

For the same reasons the Agency failed to prove Shelley violated a duty to state “I order you” to M.W., it also failed to prove a violation against Martinez. Also, as Martinez testified, if one officer issued an order, as the Agency claimed in its notice of discipline against M.W., it would be superfluous for a second officer on the scene to issue the same order. [Martinez testimony.] Nor does E.O. 94 require each officer on the scene to issue the same order separately. For these reasons, the Agency failed to prove Martinez violated E.O. 94 when she failed to order M.W. to submit to alcohol testing.

d. Duty to call Denver Police.

(1) Shelley and (2) Martinez.

The Agency’s allegation here is premised on a preceding obligation to order M.W. to submit to testing. Under remarkably similar circumstances five months earlier, the Agency determined if two officers did not agree to reasonable suspicion, then no testing could be ordered. Moreover, the Agency provided conflicting bases to impose discipline, to wit: the Agency concluded Shelley issued an order for purposes
of initiating discipline against M.W., but Shelley did not issue an order for purposes of disciplining him and Martinez. If, pursuant to the earlier incident, Shelley and Martinez were not permitted to order M.W. to submit to testing, then they were not obligated, and indeed, would have no right, to call Denver Police under either D.O. 2035.1B or E.O. 94. The Agency’s failure to establish Appellants’ duty to order reasonable suspicion testing also establishes they had no duty to call police when M.W. left. This potentially-tragic outcome begs for change to the Agency’s protocol. However, that subject is beyond the scope of this decision.

2. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

While CSR 16-60 A) and CSR 16-60 B), share similar elements of proof, they are distinguished in that, under 16-60 B., it is the Appellant’s acts (performance), rather than her omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, a violation under this rule occurs for performing poorly, rather than neglecting to perform, an important duty.

Kilroy testified Kelley and Martinez were careless for not requiring M.W. to submit to testing. First, that allegation describes a neglect of duty, not the careless performance of a duty, thus no violation for that allegation was established under this rule. Second, Kilroy’s allegation was premised on her assessment “it was pretty clear from the facts that they both suspected that [M.W.] was drunk.” The evidence does not support Kilroy’s assessment. Martinez was consistent throughout the investigation and at hearing that she was unsure if M.W. was drunk. That testimony remained unrebutted.

Kilroy also alleged both sergeants were careless in failing to supervise M.W. Again, the omission of a duty must be alleged under CSR 16-60 A., not 16-60 B. In addition it was unclear how they failed to supervise M.W. No violation was established under CSR 16-60 B, and D.O. 1100.8.

6. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

The Agency claimed the Appellant violated the following written policies.

**Department Rules and Regulations**

D.O. 2035.1B –Drug-Free Workplace

Purpose: the purpose of this order is to provide general guidelines to establish and enforce an alcohol and drug-free workplace program to ensure the safety of all employees, inmates sand the public.

Testing and Treatment:

**Reasonable Suspicion Testing:** When a supervisor has reasonable suspicion that
an employee is in violation of this policy or Executive Order 94, after taking the appropriate safety measures, the supervisor should immediately consult with an appropriate member of the Department’s personnel staff in Internal Affairs or with the City attorney’s Office to determine further actions. However, if immediate consultation is not possible, it is the responsibility of the supervisor to initiate drug and alcohol testing.

The extensive analysis under CSR 16-60 A., above, applies equally here. For the same reasons stated above under CSR 16-60 A., neither Appellant violated this rule.

The decision to test an employee must be based on reasonable belief that the employee is using, under the influence, subject to the effects of or impaired by a prohibited drug or alcohol. The supervisor’s basis for this reasonable belief shall be specific, such as, but not limited to, observing changes concerning the appearance, behavior, speech or body odors of the employee.

The first sentence in this rule is inapplicable to the present case since testing did not occur. To the extent Shelley specified the basis for his conclusion that M.W. was drunk he complied with the second part of this rule. Martinez observed many of the same manifestations as Shelley, but could not conclude their origin. To the extent the Agency alleged either of the Appellants failed to make specific observations about M.W.’s condition, that allegation fails.

If a supervisor has reasonable suspicion that an employee is under the influence of drugs or alcohol, he/she shall have the employee escorted by the Internal Affairs officer to the Occupational Health and Safety Clinic at Denver Health Medical Center or at Denver International Airport for testing as soon as practical.

As stated above, the Agency policy of requiring two on-site supervisors to concur contradicts the language of this rule which makes it an individual responsibility to require testing. No violation may be established where notice to the employee is unclear.

It is the responsibility of each employee and supervisor to be familiar with this policy, Executive Order 94, and to abide by the drug-free requirements of the City and County of Denver and the Denver Sheriff Department (DSD). [Exhibit 13-4].

This rule places the onus on each employee and supervisor to be familiar with the Agency’s drug and alcohol testing requirements, and with E.O 94 requirements. As stated previously, it is a question of notice and fairness that an employee who has not had occasion, by experience or training, to encounter a rule for 14 years, may not be held to perfect execution of such rule in the first encounter. For that reason, Shelley was not in violation of this rule, while Martinez, who encountered the rule five months early, breached her duty to be familiar with E.O. 94 on April 1, 2012.

1100.8 Failure to supervise
Supervisors are required to fulfill all obligations, duties and responsibilities of their
rank.

This catch-all requirement was supplanted by the Agency’s more specific allegations pertaining to rules specified elsewhere in this decision. Unless an agency specifies what conduct violated such a broad rule, a hearing officer will not venture into the cauldron of evidence on behalf of the agency. The Agency did not establish a violation under this rule.

**CSR 15-5, Employee conduct.**

This rule requires every Career Service employee to “conscientiously fulfill” her duties and responsibilities and to work so as to “reflect credit on Career Service and the City.” Neither side presented any evidence for or against it, thus it remains unproven. Moreover, it is doubtful this supplication is enforceable.

**CSR 15-60 Alcohol Policy**

F. A supervisor who has reasonable suspicion that an employee is in violation of this policy may initiate drug and alcohol testing.

Since this rule is plainly permissive, a supervisor may not be disciplined for choosing not to initiate drug and alcohol testing under this rule.” No violation is established against either Appellant.

7. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.

The Agency alleged more specific violations of Career Service, Departmental Orders and an Executive Order, rendering this violation redundant. No other violation was alleged specifically under this rule.

**V. DEGREE OF DISCIPLINE**

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee’s past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

**A. Seriousness of the proven offenses**

The only proven offense against Martinez was the failure of her duty to educate herself following questions that should have arisen after her first encounter with M.W. By itself, that lapse is a minor violation. The Agency failed to prove any violation by Shelley.

**B. Prior Record**

Shelley had one minor violation for his entire career, a written reprimand in
2002, Martinez had no prior discipline whatsoever in her 18 years with the Agency. Given the relatively minor nature of the proven violation in this case against Martinez, her 18-year unblemished record should be given substantial weight.

C. Likelihood of Reform

Shelley readily acknowledged he made a mistake in not fully complying with the Agency’s D.O.s and E.O. 94. Shelley’s sincerity and honesty were unquestioned. Shelley provided an accurate summary of his case thus:

Monday morning quarterbacking – I didn’t have time to look at the orders before I went down there. My whole point when I went down there was, he was about to assume the mantle of punching in on the clock and becoming a Denver Sheriff employee. You know, if he was truly intoxicated... I don’t want him assuming the mantle of being on duty... I’ve worked without a captain, until recently, for that entire time. It’s not like I had a superior officer [to whom] I could say “what’s going on?” This was the first time I’d ever dealt with a situation like that. And, for the most part, I thought I did pretty good, with the exception I didn’t give the direct order. You know, that’s on me. I’ll live and learn, but... [trails off, and IAB states “it’s your responsibility to know the orders”]. It is, it is [my responsibility]. It’s hard to remember every word of every order, of every subject, especially when it’s something you’ve never dealt with before. I’ve never dealt with a drunk employee before.

That night, when she [Major Koonce] asked me if I gave him [M.W.], a direct order, I was like ‘no,’ and that’s when I went back and reviewed the orders and I realized that I’d made that error.

With respect to Shelley, the Agency’s failure to prove any violation renders this element moot. Even if the Agency proved one or more violations against him, then, if there had been any question of Shelley’s willingness to reform, he addressed it well before being disciplined.

With respect to Martinez, she, if somewhat belatedly, also educated herself with respect to her duties under D.O. 2035.1B and E.O. 94. Thus, she also fulfilled the primary purpose of discipline under the Career Service Rules.

D. Additional Factors.

There is no recipe to determine reasonable suspicion to test an employee. That vagary enhances the importance of educating first-line supervisors what to do when called to observe an employee who is possibly impaired. Further, this case was complicated by M.W.’s diabetes and, in particular, the potential for assessment complications posed by ketoacidosis. Moreover, even when one supervisor is certain
that a subordinate is intoxicated, a second officer is not obligated to, and should not, provide perfunctory agreement without making independent observations. All these factors indicate the difficulty of applying D.O. 2035.1B and E.O. 94, a difficulty that is likely to persist under the Agency's current practices.

The Agency is responsible for educating its deputies regarding its rules and regulations. It acknowledges as much in its own rules. This appeal could have been avoided if the Agency had informed Shelley and Martinez of their responsibilities under D.O. 2035.1B and E.O. 94 at some point during their 19-year and 12-year employment.

The Agency's rules are also clear that each deputy is responsible for understanding and implementing drug and alcohol protocol. That rule applies even more so for supervisory-level employees. [Diggins testimony; Exhibit 6-2]. Had Martinez even briefly reviewed D.O. 2035.1B and E.O. 94, she might have avoided repeating her lack of familiarity with M.W.'s symptoms; but even if she had reviewed those rules, it is not certain she would have come to a different conclusion in her second encounter with M.W. on April 1, 2012.

Unlike many other appeals, this was not a case of intentional wrongdoing or neglectful indifference. Both sergeants faced a difficult situation. Shelley was sure M.W. was drunk but was unsure how to proceed as he never faced a similar situation before. Martinez was justifiably concerned that, if she prevented a sick employee from leaving, she could be exposed to discipline, and the Agency could be exposed to liability. M.W. ran off suddenly, leaving the sergeants baffled what to do and no time to find a supervisor. They informed themselves promptly after the incident so they would know how to react the next time, thus the remedial purpose of discipline was served even before any discipline was imposed. [See CSR 16-20].

Even if the Agency expects each employee to be familiar with all its rules, including 2035.1B, a reasonable administrator would determine the Agency would be better served by proactive training than by discipline after the fact. Notably, the Agency already engages in extensive training for many other rules and policies, but none for reasonable suspicion testing, according to the evidence in this case.

Since it is evident that drug and alcohol impairment on the job are prohibited, City employees are assumed to have notice of that prohibition and its consequences under E.O. 94. That presumed notice applies even though most employees' familiarity with that rule is limited to the receipt of a copy of E.O. 94 on their first day of employment.

In contrast, the responsibilities of first-line Agency supervisors under E.O. 94 and D.O. 2035.1B are complex and seldom encountered. The evidence in this case demonstrated the Agency provides no training for the responsibilities of first-level supervisors under those rules. Those three factors – complex rule, seldom

5 See n.1 above.
encountered, and no training - make it inevitable that Agency first-level supervisors will fail to comply adequately with such rules. Under those circumstances, the Agency's failure to provide training for a complex rule it intends to enforce strictly, but which is rarely encountered, fails to meet the notice requirements of the Career Service disciplinary rules.

VI. ORDER

A. The Agency's four-day suspension of Appellant Shelley is REVERSED.

B. The Agency's ten-day suspension of Appellant Martinez is MODIFIED to a written reprimand.

DONE April 15, 2014.

Bruce A. Plotkin
Career Service Board Hearing Officer