HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 129-08

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

DANELLE CHAVEZ, Appellant,

vs.

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

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

I. STATEMENT OF THE CASE

On Nov. 12, 2008, Appellant Danelle Chavez was suspended for five days from her position as Deputy Sheriff at the Denver Sheriff Department within the City and County of Denver's Department of Safety ("Agency" or "Department"). Appellant filed this direct appeal challenging that suspension on Nov. 26, 2008. Agency Exhibits 2 – 4 and 6 – 8 were admitted during the hearing. Pages 42, 49, 50, and 52 – 57 of Exhibit 1 were also admitted. Appellant offered no exhibits.

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 five-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 Danelle Chavez has been a Deputy Sheriff with the Denver Sheriff's Department for the past nine years after her graduation from the Police Academy. She is assigned to the Court Services Division, where her duties include the care, custody and transportation of prisoners in conjunction with court appearances. On Nov. 12, 2008, Appellant was suspended for five days on the basis of an off-duty incident occurring on June 6, 2007. [Exh. 4.]

The evidence is undisputed that Appellant had been drinking at "The Game" bar in Adams County while off-duty during the evening of June 6, 2007. At 1:25 a.m., she returned to her car in the bar's parking lot, where spaces are arranged in diagonal rows forming a herringbone pattern. [Exh. 1-52.] When she reached her car, Appellant found that her egress from the rear was blocked by another vehicle. Since there was no car parked in the space immediately in front of her, she drove forward and turned to the left. Appellant struck the left front bumper of a car parked to her left, causing minor damage to both vehicles.

Colorado State Trooper Andrew Jackson arrived at the scene and observed that Appellant's face was flushed, her eyes were watery and bloodshot, and there was a moderate odor of alcohol on her breath. The witness defined a moderate odor as one perceptible from four feet away. Appellant admitted she had been drinking, and agreed to undergo roadside sobriety maneuvers. [Exh. 1-49.] Appellant's performance on the Horizontal Gaze Nystagmus test showed four out of six clues indicating inebriation. She demonstrated one out of eight clues in the Walk-and-Turn test, and performed the One-Leg Stand satisfactorily. Her head swayed slightly while doing the Modified Romberg test, but she correctly estimated 30 seconds during the second part of that test, which measures the internal clock. Under the National Highway Traffic Safety Administration (NHTSA) standards used in Colorado traffic stops where alcohol is suspected, those results indicated Appellant was impaired. [Exh. 49; testimony of Trooper Jackson.] "Chavez did not perform the maneuvers as a sober person would". [Exh. 57, DUI/Accident Narrative dated June 6, 2007.] Based on Jackson's investigation at the scene, he concluded that Appellant had caused the accident.

Trooper Jackson then administered a chemical breath test under the Colorado Express Consent Law, and thereafter transported Appellant to the Adams County Colorado State Patrol Office, where an Intoxilizer breath test showed that her blood alcohol level (BAC) was .058, slightly above the level at which Colorado law permits an inference that her ability to drive was impaired by alcohol. [Exh. 1-55; C.R.S. § 42-4-1301(6)(a)(II).] Appellant was then served with a summons for careless driving, and driving while ability impaired by alcohol (DWAI). [Exh. 1-42.]

When Appellant arrived at work at 8:00 a.m. later that morning, Appellant informed her supervisor in accordance with departmental policy that she had been charged with DWAI and careless driving. Appellant pled not guilty to both charges. Her

Jan. 2008 trial in Adams County Court resulted in an acquittal on the DWAI charge, and a conviction for careless driving. [Testimony of Appellant]

In February 2008, the Internal Affairs Bureau (IAB) commenced an investigation into the incident. During Appellant's first interview with IAB Investigator Sgt. Chris Brown, Appellant stated that Trooper Jackson testified that she performed her roadside tests perfectly [Exh. 6-2], and that the judge found her not guilty on the DWAI charge because the District Attorney had not laid a foundation for admission of the breath test results. [Exh. 6-4.] At another point during that interview, Appellant stated, "they pretty much kind of said there was no probable cause to introduce the actual reading of the Breathalyzer." [Exh. 6-5.] During her second IAB interview in May, Appellant said she identified herself as a Deputy Sheriff after one of the troopers searched her glove compartment, where Appellant kept a pair of handcuffs. [Exh. 7-2.]

Appellant was first served with a pre-disciplinary letter in June 2008. [Exh. 2.] A second letter was sent on Aug. 4, 2008, changing only the date of the pre-disciplinary meeting. [Exh. 3.] The letter of discipline imposing a five-day suspension omitted reference to numerous departmental and CSA Rules alleged in the pre-disciplinary letters. [Exh. 4.]

Deputy Manager of Safety Mary Malatesta, who made the disciplinary decision, testified that she found Appellant's conduct in driving while under the influence of alcohol both negligent and prejudicial to the efficiency, good name and reputation of the city. She determined that the actions would cause the public to lose confidence in the Agency, and that they legitimately led the Agency to question Appellant's good judgment, an essential part of her job as a Deputy Sheriff. After a review of the entire record, including Appellant's employment record and tapes of her interviews, Ms. Malatesta imposed a five-day suspension based on findings that Appellant violated three Career Service Rules: CSR § 16-60 L (violation of regulations), P (criminal charges), and Z (conduct prejudicial to the department). [Exh. 4-4.] This timely appeal followed.

IV. ANALYSIS

The Agency bears the burden to prove that the imposition of discipline was appropriate under the Career Service Rules, and that the level imposed was within the range that could be issued by a reasonable administrator. The City Charter requires that appeals from employment actions must be decided based on a de novo determination of the facts. D.R.M.C. § 18-3.

1. 16-60 L: Failure to observe departmental regulations

Denver Sheriff's Department Regulation 300.11 prohibits deputy sheriffs from becoming "involved in activities involving violations of the law." [Exh. 4-1.] In her testimony, Deputy Manager Malatesta found Appellant violated this rule based on her actions in causing an accident while driving under the influence of alcohol. The

Department's concern about this type of behavior is based on Appellant's job duties as a Deputy Sheriff to uphold the law and to transport prisoners to and from court in city vehicles. Ms. Malatesta noted that two different law enforcement agencies concluded that Appellant was impaired. After looking at the conduct supporting the DWAI charge, Ms. Malatesta found the evidence "overwhelmingly clear" that Appellant drove while her ability to operate the vehicle was impaired by alcohol. Ms. Malatesta acknowledged that Appellant was found not guilty of the criminal charge of DWAI, but stated that disciplinary proceedings need only be supported by evidence that proves the violation by a preponderance of the evidence. In contrast, a criminal conviction requires evidence that establishes guilt beyond a reasonable doubt.

Appellant conceded during her pre-disciplinary meeting and during this hearing that she consumed two alcoholic beverages before taking the wheel on June 6, 2007. Her BAC a few hours' later was .058, over the legal limit for which a presumption of driving while impaired can be drawn. [Exh. 1-55, 57.] Appellant decided to pull forward through a diagonal parking spot, and miscalculated her turn, causing minor damage to a parked car and her own front bumper. The Agency's determination that Appellant was at fault in the accident, and that alcohol impaired her judgment, was reasonable given the fact that the other car was parked properly in its own space, and Appellant made the decision to drive forward. The uncontested facts proven at hearing support a finding that Appellant took actions that were in violation of two laws: careless driving and DWAI.

The Department's role in enforcement of the law, and its explicit policy prohibiting activities that violate the law, support its conclusion that Appellant violated departmental policy 300.11, and CSR § 16-60 L.

2. 16-60 P: Conviction of or being charged with a crime

Appellant was charged with careless driving and DWAI on June 6, 2007, and convicted of careless driving on Feb. 8, 2008. Shortly thereafter, the Department initiated an internal investigation to determine the nature and significance of the conduct underlying the charges. During her February and May 2008 interviews with IAB's Sgt. Chris Brown, Appellant admitted she had two drinks before getting in her car on the night in question, and then caused "a fender bender" to a parked car. [Exh. 6-1.] She also conceded that the breath test administered after the accident showed her BAC at .058. Appellant told Sgt. Brown that her acquittal was based on the inadmissibility of the breath test results based on either lack of foundation or probable cause. [Exh. 6-4, 6-5.]

The Agency did not present evidence that it made a determination under § 16-61 that discipline was appropriate prior to the commencement of its pre-disciplinary procedures in June 2008, either as a part of the IAB investigation or in any other manner. Appellant raised no objection or defense in this appeal based on the failure of the appointing authority to comply with § CSR 16-61. The issues here are whether the Department failed to conduct the initial check required by § 16-61, and, if it did not,

whether the Department nonetheless established a violation of § 16-60 P in the absence of compliance with § 16-61.

A. Did Department conduct § 16-61 analysis?

The City and County of Denver has provided its career service employees with a property right to continued employment. "Dismissals, suspensions or disciplinary demotions of non-probationary employees in the Career Service shall be made only for cause, including the good of the service." D.R.M.C. § 9.1.1.B. Due process requires "some kind of hearing" prior to discharge of a public employee who has a protected property interest in his employment. U.S.C.A. Const. Amends 5, 14; Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law'". Id. at 538, quoting Board of Regents v. Roth, 408 US 564, 577 (1972). When a public employer promulgates rules governing disciplinary procedures that are more stringent in favor of an employee, due process requires that the public employer strictly comply with those rules. Service v. Dulles, 354 U.S. 363 (1957) (holding that regulations providing for procedural safeguards prior to discharge of a Department of State employee were mandatory). See also Department of Health v. Donahue, 690 P.2d 243 (Colo. 1984) (departments are required by due process to strictly adhere to regulation requiring pre-disciplinary meeting before termination of probationary employees); Subryan v. Regents of University of Colorado, 698 P.2d 1383 (Colo.App. 1984) (due process requires that regents must strictly comply with its own termination rules favoring an appointee).

Career Service Rule § 16-60 P provides that an employee may be disciplined under certain conditions for off-duty conduct that leads to a criminal charge or conviction. As a procedural safeguard, § 16-60 P mandates that the appointing authority make an initial determination that the employee engaged in the conduct, or, in the case of a conviction, consider the facts underlying the crime. The agency must also evaluate "the impact of the facts on the employee's ability to perform the position", among other factors. "If the department or agency, after considering these factors, believes that discipline is appropriate, it shall proceed with the pre-disciplinary procedures contained in this Rule 16." CSR §§ 16-60 P; 16-61. The clear language of the rules mandates that the department consider the stated factors and determine whether "discipline is appropriate" prior to proceeding with pre-disciplinary procedures.

The Department presented no evidence that it followed the guidelines of § 16-61. The fact that a pre-disciplinary letter was sent a month after Appellant's second IAB interview does not support a finding that the Department engaged in the analysis and findings required by the rule. The only witness who testified about the Department's conclusions regarding Appellant's conduct was Deputy Manager of Safety Malatesta, who made the Nov. 2008 decision to discipline Appellant. The rules require that agencies render their initial determination under § 16-61 prior to and separate from the disciplinary process, in keeping with its purpose to protect employees from an inappropriate extension of the disciplinary rules, while permitting discipline for off-duty

conduct if it impacts an employee's ability to do his job. The pre-disciplinary letter assures the employee that "no decision regarding any action has been made or will be made until after the pre-disciplinary meeting." [Exh. 3-4.] I find that the Agency did not conduct the analysis required by § 16-61.

B. Did non-compliance with rule deprive Appellant of due process under CSR?

By requiring an agency to make an initial determination that discipline is appropriate based on criminal charges or convictions, the Career Service Board appears to recognize that, in some circumstances, the asserted factual basis for the criminal charge may not exist, or may not be sufficiently serious or work-related to justify discipline. This is consistent with the rules' purpose "to foster and maintain a merit-based personnel system", and to ensure that "cause, including the good of the service," justify discipline. The disciplinary process itself is "governed by the principles of due process, personal accountability, reasonableness and sound business practice." CSR, Appendix 2.A; Rule 16, Purpose statement. The entirely internal process required by § 16-61 protects an employee from disciplinary proceedings where the offense is minor, unrelated to their job duties, or the conduct proving the offense cannot be established by a preponderance of the evidence.

The rule creates additional procedural due process rights above and beyond what is constitutionally required under Loudermill, infra. Since § 16-60 P permits discipline and even termination based on off-duty conduct only if the agency complies with § 16-61, the safeguard provided by the latter is intrinsic to the disciplinary rule. The Department is therefore "the proponent of the order" within the meaning of C.R.S. § 24-4-105(7), and thus has the burden to prove the existence of a violation in accordance with the disciplinary rules, and in line with constitutional protections. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1984); Spedding v. Motor Vehicle Dealer Bd., 931 P.2d 480 (Colo.App. 1996). If the mandatory words used in §§ 16-60 P and 16-61 are to be given effect, an agency must be held to comply with their terms as part of its burden to prove a violation of § 16-60 P. by a preponderance of the evidence.

Even if the harmless error standard is applicable to a procedural due process requirement of this nature, I cannot conclude that the failure to conduct the preliminary analysis did not adversely affect Appellant's substantial rights. See Motor Vehicle Dealer Bd v. Northglenn Dodge, 972 P.2d 707 (Colo.App. 1998). Appellant, a six-year employee with no disciplinary record, was convicted of careless driving, a traffic misdemeanor, and acquitted of DWAI. The facts could have justified an initial conclusion that her conduct would have minimal impact on her ability to do her job, in which event the disciplinary process would have been avoided altogether by compliance with § 16-61.

Since the Department did not comply with § 16-61 "prior to imposing discipline", as required by § 16-60 P., the evidence fails to establish a violation of the rule. See In re Davis, CSA 46-06, 8 (6/8/07).

3. 16-60 Z: Conduct prejudicial to department

Conduct is prejudicial to the good order and effectiveness of a department if it is hindered by that conduct in its ability to perform its mission. In re Compos, CSA 56-08, 15 (12/15/08); In re Catalina, CSA 35-08, 8 (8/22/08). Deputy Manager of Safety Malatesta concluded that Appellant's actions violated the oath she took as a Deputy Sheriff to uphold the law. Without some evidence that Appellant's actions hindered the Department's ability to perform its mission, the evidence failed to established that Appellant violated this subsection of the rule.

An employee may also violate the rule by "conduct that brings disrepute on or compromises the integrity of the City." This second clause in the rule is violated only if there is actual injury to the city's reputation or integrity. In re Compos, CSA 56-08, 15 (12/15/08); In re Strasser, CSA 44-07 (CSB 2/29/08).

In support of this allegation, Ms. Malatesta determined that two other law enforcement agencies were involved in the incident leading to Appellant's arrest for careless driving and DWAI: Adams County Police Department and Colorado State Patrol. The disciplinary letter stated that Appellant "told the trooper that you were a deputy sheriff because you had two pairs of handcuffs in your glove compartment and you wanted to explain before the other trooper found them in your car." [Exh. 4-2.] Trooper Jackson, the only witness present at the incident, did not testify that the city's reputation or integrity was injured by Appellant's conduct in his eyes or those of any other officer or person. Ms. Malatesta's testimony that "deputy sheriffs have a lot of contact with the public" does not in itself prove that the incident caused damage to the city's reputation, absent evidence that the incident became known to others outside the agency, or otherwise affected the city's reputation.

No other evidence was presented as to this issue. Therefore, it is determined that the Department failed to establish a violation of this rule.

4. Appropriateness of Discipline

The purpose of discipline at the Department is to correct behavior, and render a penalty both consistent with other misconduct and appropriate to the circumstances.

In determining the appropriate penalty, Ms. Malatesta considered the discipline imposed by the Department for similar offenses. She testified that those with a first-time conviction of Driving Under the Influence (DUI), a more serious misdemeanor proven by permissible inference with a BAC of .08 or higher, the Department considers a ten-day suspension, while DWAI convictions usually bring a five-day suspension. Ms. Malatesta considered the entire range of penalties before concluding that a five-day suspension was most in keeping with the nature of the proven conduct. She rejected a reprimand because it would not convey the correct message, and also concluded that the behavior

did not justify termination, and the sacrifice of "a very good deputy", for a mistake in judgment.

In imposing this suspension, the Department took into consideration Appellant's lack of any past discipline over the six years of her employment as a Deputy Sheriff. [Exh. 4-3.] Ms. Malatesta acknowledged that Appellant "very appropriately" contacted her supervisor about the arrest immediately on her arrival to work that day. She also acknowledged that Appellant was not "falling down drunk", and that the property damage she caused was not severe.

After thoroughly reviewing the file and videotapes of Appellant's statements, Ms. Malatesta determined that Appellant drove while her ability was impaired, and caused property damage by misjudging her ability to get by the car parked in the row in front of her. Ms. Malatesta also considered her conviction for careless driving as a violation of the law inconsistent with her oath as a Deputy.

In consideration of the importance of compliance with the law and careful driving for Deputy Sheriffs, a five-day suspension was reasonably related to the seriousness of the offenses, and was within the range of discipline that could be imposed by a reasonable administrator under the principles of progressive discipline. CSR §§ 16-20, 16-50.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency action dated Nov. 12, 2008 is AFFIRMED.

DATED this 24th day of February, 2009.

Valerie McNaughton
Career Service Hearing Officer