

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

Appeal No. 337-01

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

TERRY T. WORTHAM, Appellant

Agency: DEPARTMENT OF PUBLIC WORKS, TRAFFIC OPERATIONS DIVISION,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

INTRODUCTION

This matter comes before the Career Service Board on appeal by Terry T. Wortham (hereinafter "Appellant") filed September 27, 2001. Appellant challenges the Department of Public Works, Traffic Operations' (hereinafter "Agency") decision to terminate his employment for cause. The Agency maintains that Appellant was dismissed because he was absent without leave as a result of incarceration for matters of his own doing. The Agency asserts that as a Crew Supervisor, Appellant must not only be available to perform his supervisory duties, but must also set a good example for his employees and favorably represent the City and County of Denver as a public employee.

Appellant asserts that his jailing arose from matters of his past personal life which occurred prior to his promotion to the position of Crew Supervisor, not recent wrongdoings. Appellant argues that he diligently tried to keep the Agency notified of his status while in jail and diligently pursued his own expedited release so that he could return to work as promptly as possible. He seeks reversal of his termination from the position of Crew Supervisor, or in the alternative, the modification of that decision to suspension, demotion, or some other form of discipline short of termination.

A hearing in this matter was held before Personnel Hearing Officer Joanna L. Kaye ("hearing officer") on November 29, 2001 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Sybil R. Kiskan, with Director of Traffic Operations Robert A. Kochevar, and Public Works Human Resources Director Jan Meece, both present for the entirety of the proceedings and serving as advisory representatives for the Agency. Appellant was present and represented himself, with assistance by Crew Supervisor and Leadworker Roger Marez.

Witnesses for the Agency included Appellant as an adverse witness, and Mr. Kochevar.

Appellant's witnesses included Mr. Marez, Nicole Anderson, Operations Supervisor Henry Michael Contreras, and Appellant himself.

The parties stipulated to the admission of all the previously endorsed exhibits, including Agency Exhibits 1 through 6 and Appellant's Exhibits A through G. Agency Exhibits 7 and 8 were offered and admitted on rebuttal without objection.

For purposes of the Findings and Order, the Rules of the Career Service Authority shall be abbreviated as the "CSR" with a corresponding numerical citation.

ISSUES

1. Whether the Agency demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
2. If so, whether Appellant rebutted the Agency's showing of just cause by demonstrating by a preponderance that his absence from work was not of his own doing or was otherwise beyond his control.
3. If not, whether Appellant's termination is reasonably related to the seriousness of the offense given the totality of the evidence.

FINDINGS OF FACT

1. Appellant was an employee of the City and County of Denver for approximately 7 years. He had been employed by the Agency in this case since February of 1997. He began in the position of Senior Utility Worker for the Agency's Traffic Operations Division, Pavement Markings Section. At the time of his termination, Appellant was a Crew Supervisor for that Section, having been promoted to that position in July of 2000. Appellant's work quality is not at issue in this case. He reportedly engaged in volunteer functions regularly and was entrusted with the responsibility of training new employees.
2. On April 7, 1999, Appellant was ticketed for Driving While Ability Impaired in Arapahoe County Court Case No. CO711999T (hereafter "DWAI case") (*see*, Exhibit B p. 5) and his driver's license was temporarily suspended. After Appellant exhausted an uncertain portion of sick leave, the Agency placed Appellant on unpaid leave during the suspension period, from June 14 to September 13, 1999. The Agency elected not to pursue disciplinary action against Appellant for this incident.
3. As part of his responsibilities under the subsequent plea agreement in the DWAI case, Appellant was obligated to perform 20 hours of community service. Appellant had gotten custody of his children around that same time and had no babysitting arrangements. He sought an extension of time within which to perform the community service obligation. An extension was granted, but Appellant failed to fulfill the obligation within that time or seek

additional extensions. Appellant ultimately did not fulfill this community service obligation.

4. From December 2 to December 10, 1999, Appellant was placed on unauthorized unpaid leave for a total of 56 hours. While there is some dispute as to the reason for this period of leave, Appellant testified that he was arrested for some reason he cannot recall at the beginning of this time period. Agency files suggest that Appellant was jailed for the duration of the leave period, but Appellant does not recall being incarcerated for the entire period.
5. On December 15, 1999, Field Operations Supervisor H. Michael Contreras issued Appellant a Verbal Warning for unauthorized leave (Exhibit 4). While Mr. Contreras was unable to recall the specifics of this Verbal Warning, he testified he would have issued it to Appellant for abusive leave practices. It is undisputed that Appellant received this Verbal Warning.
6. On February 17, 2000, Agency Director Robert Kochevar signed off on a Memorandum (Exhibit 5) placing Appellant on notice that his sick and vacation leave balances were running low. The Memo set forth the requirements of notification and documentation justifying sick leave, and reminded Appellant of the advance authorization requirements for the use of vacation leave. The Memo also noted that Appellant was engaging in numerous incidents of tardiness. It placed Appellant on notice that any additional leave difficulties would be subject to further progressive discipline. The Memo requested that Appellant monitor his leave use habits in the future. It is undisputed that Appellant received this Memo and was made aware of its contents at that time.
7. On February 26, 2000, Appellant was taken into custody on assault charges in Englewood Municipal Court Case No. E-333699DV (hereinafter "DV case"). Appellant eventually pled this case and was to complete 36 hours of anger management classes as part of the dispositional requirements. Appellant completed all but two of the classes, representing approximately 32 of the 36 required hours. Appellant was subsequently promoted to the position of Crew Supervisor approximately five months later, in July of 2000. Appellant testified he focused on his new job and never finished the remainder of his anger management class obligations.
8. On April 18, 2000, Mr. Contreras issued a Written Reprimand to Appellant (Exhibit 6) for failing to report to work and failing to notify his direct supervisor. This document indicates Appellant left a message on Superintendent Phil Torres' phone machine at an unstated time stating "I won't be in today, I have something to do." Appellant challenges having ever said such a thing and the allegation is based on hearsay, but he did not appeal the Written Reprimand at the time of its issuance and does not deny his absence from work that day. The Written Reprimand reminded Appellant that this was a violation of leave procedure, and that Appellant had been counseled and warned on numerous prior occasions as to the appropriate procedures for requesting and using leave. It further placed Appellant on notice that any additional leave difficulties would be subject to further progressive discipline. It is undisputed that Appellant received this notification and was made aware of its contents at that time.

9. Appellant testified that at some point during the fall of 2001, over a year after his appointment to the position of Crew Supervisor, Appellant had a conversation with Mr. Marez and Mr. Contreras during which he expressed something to the effect that he had unfinished court business which he needed to address before it caught up with him.
10. The Agency established through the testimony of its witnesses that the busy season for the Pavement Markings Section is during the warmer months of the year, from April through October. August and September are times of additional increased workload due to the preparation of roadways near schools for the increased foot and vehicle traffic during the school year. The Agency further established that in August of 2001, just before Appellant's incarceration, two new employees had been hired, the training for whom Appellant was responsible.
11. There was no evidence tending to establish any specific work in Appellant's area had not been done as of the middle of August, 2001, but Mr. Kochevar testified that road markings regularly become worn and there is an unpredictable influx of work orders for the Section.
12. On August 15, 2001, Appellant and his wife, Nicole Anderson, were pulled over by a patrol officer because the temporary tags on the car they had recently purchased were faded. When Appellant provided the officer with his license, the license check revealed two outstanding bench warrants. The first was for probation revocation for Appellant's failure to do the required community service in the 1999 DWAI case (*see*, Exhibit B, p. 5). The second was for probation revocation for Appellant's failure to complete the anger management course arising from the 2000 DV case (*see*, Exhibit 7). Appellant was taken into custody at that time and was incarcerated at the Denver City Jail.
13. Prior to being taken into custody on August 15, 2001, Appellant gave Ms. Anderson several cell phone, work and pager numbers for Crew Supervisor/Leadworker Roger Marez, Appellant's immediate supervisor Mr. Contreras, and Mr. Contreras' supervisor, Mr. Torres. Appellant instructed Ms. Anderson to aggressively try to contact the supervisors and tell them he was being detained for an indefinite period of time. Ms. Anderson immediately began calling the numbers. She successfully contacted Mr. Marez at home that evening, and Mr. Contreras at work on the following morning of August 16, 2001, at 6:05 a.m.
14. Appellant tried unsuccessfully using the jail "blue" phones to contact the Agency directly to report on his absence. Presumably the City's (720) area code, being the same as the jails, was not recognizing the phone numbers as local because the calls were being placed from within the City's telephone system. Appellant made numerous requests for help with the phone system but was unsuccessful in getting through to the Agency.
15. August 17, 2001 was Appellant's scheduled day off. Presumably August 18 and 19 fell on the weekend. During this period of time, Appellant continued to try to reach Ms. Anderson as well as the Agency, but was unable to do so because of the telephone difficulties described above. Ms. Anderson therefore did not know what Appellant's status was.
16. On August 20, 2001, Appellant was finally able to reach Ms. Anderson collect while she was at work. Appellant updated Ms. Anderson based on his understanding of the status of

his incarceration. Ms. Anderson again contacted Mr. Contreras and passed this information along. Ms. Anderson thereafter continued to call the Agency on Appellant's behalf and update them as to his status whenever possible.

17. Appellant was then transferred to Denver County Jail on August 20, 2001. Once again, Appellant experienced the same difficulty with the blue phones at the County Jail. Appellant implored the Deputies there to assist him with personally contacting his workplace to no avail.
18. On August 22, 2001, Appellant was transferred to Arapahoe County Jail, that being the original jurisdiction of the offenses. There he was permitted to make 5 free phone calls. He first tried calling Mr. Contreras at home, but the line was busy. He then called Mr. Marez to inform him that Appellant had a court date of August 31, 2001. His third call was to his grandmother, in order to inform his family of his whereabouts. Fourth, he called Ms. Anderson. The destination of Appellant's fifth phone call was overlooked during his testimony.
19. After Appellant made his phone calls he was booked into the jail and once again was restricted to use of the blue phones. Once again, Appellant experienced the same difficulties as before, and implored the Deputies for assistance with use of the phones. The Deputies advised Appellant to write a "KITE" (form requesting assistance while in jail). Appellant filled out a KITE that day (Exhibit D, p. 1). Thereafter, Appellant wrote KITES every few days requesting assistance with use of the phones. (*See*, Exhibits B, D and F).
20. On August 30, 2001, the Agency sent Appellant a Notice of Contemplation of Disciplinary Action for numerous leave violations, including abandonment of his position since August 16, 2001, failure to notify his supervisor of absence prior to beginning of shift, and unauthorized absence from work, in addition to various charges of Appellant's failure to perform his duties as a result of his absence (Exhibit 1).
21. On August 31, 2001, Appellant was seen in court concerning the outstanding warrant on his DWAI case. Appellant received an Order of the Court granting work release (*see*, Exhibit B, p.5). It is unclear whether Appellant was seen in court on that day or some other date concerning the warrant in the DV case. At or around this court date, Appellant understood that his potential release date was November 20, 2001, but Appellant was uncertain of this date.
22. On August 31, 2001, Appellant wrote a KITE attempting to act on the work release granted that same day in the DWAI case (*see*, Exhibit B, p. 6). Appellant made additional such requests, and meanwhile also pursued a reduction of his jail sentence through various pleas to the judge in order to salvage his job (*see*, Exhibits D, pp. 2-5 and E). The documentation indicates that Appellant's request for work release was denied on September 6, 2001 (Exhibit D, p. 7). Appellant did not receive notification of this Order until September 14 (Exhibit D, p. 6). Appellant sent in a KITE the following day, September 15 (Exhibit D, p. 8), inquiring as to why his work release was denied. Appellant still had not received a response as of September 27. Appellant sent in another KITE that day (Exhibit D, p. 9). Deputy Vaught replied that Appellant's work release was denied because Appellant had not

- received a court order approving it. Appellant sent a copy of the Court Order (Exhibit B, p. 5) approving work release with another KITE the following day, September 28. Appellant again heard nothing as of October 7, 2001. He sent in another KITE, to which Deputy Vaught again responded he did not have a court order approving work release (Exhibit D, p. 11). On the following day, October 8, Appellant sent in a KITE pointing out that he had already provided such a court order and requesting its return (Exhibit F, p. 1).
23. Meanwhile, Appellant's predisciplinary meeting was held on September 11, 2001. Present were Mr. Kochevar, Mr. Torres, Public Works Human Resources Director Jan Meece, and Assistant Director of Traffic Operations Matt Wager. Appellant himself did not attend due to his incarceration and Mr. Marez represented Appellant at this meeting. Mr. Marez told the supervisors at the meeting that Appellant might be released by November 20, requested leave without pay for Appellant, and otherwise appealed to them on Appellant's behalf.
 24. The Agency sent Appellant a letter of dismissal on September 17, 2001 (Exhibit 2).
 25. Appellant appealed to the judge to reconsider and reduce the length of his sentence in an attempt to save his job on September 26, 2001 (Exhibit E). This request was denied by Order of the Court on October 10, 2001 (Exhibit F, p. 2).
 26. Appellant filed his appeal with the Career Service Authority on September 27, 2001, despite that he was still incarcerated at that time.
 27. Appellant continued to send in KITE requests pleading for assistance with the phone system in calling City and County numbers. The Jail finally acknowledged that the phone problem was legitimate on October 27, 2001. (See, Exhibits F, p. 4, and G).
 28. Appellant was released from jail on November 23, 2001, having served the imposed sentence.

PRELIMINARY MATTERS

1. The Hearing Officer's Jurisdiction

The hearing officer finds she has jurisdiction to hear this case as a dismissal case, pursuant to CSR Rule 19-10 b), as follows in relevant part:

Section 19-10 Actions Subject to Appeal

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

- ...b) Actions of appointing authority: Any action of an appointing authority resulting in dismissal... which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

Jurisdiction over Appellant's dismissal was not disputed by either party to this case.

2. Burden of proof

It has been previously established that the Agency responsible for terminating a career service employee bears the burden of establishing, by a preponderance of the evidence, that it had just cause for taking disciplinary action. *See, In the Matter of the Appeal of Vernon Brunzetti*, Appeal No. 160-00 (Hearing Officer Bruce A. Plotkin, 12/8/00). The Agency must also demonstrate that the severity of discipline is reasonably related to the offense in question. *See, In the Matter of Leamon Taplan*, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99). The burden of proof was not disputed by either party to this case.

3. The Agency's Motion for Partial Summary Judgment

During the course of Appellant's testimony it became clear that the evidence he offered tended to suggest that he should have been granted a work release pursuant to the Court Order in Exhibit B as early as August 31, 2001. However, despite this Court Order, Appellant's repeated pleas for work release were denied by the Deputy Sheriffs responsible for his incarceration (*see*, Exhibits B, D and F). Since this date precedes the date of the predisiplinary meeting on September 11, 2001, and since the Agency asserted that the indefinite nature of Appellant's unavailability was critical in its decision, the potential error might have impacted the Agency's decision in a manner prejudicial to Appellant's case.

The documents themselves did not make clear on their face that Appellant's continued incarceration after August 31, 2001 might have been erroneous. In light of this apparent surprise, the Agency was permitted to inquire into the matter during recess. It procured rebuttal documentation establishing that the Court Order of August 31, 2001 represented the disposition of only one of the two cases for which Appellant was arrested on outstanding warrants. Thus, while the judge granted Appellant's work release in the DWAI case, apparently no such order in the DV case had been issued. It was the absence of this order upon which the Deputies denied Appellant a work release during his incarceration. (*See*, Exhibits 7 and 8.)¹

Upon presentation of this rebuttal evidence, the Agency moved for Summary Judgment on the limited issue of whether Appellant had proved his incarceration after August 31, 2001 was erroneous and therefore arguably beyond his control. The hearing officer found that the Agency's rebuttal documentation demonstrated by a preponderance that the absence of a court order in the DV case was the basis for the denial of Appellant's work release. The hearing officer concluded that Appellant had not demonstrated his continued incarceration after August

¹ Appellant pointed out that a permanent restraining order ("PRO") was one of the reasons given in Exhibit 8 for the denial of his work release in the DV case. Appellant argued that he did not know such a PRO was in place. The hearing officer found this claim credible, particularly in light of the fact that Appellant and Ms. Anderson, the alleged victim of the DV incident, presently live as husband and wife. However, the PRO was only one of several reasons listed in Exhibit 8 for the denial of Appellant's work release request. It was Appellant's burden to rebut the Agency's demonstration that it had just cause to discipline Appellant. Appellant did not establish that the PRO was not still legitimately in place at the time his work release was denied, and he furthermore did not establish that but for the PRO, his work release would have been granted. Appellant therefore failed to demonstrate that the County's failure to grant him work release was in error.

31, 2001 was in error, and granted the Agency's Motion for Summary Judgment in favor of the Agency on this issue.²

DISCUSSION

1. The Agency's Case in Support of Appellant's dismissal.

a. Rules the Agency alleges Appellant violated.

The Agency asserts Appellant violated the following relevant portions of CSR Rule 16, DISCIPLINE:

Section 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...

- 1) Gross negligence or willful neglect of duty.
- ...12) Failure to report for assigned shift and failure to notify immediate supervisor of absence prior to start of shift (no show-no call) for three (3) consecutive workdays. Such conduct constitutes job abandonment.
- ...13) Unauthorized absence from work...
- ...20) Conduct not specifically identified herein may be cause for dismissal.

Section 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline.... Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline...

- ...2) Failure to meet established standards of performance including either qualitative or quantitative standards.
- ...4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.
- ...5) Failure to observe departmental regulations (set forth below).

² There was additional discussion in the record concerning whether the Sheriff's Department had the authority to deny work release in the face of a standing court order granting it. However, the determination that there was no such court order in one of the two cases for which Appellant was serving a sentence rendered this issue moot.

- ...10) Failure to comply with the instructions of an authorized supervisor.
- 11) Conduct not specifically identified herein may also be cause for progressive discipline.

* * *

The Agency further cites Public Works Rules and Regulations (*see*, Exhibit 3), which state:

2. WORK SCHEDULES

B. Time and Attendance

It is the employee's responsibility to be at work each day and to report an absence in accordance with the Agency/Division procedures.

...D. Attendance and Punctuality

2) Non-Exempt

It is the non-exempt employee's responsibility to report to work at the scheduled starting time each working day. Reporting after the scheduled starting time may be recorded as tardiness, and habitual tardiness is cause for disciplinary action. Should a situation arise where an employee expects to be late, it is the employee's responsibility to contact his/her supervisor immediately so that leave may be authorized in cases of a bonafide emergency, as determined by the immediate supervisor. Reporting expected tardiness must be done in accordance with Agency/Division procedures.

3. LEAVE AND HOLIDAYS

...It is the employee's responsibility to follow the procedures for requesting leave. If those procedures are not followed, the employee may not receive the leave requested...

A. Requesting Leave

For all leave, except sick leave, a written request on the leave authorization form, indicating the kind of leave, duration and dates of departure and return must be approved prior to taking the leave...

B. Vacation Leave

...Vacation leave is requested, in advance, by submitting a leave authorization form to the supervisor for approval. Requests for emergency vacation leave will be granted only with a supervisor's approval.

C. Sick Leave

Sick leave may be used when an employee is incapacitated by sickness or injury, or for necessary care and attendance during sickness of an immediate family member, or for death of a member of the employee's immediate family...

b. The Agency's arguments.

The Agency argues that Appellant was responsible for fulfilling the terms of his probationary agreements, and that his failure to do so was the cause of the warrants leading to his incarceration. It argues that Appellant therefore negligently brought his absence on himself. The Agency posits that Appellant's inability to report to work and to follow leave procedures was of his own doing, constituting gross negligence or willful neglect of his duties, job abandonment, failure to meet established standards of leave use requirements, and failure to observe departmental regulations.

The Agency further asserts that Appellant, as a Crew Supervisor, is not only required to be present for the training of new employees and supervision of the crew, but is responsible for conducting himself as a role model to his employees, and as a representative of the government to the public at large. It argues that Appellant's probation violation and incarceration therefore constitute a failure to maintain the satisfactory standards of working relationships he should maintain with his crew and with the public at large.

In addition, the Agency underscores that Appellant has a history of progressive disciplinary actions relating to leave abuse problems for which he has been repeatedly warned, and further that Appellant has been absent from work on several occasions relating to prior violations of the law. It posits that Appellant's absence on this occasion is therefore a violation of the repeated directives of his supervisors in those actions that he follow leave policies and standards.

Finally, the Agency argues that it cannot be expected to hold positions open indefinitely for individuals who are incarcerated for uncertain periods of time, as was the case here.³

2. Appellant's Response.

Appellant responds with a strong plea that his incarceration was a circumstance beyond his control and he did everything in his power to correct the situation. He first points out that the warrants were for charges brought upon him one to two years ago, before his appointment as Crew Supervisor, and that he has engaged in no further similar activity since these incidents. He points out that his leadership skills, work quality and performance record while on the job were good as evidenced by his supervisory appointment and training responsibilities.

Appellant convincingly testified that he has gone to great lengths to live up to his new position, to put his life back together, and to make good on his honor as a respectable role model to his crew and the public. He implores the authorities to consider these elements of his circumstances in the deliberations of his dismissal.

³ The Agency offered testimony and evidence tending to establish that Appellant's failure to contact his supervisors directly to report his inability to report to work, was one of the considerations in its determination that he violated the Agency's leave policies. However, upon Appellant's presentation of his persistent attempts to contact the Agency during his incarceration, the Agency offered rebuttal testimony establishing that it would have taken the same action despite Appellant's failure to himself contact the Agency, in light of numerous other considerations.

3. The Hearing Officer's Analysis of Just Cause.

The hearing officer found Appellant's account of his ordeal while in jail to be very persuasive. His diligent attempts to get through to the Agency by telephone, to get a work release and his pleas to achieve a reduction of his sentence for the sake of his job are admirable.

The extended incarceration of an individual is usually presumed legitimate under the constitutional controls of due process. However, depending on the stage of the process and other circumstances, incarceration in itself might or might not be considered sufficient to establish a *prima facie* case of the abandonment of an individual's position justifying disciplinary action for leave violations. This is at most a rebuttable presumption. The controlling CSR and Public Works Rules clearly suggest that certain allowances should be made in cases of emergency when circumstances are beyond the employee's control.

An individual is not "guilty until proven innocent." An individual may be incarcerated for many reasons, not all of which are of his own doing. There may be evidence that his arrest and detention were in error. For instance, the charges against him may be false. The charges may subsequently be dropped for lack of evidence, or dismissed upon his acquittal after trial. His conviction may be reversed on appeal, or upon the discovery of new evidence exonerating him. A clerical error may result in an improper extension of his incarceration. Thus, an employee must be permitted the opportunity to present evidence tending to establish by a preponderance of the evidence that his incarceration was erroneous and beyond his control.

The decision-maker should further be wary even of a guilty plea as establishing that an individual's incarceration was not legitimately beyond his control. It is common knowledge that individuals who maintain complete innocence are compelled to plead guilty to a lesser offense in order to avoid the expense of a criminal defense, even if the charges are a total fabrication and might have been proven so at a trial. Under circumstances such as these, the individual is absent through no wrongdoing of his own, and he cannot be held accountable for his inability to be present at work under the Career Service Rules.

However, once an individual has accepted a plea, he becomes responsible for fulfilling the terms of that agreement, the underlying circumstances notwithstanding. In this case, it was Appellant's own negligent failure to dispense with his prior affairs, as ordered by the court, which caused the warrants to be issued and brought him to be in jail. While Appellant's story is both persuasive and moving, it is equally troubling that Appellant apparently took these court-imposed obligations so lightly as to simply abandon them in the first place. Appellant has admitted that it was his responsibility to fulfill the terms of his probationary obligations, but states that he "got busy with life." This is not to minimize Appellant's complications with fulfilling the terms of his probation agreements. But his abandonment of them was not a reasonable response to those complications.

Therefore, by Appellant's own admissions, he is responsible for the events leading to the issuance of the warrants, and thus for his inability to be present at work or request leave as required by the governing regulations. The hearing officer concludes that Appellant's incarceration was of his own doing and was within his control. It was legitimate and not erroneous. Therefore, the Agency has demonstrated just cause for disciplining Appellant.

4. Severity of the Discipline.

The Agency posits that its termination of Appellant was proper under the circumstances of this case. First, Appellant had a prior history of absence from work, at times due to his incarceration for various alleged offenses. He had other leave difficulties resulting in a Verbal Warning on December 15, 1999 (Exhibit 4), a Memorandum setting forth the requirements for leave use on February 17, 2000 (Exhibit 5), and a Written Reprimand on April 18, 2000 (Exhibit 6).

Second, Appellant had subsequently been appointed Crew Supervisor, and thus was held to a higher standard at the time of the incident in question. The Agency argues that Appellant sets an example for his crew and serves as a representative of city government to the public at large.

Third, the Agency argues it cannot be expected to hold Appellant's position indefinitely where his unavailability was of his own doing. The Agency argued that this would set a dangerous precedent, especially where supervisory positions are at issue. The supervisory employee's presence at work is critical to the smooth operation of the crew he supervises, and his indefinite absence places an undue hardship on the Agency to fill the position for an uncertain period of time.

Appellant responds that the Agency should not consider actions Appellant had taken before he straightened out his life and was awarded his promotion. He argues that any such infractions for which he was not previously disciplined should not be considered as part of this action. He underscores the fact that he has not had any such problems since his appointment to the position of Crew Supervisor and has taken this additional responsibility very seriously.

Appellant's assertion that he should not continually be held accountable for his past wrongdoings is belied by the evidence and controlling regulations. Appellant's failure to abide by the court orders governing his probation is not so remote in time that it should be disregarded. On the contrary, he continued to neglect these matters right up to the time of his arrest on the outstanding warrants. It is this continuing neglect which resulted in Appellant's arrest, not incidents in his remote history. In addition, the CSR Rules prohibit consideration of disciplinary actions more than five years prior to the incident in question, unless additional such offenses took place within the most recent five-year period. *See*, CSR Rule 16-40 D. All of the prior progressive discipline in this case took place within the past three years, and its consideration is therefore permitted and appropriate under the Rules.

Appellant further urges that if the hearing officer is to consider Appellant's progressive disciplinary history, she should likewise consider the fact that certain steps in the progressive disciplinary process have been skipped. That process is set forth here:

Section 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; and
- e) Dismissal, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority.

The hearing officer is sympathetic to Appellant's plea for some lesser form of punishment commensurate with the next step in progressive discipline, such as a long-term suspension without pay or an involuntary demotion. Given the Agency's argument that Appellant's supervisory status enhanced the seriousness of its action, it is somewhat troubling at first blush that the Agency did not simply remove that supervisory status by demoting Appellant, particularly in light of his obviously sincere efforts to rectify the situation while in prison. However, while the hearing officer might agree that such lesser disciplinary actions might also have been reasonable under these circumstances, her jurisdiction only extends to the determination of whether the Agency's disciplinary action is within the scope of reasonable alternatives. If it is, the hearing officer cannot reverse or modify the decision. *See, In the Matter of Leamon Taplan* (above).

The CSR Rules governing progressive discipline are permissive, not mandatory. CSR Rule 16-21, Progressive Discipline, states:

- 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.

The hearing officer finds the Agency's concerns of the heightened responsibilities of public employees to be legitimate. As the hearing officer has held in prior cases, Career Service employees are representatives of the government. They must be held to a higher level of public scrutiny and accountability because of this, whether they hold line or supervisory positions. *See, In the Matter of the Appeal of Louis Vigil*, Appeal No. 06-01.

In addition, the hearing officer finds equally persuasive the Agency's arguments that it should not be forced to hold a position open indefinitely for an employee who is legitimately jailed. Even a person who is detained by circumstances beyond his control cannot expect his

position to be held open indefinitely. Eventually the Agency must take the necessary actions to assure that the staff is complete enough for it to perform its essential functions.

Whether the termination of an individual who is indefinitely detained would be *for cause* or not depends on the circumstances. Appellant was incarcerated of his own doing from August 16 until November 23, 2001, a period of over three months. It is not at all clear when even Appellant himself learned of the expected date of his release. While November 20, 2001 was mentioned to the Agency as a possibility at the pre-disciplinary meeting, Appellant offered no evidence contradicting the Agency's assertion that it was never informed of a definite release date.

In light of these reasonable arguments, the hearing officer cannot find that the Agency's decision to terminate Appellant was outside the scope of reasonable alternatives. It must therefore be upheld. As the Agency has argued, it is gravely unfortunate that Appellant did not exercise the same diligence in staying out of jail as he did getting out of jail.

CONCLUSIONS OF LAW

1. The Agency has demonstrated by a preponderance of the evidence that Appellant engaged in:
 - a) Failure to report for assigned shift for more than three consecutive work days due to circumstances of Appellant's own doing, constituting job abandonment in violation of CSR Rule 16-50 A. 12);
 - b) Unauthorized absence from work in violation of CSR Rule 16-50 A. 13);
 - c) Failure to meet established standards of performance including either qualitative or quantitative standards; namely, Appellant's inability to adhere to required attendance standards as a result of actions of his own doing in violation of CSR Rule 16-51 A. 2);
 - d) Failure to maintain satisfactory working relationships with the public in violation of CSR Rule 16-51 A. 4);
 - e) Failure to observe departmental regulations; namely, Appellant's inability to adhere to leave requirements as a result of actions of his own doing in violation of CSR Rule 16-51 A. 5) and Public Works Policies and Rules No. 3, Leave and Holidays;
 - f) Failure to comply with the instructions of an authorized supervisor in violation of CSR Rule 16-51 A. 10); namely, the Agency's repeated warnings that Appellant must do what is necessary to be on duty when expected.
 - g) Conduct not specified in the CSR Rules; namely, Appellant's willful abandonment of the terms of his probationary obligations in violation of standing court orders, resulting in the revocation of his probation and the subsequent issuance of warrants for his arrest. As a government employee, Appellant is held to a higher standard and should refrain from actions constituting *de facto* contempt of the courts of that government.

2. The Agency has failed to demonstrate by a preponderance of evidence that Appellant engaged in:
 - a) Gross negligence or willful neglect of duty in violation of CSR Rule 16-50 A. 1). While Appellant failed to take the actions necessary for him to be present at work, there is no evidence that Appellant neglected his duties in any way while at work willfully or otherwise, or that his absence had a demonstrated impact so severe as to be characterized as gross negligence or willful neglect of duty.
3. Appellant failed to demonstrate that his absence was beyond his control, and failed to rebut the Agency's presumption that Appellant was responsible for his absence from work.
4. The Agency has demonstrated by a preponderance of the evidence that it had just cause for disciplining Appellant.
5. In light of repeated prior progressive discipline, the length and indefinite duration of Appellant's absence, and the totality of evidence in this case, the Agency's termination of Appellant is reasonably related to the seriousness of the offense.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Director's decision to terminate Appellant's employment is **AFFIRMED**.

The Agency shall **MODIFY** Appellant's personnel files to reflect the Conclusions of Law in which the hearing officer has concluded charges were unsubstantiated.

This case is hereby **DISMISSED**

Dated this 11 th day of December, 2001.


Joanna L. Kaye
Hearing Officer for the
Career Service Board