HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 25-09

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

KONSTANTIN VESSELOVSKII, 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 August 17, 2009 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Michael T. Lowe, Esq. The Agency was represented by Assistant City Attorney Franklin Nachman, and Captain Robert Kricke served as 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 March 16, 2009, Appellant Konstantin Vesselovskii was suspended for sixty days from his position as a Deputy Sheriff with the Denver Sheriff's Department ("Agency" or "Department"). Appellant filed this direct appeal challenging that suspension on March 31, 2009. On July 2, 2009, the parties submitted a stipulated exhibit log, and stipulated to the admissibility of Exhibits 1 - 20 and 22 – 36. Exhibit 21 was withdrawn by agreement of the parties.

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 a sixty-day suspension 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 Konstantin Vesselovskii has been a Deputy Sheriff since September 2005. Appellant was born in the Republic of Ukraine, and lived there until 1992. He attended the Denver Sheriff's Academy from Sept. to Dec. 2005, and was ranked first in his class. [Testimony of Appellant.] This sixty-day suspension stems from Appellant's use of a city credit card to pay for alcohol during an extradition trip to Las Vegas, Nevada on July 14, 2008, and a finding of dishonesty for statements made thereafter.

In 2007, Appellant applied for extradition duty. City and departmental policy requires that officers who make extradition trips must use a Visa travel credit card for all authorized expenses, and promptly pay all charges made to that card. [Exh. 10.] On Feb. 7, 2007, Appellant signed the department's extradition agreement that he would not use his travel card for personal business, among other conditions. [Exh. 9.] Appellant testified that he familiarized himself with the departmental policies governing extradition and use of the travel card, and trained with Deputy Rader during a trip to El Paso in Dec. 2007. City policy prohibits charging alcoholic drinks on the travel card. [Exhs. 10-2, 11-3.]

In July 2008, he was selected by rotation to perform the lead officer function on an extradition trip to Las Vegas. Since it was only his second extradition assignment, he asked Deputy George Gatchis, an officer experienced in extraditions, to accompany him as second officer. Dep. Gatchis agreed after several requests by Appellant. Pursuant to procedure, Appellant obtained and reviewed a packet containing a copy of the travel card agreement, the extradition agreement, departmental trip procedures, and an August 2006 departmental memo outlining the requirements applicable to officers prior to each extradition. [Exhs. 8 – 11.]

On July 14, 2008, Appellant and Dep. Gatchis traveled to Las Vegas to execute a warrant to extradite a Las Vegas prisoner back to Colorado for criminal proceedings. That evening, they ordered dinner and wine at Gallagher's Restaurant, located in their hotel, NYNY. Dep. Gatchis asked the waiter to put the wine on a separate check. During dinner, they conversed with other diners sitting close by, including two women. When the bills arrived, Appellant presented his city credit card to pay for both the food and wine tabs. Dep. Gatchis told him he would pay for the wine, and that they could get in trouble for using a city card to pay for alcohol. Appellant insisted that he would pay. [Testimony of Dep. Gatchis; Exh. 16-19.] Dep. Gatchis tried to persuade Appellant to let him pay, but became embarrassed when he realized that other diners could hear their disagreement. When Appellant gave the waiter his city card to pay for the wine, Dep. Gatchis put his hands up and said, "[y]ou're a big boy", but emphasized again that he could get into big trouble over it. Dep. Gatchis immediately left the restaurant and went back to the hotel room for the rest of the evening. [Testimony of Dep. Gatchis; Exh. 7.] Appellant then paid both tabs with his city credit card. [Testimony of Appellant; Exhs. 16-67, 29.]

The testimony is disputed as to one incident alleged in the disciplinary letter. The Agency found based on an Internal Affairs (IA) interview of Dep. Gatchis that Appellant told the women dining next to them, "[l]adies, we've got your bill." Dep. Gatchis reminded him that he could not put their bill on a city credit card. Appellant then told the women he was sorry, but he could not pay for their dinner. [Exh. 1-3, 19.] However, Dep. Gatchis' July 28th statement to IA's Sgt. Rolando makes no reference to this exchange. [Exh. 7.] Dep. Gatchis testified that Appellant leaned over to the women's table at the end of the meal and offered to pay their bill. Appellant concedes he may have asked the women if it "would make any difference" if they paid for dinner, but explained that it was guy talk that didn't make any sense. Appellant told the Internal Affairs investigator that he made a joke to Dep. Gatchis about paying for the women's dinners. [Exh. 16-23.] I find that Appellant joked about paying for the women's dinners, but had no intention of doing so.

The next day, Appellant and Dep. Gatchis returned to Colorado with the prisoner. Appellant mistakenly used his city credit card to purchase $53.70 in personal items at the Aurora Wal-mart. It is not disputed that the city card is similar in appearance to Appellant's credit card.

A few days later, in keeping with extradition policy, Appellant submitted his expense report to Jon James, the Court Services Division's Staff Assistant who coordinates extradition matters for extradition officers and criminal courts. [Exh. 11-1.] Appellant included the bill for the wine, but not the Wal-mart charge. The wine receipt submitted with the expense report showed only the total charged, not what was purchased. [Testimony of Ms. James; Exh. 34.] Appellant admits he did not notify anyone in the Department that he used the city card for these two personal charges.

Both the wine and Wal-mart charges appeared on Appellant's July 21st Visa city credit card statement. Appellant's handwritten notes on his Visa bill indicate that he calculated the total for his expense report by subtracting only the Wal-mart charge, but not the $82.97 wine tab from Gallagher's Restaurant. [Exh. 16-73, 29.] On Aug. 20, 2008, Appellant paid Visa those amounts along with the rest of the balance due. [Exhs. 29, 30.]

Part of Ms. James' job is to prepare a statement of extradition costs to the District Court for reimbursement from the defendant or surety on the criminal bond. On July 17, 2008, extradition head Capt. Blair submitted the statement of costs to the District Court for the entire amount of Appellant's expense report, which included the wine as a part of the expense for meals. [Exh. 35.] Court Services' procedure also requires that Ms. James promptly submit the expense report to the Controller's Office for reimbursement to the officer. A check for the full amount was issued to Appellant on Aug. 4, 2008. [Exh. 31.] That check was marked "in dispute" the same day by Capt. Blair because the charge for alcohol on the expense report became the subject of an IA investigation. [Exh. 36.]

While reconciling Appellant's receipts and the expense report, Ms. James noticed there were two bills dated July 14, 2008 from Gallagher's Restaurant within about an hour of one another. [Exhs. 16-67, 16-69.] She called the restaurant to get copies of the underlying bills in order to be sure the bills were not duplicates or issued in error. On Aug. 6th, the restaurant sent back a check report showing that the bill issued at 4:49 pm was a charge for $33 for three glasses of Castle Cabernet, plus a $44 bottle of Castle Cabernet. [Exh. 16-68.] The bill issued at 5:55 pm contained charges for two steak dinners and side dishes. [Exh. 16-70.] Since Ms. James had not received this information before she needed to submit the statement of extradition costs to the District Court and the request for reimbursement to the Controller, both inadvertently included the cost of the wine. A few days after Ms. James had reconciled the trip expenses, Appellant called her and said that he had a purchase of alcohol that should have been put on a different credit card. Appellant told Ms. James he would bring a check in for the alcohol purchase. [Testimony of Ms. James.] Appellant did not bring in his check to cover the wine until Oct. 9, the date he picked up the city's reimbursement check. [Exh. 16-97.]

As an experienced extradition officer, Dep. Gatchis was aware that he was required to follow the rules related to official expenditure, including those prohibiting the purchase of alcohol with a city credit card. He also knew he was required to report any violations of departmental policies. [Exh. 13-3.] Dep. Gatchis expected that Appellant would report his unauthorized use of the card to Court Services, or that it would be discovered during reconciliation of the expense report. After two weeks of hearing nothing, he spoke with Officer Tribble, an operations officer who handles extradition assignments. Officer Tribble referred him to Sgt. Rolando of the Internal Affairs Bureau, and Dep. Gatchis prepared a statement for Sgt. Rolando that same day. [Testimony of Dep. Gatchis; Exh. 7.] On Aug. 4, 2008, an IA investigation of the matter was initiated. [Exh. 16-1.]

Although Appellant paid his city Visa bill in August, he did not pick up his reimbursement check from Ms. James at Court Services until Oct. 9, 2008. [Exhs. 30, 16-97.] Appellant testified that his work and family schedule, parking logistics, and Court Services hours combined to cause the delay. [Testimony of Appellant.] He immediately gave Ms. James his own check for $82.97 to cover the wine bill. [Exh. 16-97.] The Agency lost that check, and Appellant wrote a replacement check on Nov. 18, 2008. [Exh. 32.] The Agency later located and destroyed Appellant's original check.

Sergeant Lori Robirds conducted the IA investigation, and presented her report to the Division Chief and Captain for decision. [Exh. 16.] During his Oct. 23rd IA interview, Appellant stated that he wanted wine with dinner, and had estimated that a bottle would be about four times the cost of a glass, which he believed was $6 to $7. When he got the separate bill for the wine, he saw that it was for $82.97, well over his estimate.[1] He decided he would pay for it with the city credit card, since he brought only minimal cash with him to dinner, and he did not want to borrow the money from Dep. Gatchis. Appellant also decided it would be sufficient if he included the cost of the wine

[1] The bill included three glasses of wine, at $11 a glass, and a full bottle of $44 wine. [Exh. 16-67, -68.]

with his expense report, then repaid the city once he received the reimbursement check. [Exh. 17.] Based on the IA report, the matter was set for a pre-disciplinary meeting on Feb. 19, 2009.

Appellant attended the pre-disciplinary meeting with his attorney, Michael T. Lowe. He told the panel that he paid the wine bill with his city credit card because he discovered he did not have enough cash to cover it. Appellant stated that he delayed repaying the city until he got the city's reimbursement check because he wanted to make sure he had sufficient funds in his account. He added that repaying before he got the reimbursement "would not be fair, like I would pay twice for the wine." [Exh. 24.] He apologized for his actions and stated he would not let it happen again. [Exh. 1-5.]

Deputy Manager of Safety Mary Malatesta made the disciplinary decision in this case. In October 2008, Manager of Safety Al LaCabe had delegated to Ms. Malatesta disciplinary authority over all uniformed officers. In that capacity, Ms. Malatesta reviewed the entire pre-disciplinary file in this matter, including the Internal Affairs investigation, witness statements, audio and video recordings of interviews, extradition documents, and Appellant's employment record. Based on her determination that Appellant knowingly misused the city card, but intended to repay the wine bill, Ms. Malatesta removed the charges of neglect, theft, unauthorized use of city equipment, and five departmental rules related to those charges.

Ms. Malatesta determined that Appellant was careless in using the city card to buy personal items at Wal-mart on July 15, 2008. She also found his expense report was dishonest, and that he violated departmental policies regarding departure from the truth and use of city equipment. Finally, Ms. Malatesta determined that Appellant's actions failed to comply with the aspirational standards set forth in the Departmental Code of Ethics, including honesty and use of good judgment. Based on the seriousness of these violations, Ms. Malatesta imposed a 60-day suspension, despite Appellant's lack of a previous disciplinary record.

At hearing, Appellant testified that he brought cash, his city credit card and his Sheriff's Department identification to the restaurant that evening. He spent some of his cash gambling on the way to dinner. The price of the wine took him by surprise, and he was embarrassed to find that he had less than $30 left, which was insufficient to pay the wine bill. Appellant decided to pay it with the city credit card because it seemed to be the lesser of two evils. He felt obligated to pay for the wine because he suggested it, and Dep. Gatchis had already used his city card to pay for the hotel. He added that he felt responsible as the lead officer, and opted not go back to the hotel for more money because "I didn't have the code to the safe", and he didn't want to "bother" Dep. Gatchis by asking him for the code.

Appellant admitted that he did not notify anyone in the department or city that he charged alcohol on the city card. Appellant testified that he believed it would be sufficient if he included the $82.97 alcohol bill in his expense report, paid the Visa bill in full, and then waited for the city's reimbursement check before repaying the city for the

wine. Appellant reasoned that the city would not be out any money if he paid the Visa bill. He conceded that he "didn't think of all my options", but said he did not think it was a "big deal. I didn't think it was something I needed to broadcast."

Appellant denied that he heard Dep. Gatchis' offer to pay for the wine, or that he argued with Dep. Gatchis that the city should pay for it. He testified that he paid for his beer with cash during his previous extradition trip to El Paso with Dep. Rader.[2]

IV. ANALYSIS

The City Charter requires that appeals from employment actions must be decided based on a de novo determination of the facts. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975); In re Luna, CSB 42-07, 4 (1/30/09). 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.

1. 16-60 B: Carelessness in the performance of duties

To establish carelessness, the Agency must prove Appellant was heedless of an important work duty, resulting in potential or actual significant harm. In re Mounjim, CSA 87-07, 5 (7/10/08). The Agency bears the burden to prove it made the employee aware that the extradition procedures prohibiting purchase of alcohol with a city card was a clear performance standard. See In re Mestas et al., CSA 64-07 (5-30-08).

Based on her determination that Appellant used the city card with the intent to repay the wine bill, and then did so, Ms. Malatesta removed the charges of neglect, theft, unauthorized use of city equipment, and five departmental rules related to the July 14th incident. Ms. Malatesta found instead that Appellant carelessly presented the city card at Wal-mart rather than his personal card on July 15th, which was similar in appearance and next to it in his wallet. She determined that this was careless rather than intentional because Appellant noticed the charge on his bill, and paid it immediately without including it in his expense report. Appellant also took action to prevent future such mistakes by separating the two cards in his wallet.

I find based on the evidence that Appellant ignored an important work duty of complying with the extradition procedures when he placed his city card next to his personal credit card in his wallet, knowing they were similar in appearance, and that he carelessly used the city card to make personal purchases on July 15, 2008. He recognized his mistake when he received his next Visa bill, and paid it without submitting it for reimbursement. However, Appellant did not inform the Agency of his error. As a result, the city suffered potential harm by virtue of having a personal charge appear on a city-issued credit card.

[2] Dep. Gatchis' Aug. 14, 2008 interview to IA included his recollection that Appellant justified using the city card for wine by saying, "[Dep. John] Rader and I did it [during the El Paso extradition]." [Exh. 19.] However, this allegation was not including in either disciplinary letter. [Exhs. 1, 2.] For this reason, I do not consider the allegation or evidence on this issue in support of the disciplinary action.

2. Dishonesty

Dishonesty is the knowing communication by an employee of a false statement within the employment relationship. In re Dessureau, CSA 59-07, 6 (1/16/08). The Agency concluded that Appellant was dishonest in his statements to the Agency on this matter, as well as his certification of an official expense report which contained the unauthorized charge for alcohol.

Appellant has consistently admitted that he charged alcohol on his city credit card, in violation of city policy. He made the same statement and presented the same explanation for this action at the IA interview, the pre-disciplinary meeting, and his testimony in this appeal: he chose to avoid embarrassment and inconvenience by paying with the only card he had with him, in the absence of sufficient cash. Likewise, Appellant has explained his delay in repaying the city for his alcohol purchase in the same manner throughout this process. Appellant stated that he believed the city would not be out any money if he paid the entire Visa bill off when due, and then gave the city his check for the wine at the same time he received his expense reimbursement.

At the pre-disciplinary meeting, Appellant admitted paying for the wine with his city credit card because he did not have enough cash, but said he did so with the intent to pay it back. "My plan was to give a check in exchange of city check. I thought it would be just that easy." [Exh. 24.] At the Oct. 23, 2008 Internal Affairs interview, Appellant made a similar statement: "I put it on the credit card with intent to pay it back. My plan was to pay back when I get check from them, so basically just swap the checks." [Exh. 17.] At hearing, Appellant testified that he violated city policy by paying for wine with the city credit card, but thought it was not "a big deal" if he added it to the expense report, paid the Visa statement when it was due, then paid the city for the wine included on the expense report after he received his reimbursement check. Since Appellant's statements have been consistent on this issue, the Agency did not prove that Appellant knowingly made a false statement during the IA or the pre-disciplinary meeting regarding his use of the city card to buy the wine.

Ms. Malatesta also found that Appellant was guilty of dishonesty in violation of § 16-60 E.3. in that he made a false statement to his superiors by including in his official expense report a charge for alcohol, and certifying by his signature that the expenses were incurred while on official duty. She determined that Appellant's employment test results showed he had no problem in comprehending English, and that he understood the policies against purchasing alcohol with a city credit card.

Appellant admitted at hearing that he wanted to pay for the wine because he had to choose between two evils, and opted to use the city card in order to avoid embarrassment or imposing on Dep. Gatchis. There is no dispute that Appellant intended to and did pay for the wine, knowing that it violated the department's extradition policy. It is also uncontested that Appellant's signature on the expense

report constituted his statement that the wine was an "[expense] incurred while on official duty." [Exh. 28.]

Appellant argues that his actions were not dishonest because the city suffered no financial loss: he paid the bill when it was due, and gave Ms. James his check for the wine bill at the same time he received reimbursement on his expense report. However, Appellant does not deny he used the city's credit for a month to pay for the wine. Moreover, it was his certification that the wine receipt constituted an official expense that is the basis for the Agency's finding of dishonesty. Appellant does not dispute that he submitted the receipt as an official expense, knowing it was not one. The harm done by such a false statement is that 1) it was submitted to the District Court as a reimbursable extradition cost to the defendant or surety, 2) it was processed by the Controller's Office as an official expense, and 3) the city issued a check to Appellant for the amount of the wine, despite the strong and clearly understood policy against charging alcohol. This financial transaction is a matter of public record[3], and could reflect negatively on the Agency and the city. The fact that Appellant immediately repaid the city's check led Ms. Malatesta to remove the theft charge, but it does not undo the effects of the original false certification on the expense report.

Appellant testified, and argues in closing, that he included the wine bill on his expense report because he believed he should submit all receipts with his expense report, even those for personal expenditures. However, Appellant did not act in accordance with that belief regarding the Wal-mart charge included in the same Visa bill. Appellant admits that he did not include that charge in the expense report because it was made for personal items. This admission demonstrates that Appellant understood and acted upon his understanding of the extradition policy that "[o]nly official expenditures will be reimbursed", and only authorized expenses "shall be submitted" on the expense report. [Exh. 10-1.] Even if Appellant was unaware of the mistaken Wal-mart purchase until he received the Visa bill on July 21st, Appellant readily admitted at hearing that it was always his intention to submit the wine bill on the expense report, and pay the city back for the wine only after he received his reimbursement check. I conclude that Appellant knew that charges for personal items are not official expenses for which he could seek reimbursement. [Testimony of Appellant; Exh. 16-72, -73.]

Therefore, the Agency met its burden to prove that Appellant violated § 16-60 E.3. by virtue of his claim for reimbursement for alcohol on his official expense report. Based on this same evidence and analysis, the Agency established that Appellant violated Departmental Rule 200.4, which prohibits Deputy Sheriffs from departing from the truth or falsifying any report. Ms. Malatesta also found that Appellant's knowingly false statement made on an official report for financial advantage failed to adhere to the Code of Ethics' call for honesty. However, Ms. Malatesta noted that the Code of Ethics requiring employee to be "ethical and honest in everything we do or say" is an aspirational rule; i.e., a guiding principle rather than an enforceable rule. The evidence supports her findings of dishonesty under both § 16-60 E.3 and D.R. 200.4.

[3] "E]mployees should be aware that all expenditures are a matter of Public Record." [Exh. 9, Extradition Agreement.]

3. Failure to observe other departmental regulations

The Agency also found that Appellant's conduct violated a number of departmental regulations not involving honesty.

First, he was found to have used department-issued equipment in an unauthorized manner, in violation of Departmental Rule (D.R.) 300.16. Appellant concedes that the travel card agreement prohibits charging personal items on the card. [Exh. 8.1, ¶ 4.] The extradition agreement signed by Appellant affirms his agreement that "I will not use my travel card for personal business". [Exh. 9.] The extradition memo states, "[a]lcoholic drinks . . . are not authorized expenses." [Exh. 1-2, ¶ c.2.] The written extradition procedure repeats, "[a]lcoholic drinks . . . are not covered expenditures." [Exh. 11-3.] Copies of all of the foregoing were given to and reviewed by Appellant prior to both of his extradition trips. [Testimony of Appellant.]

It is undisputed that Appellant paid for alcohol with his city credit card. Appellant admitted he knew on July 14th that it was a violation of the travel card agreement and departmental policies to pay for the wine with his city card. Likewise, Appellant was aware that departmental policies prohibited him from including unauthorized expenses, including alcohol, on his official expense report. "All receipts for *authorized* incurred expenses shall be submitted in itemized form for reconciliation". . . Only *official* expenditures will be reimbursed." [Exh. 10-1, emphasis added.] Appellant also admitted that he used the card twice on that trip for unauthorized personal expense. Therefore, it is determined that the Agency proved Appellant violated D.R. 300.16 by his use of the city credit card to pay for alcohol on July 14 and for personal items at Wal-mart on July 15, 2008.

Next, the Agency found that Appellant violated its extradition trip procedures, travel card agreement, and Code of Ethics by virtue of his purchase of alcohol with a city credit card. An administrative rule is an "officially promulgated agency regulation that has the force of law. Administrative rules typically elaborate the requirements of a law or policy." Black's Law Dictionary (8th ed. 2004). "[R]ule-making occurs when an administrative agency adopts a statement of general applicability with future effect implementing, interpreting, or declaring law or policy, or setting forth a procedure or practice requirements of an agency." Hartford Fire Ins. Co. v. Colorado Div. of Ins., 824 P.2d 76, 79 (Colo. App. 1991). The Agency failed to offer any evidence that employees have been given notice that the extradition procedure memo and travel card agreement are to be enforced as regulations, policies or rules within the meaning § 16-60 L. See In re Stone, CSA 70-07, 10 (10/23/07). Likewise, the Code of Ethics' exhortations to be accountable and use good judgment are conceded to be aspirational principles rather than enforceable rules. I therefore cannot conclude that Appellant violated a departmental regulation based on evidence that he exercised poor judgment or failed to be accountable, or that he violated extradition trip procedures and the travel card

agreement. I find that Appellant violated § 16-60 L. based on his violations of D.R. 200.4 and 300.16.

4. Conduct prejudicial to department

The Agency determined that Appellant's conduct was prejudicial to the good order and effectiveness of the Department, and had the potential to bring disrepute on the city. Conduct is prejudicial to the good order and effectiveness of an agency in violation of the first part of § 16-60 Z if it hinders the agency's ability to perform its mission. In re Compos, CSA 56-08, 15 (12/15/08).

Ms. Malatesta found that Appellant's use of the city card to buy alcohol caused embarrassment to his co-worker, and required Court Services staff to obtain verification of the nature of the expense.[4] The Agency presented no evidence that either result had any negative effect on the Department's ability to perform its mission. The officers performed their extradition duties, and Court Services successfully and accurately processed the extradition expenses.[5] Based on the evidence, I find that the Agency failed to prove a violation of the first part of this rule.

The second clause of § 16-60 Z is violated if the conduct "brings disrepute on or compromises the integrity of the City", which requires proof of actual injury to the city's reputation or integrity. In re Compos, CSA 56-08, 15 (12/15/08), *citing* In re Catalina, CSA 35-08, 8 (8/22/08). Here, Ms. Malatesta concedes that the public nature of expense reports creates only a potential harm to the city's reputation. The evidence is therefore insufficient to establish a violation of either provision of § 16-60 Z.

5. Appropriateness of level of discipline

The purpose of discipline for misconduct at the Denver Sheriff's Department is to give the employee an opportunity to correct behavior, and render a reasonable penalty based on the nature of the misconduct and the employee's disciplinary and employment record.

Ms. Malatesta considered Appellant's misuse of the card and dishonesty as the most serious of the proven acts of misconduct, and his carelessness in using the card at Wal-mart as less serious. Dishonesty goes to the essence of the job of Deputy Sheriff, and false statements to superiors are considered among the most serious rule violations, eroding the trust that needs to exist within the law enforcement community. [Testimony of Sheriff Department Director Lovingier, Ms. Malatesta.] Dep. Gatchis stated during his interview that the experience negatively affected his trust in Appellant. [Exh. 19.] The Agency determined that Appellant was dishonest during the internal

[4] Ms. Malatesta also found that Appellant accused Dep. Rader of deceit, which itself creates problems for the Agency. Dep. Gatchis made this statement during his IA interview, but the Agency did not include the allegation in the pre-disciplinary or disciplinary letters. It is therefore not considered here. [Exhs. 1, 2, 19.]

[5] While the bill for extradition costs includes the unauthorized charge, there is no evidence that the defendant or surety was required to pay that charge. [Exh. 35.]

investigation and pre-hearing meeting, and submitted a false expense report to the Agency. I have upheld only the latter finding of dishonesty.

Ms. Malatesta also found that Appellant told no one about his misuse of the card, and took other steps to avoid detection. Both Director Lovingier and Ms. Malatesta concluded that Appellant's explanations during the IA and pre-disciplinary proceedings lacked credibility based on his actions. Ms. Malatesta observed that Appellant demonstrated a desire to "confess and avoid": i.e., admit just enough to appear honest. Based on his lack of previous discipline, she eliminated termination as an appropriate punishment, opting instead to give Appellant a sixty-day suspension to both demonstrate the seriousness with which the Agency considers dishonesty, and give him the opportunity to learn from the experience and improve his behavior.

Based on a de novo review of all the evidence presented, I have determined that the Agency proved by a preponderance of the evidence that Appellant was dishonest in his certification on his expense report in violation of § 16-60 E and D.O. 200.4, misused Agency equipment - the city credit card - in violation of D.O. 300.16, and was careless in using his city card at Wal-Mart in violation of §16-60 B. I have found that Appellant was not dishonest during the departmental proceedings, that his noncompliance with the extradition and travel card agreements are not separate violations of departmental regulations under § 16-60 L, and that he did not violate § 16-60 Z. I have excluded from consideration the evidence related to whether Appellant told Dep. Gatchis, "Rader and I did it" because it appears the disciplinary decision did not consider that information, and the disciplinary letters did not give Appellant notice of that allegation.

Appellant argues that the penalty of sixty days should be reduced based on the Agency's failure to prove a number of rule violations asserted in the disciplinary letter, and evidence of mitigation and remorse related to the stated purposes of discipline under § 16-20, citing In re Weeks, CSA 26-09 (7/20/09).

The first factor listed in § 16-20 for determining the level of discipline is the gravity of the offense. Here, the Agency established one of the allegations of dishonesty and failed to prove the other. While a false statement on an official expense report is obviously a serious matter, the Agency did not prove that Appellant was dishonest during the Internal Affairs investigation and the pre-disciplinary proceedings, a matter of at least equal importance to the smooth functioning of the Department. The Agency proved Appellant was careless under § 16-60 B, but failed to prove Appellant engaged in conduct prejudicial to the Agency or city under § 16-60 Z. Clearly, bringing disrepute on the city and interfering with the Agency's ability to perform its mission would have been much more serious matters than the inadvertent, and promptly corrected, use of the city credit card for personal purchases at Wal-mart. The Agency also proved Appellant's misuse of the card and expense account also violated two separate departmental regulations. However, I have found that those same actions did not also violate the Agency Code of Ethics or two cited Agency documents that were not proven to be enforceable regulations. In sum, the Agency proven approximately half of

its asserted rule violations, and, in one instance, failed to prove the more serious allegation.

The next factor to be considered in determining the type and level of discipline is Appellant's past record. "Wherever practicable, discipline shall be progressive" in order to provide an employee with an opportunity to correct behavior. § 16-50 A.1. Here, Appellant has had no prior discipline during his three and a half years of employment up to the time of this discipline. [Exh. 1-4.] His last performance review showed a rating of successful, and his periodic reviews were successful or exceptional. [Exhs. 16-42 to -55.]

Finally, the rule states that discipline must be of the type and level "needed to correct the situation and achieve the desired behavior or performance." § 16-20. Ms. Malatesta imposed a sixty-day suspension based in part on her observation that Appellant minimized the seriousness of his conduct during the investigation. In some respects, an employee attending disciplinary proceedings must play three conflicting roles: witness, advocate and defendant at sentencing. Likewise, the decision-maker must consider the employee's statements in support of separate findings as to the facts, rule violations, and appropriate penalty. An employee's statements in mitigation may be considered evidence of lack of remorse at the penalty phase. However, here Appellant has consistently admitted he violated policy by using his credit card to purchase wine. He correctly informed the disciplinary panel that he paid the Visa charge and reimbursed the amount claimed under the expense report. While Appellant did say he delayed retrieving his reimbursement check because it was "not a big deal", I conclude that this statement was intended to explain his delay, not an attempt to avoid the consequences of his actions or minimize his admitted misconduct.

In light of these findings and the proven rule violations, I must determine the appropriate level of discipline. Director Lovingier testified that he reviewed the entire record in this matter and concluded that Appellant was disingenuous. He recommended that the allegations of dishonesty, prejudicial conduct, misuse of city equipment and carelessness should be sustained. On that basis, it was his recommendation that a thirty-day suspension was appropriate under the circumstances. Given the seriousness of the proven misconduct, Appellant's lack of previous discipline, Appellant's efforts at mitigation and statements of remorse, I conclude that a thirty-day suspension is appropriate to achieve the purposes of discipline under the Career Service Rules.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency action dated March 16, 2009 is MODIFIED to a 30-day suspension.

DATED this 1st day of October, 2009.

Valerie McNaughton
Career Service Hearing Officer