DISTRICT COURT, DENVER, COLORADO 1437 Bannock St. Denver, CO 80202	DATE FILED: November 9, 2016 CASE NUMBER: 2016CV31292
Plaintiff / Appellant: JAMES MEDINA, v. **Defendants / Appellees:** THE CAREER SERVICE BOARD of the CITY AND COUNTY OF DENVER; THE CITY AND COUNTY OF DENVER, a Colorado Municipal Corporation; and the DEPARTMENT OF SAFETY for the CITY AND COUNTY OF DENVER.	σ COURT USE ONLY σ Case Number(s): 16CV31292 Courtroom: 331

ORDER RE: COMPLAINT FOR JUDICIAL REVIEW PURSUANT TO C.R.C.P. 106(a)(4)

THIS MATTER is before the Court on Appellant's Complaint seeking judicial review, filed April 12, 2016. The Court, having reviewed the Briefs, the case file, and being otherwise fully advised, makes the following findings and orders:

I. Background

On July 10, 2014 Appellant James Medina arrested Seryina Trujillo for assault on a police officer after she spat in the face of Officer Cheryl Smith. (Hearing Officer Order, CSC00331 at ¶ 1.) Appellant led Ms. Trujillo to his patrol car and, as he was placing her in the car, Ms. Trujillo kicked Appellant in the face. Id. at ¶ 3. In order to stop her aggression Appellant punched Ms. Trujillo in the face one time. Id. Appellant transported Ms. Trujillo her to Police District Two Headquarters after securing her in his patrol car. Id. at ¶ 5.

Once at District Two Headquarters Appellant placed Ms. Trujillo in a holding cell. (CSC Decision, CSC000454). Pursuant to Denver Police Department policy, a prisoner is not permitted to wear their shoes or belt while in a holding cell. (Hearing Officer Order, CSC000331 at ¶ 6; CSC Decision, CSC000454) Appellant verbally commanded Ms. Trujillo to remove her shoes and belt but she repeatedly refused to comply. (Hearing Officer Order, CSC000331 at ¶ 7(a).) Due to her refusal tom comply Appellant physically attempted to remove Ms. Trujillo's shoes and belt. Id. at ¶ 7(d). During the altercation Ms. Trujillo resisted and the two engaged in a physical altercation that lasted a couple minutes. Id. Appellant placed his knee on Ms. Trujillo's upper chest to restrain her. Id. at ¶ 7(e). Ms. Trujillo went physically limp and slid off the bench, slumping onto the ground of the holding cell. (CSC Decision, CSC000454) It is unclear if Ms. Trujillo lost consciousness. (Hearing Officer Order, CSC000331 at ¶ 7(h).) Appellant then removed Ms. Trujillo's shoes and belt and exited the holding cell. Id. at ¶ 7(f).

Appellant returned to the holding cell a short time later. Id. at ¶ 7(i). Appellant verbally engaged Ms. Trujillo again, stating "You know what you did and I know what I did. Don't cry now. You can tell that to God." Id. Appellant did not seek medical attention for Ms. Trujillo nor did Appellant file a use of force report[1]. Id. at ¶ 7(j)-8. Ms. Trujillo did not make a complaint against Appellant or seek medical attention. Id.

The incident was ultimately investigated by the Conduct Review Office and, on January 22, 2015, they found that Appellant violated three department rules: RR-306, inappropriate force; RR-102.1, Duty to Obey Departmental Rules; and RR-105, Conduct Prejudicial. (Hearing Officer Order, CSC000331 at ¶ 11-17.; Bates Ex., CSC00845) The Conduct Review Office report was signed by Commander Michael Battista on behalf of the Chief of Police Robert C. White. Id. The report recommended termination to be held in abeyance for a period of two years for the violation of RR-306, a thirty-day suspension for the violation of RR-102.1 and a thirty-day suspension for the violation of RR-105. (Bates Ex., CSC000840-) The report was 11 pages in length and included a summary of the evidence and a rationale for finding each violation. (Bates Ex., CSC000835-845) On February 9, 2015 Appellant signed a notice of discipline and requested 24 hours to contemplate the recommended penalty. (Bates Ex., CSC000845)

[1] Five days after the incident Officer Medina filed a follow-up report, generally describing the event in the holding cell.

On February 10, 2015 Appellant signed the Contemplation of Discipline Letter. (Bates Ex., CSC000847-849) The letter described each violation and the recommended punishment. Id. The letter included a short summary of the case file, stating "There is a preponderance of evidence that...you violated [Denver Police Department Rules] when you physically restrained Ms. Seryina Trujillo, obtained her shoes and belt, handcuffed her in the District 2 holding cell and failed to complete a Use of Force Report for the incident in the holding cell." (Bates Ex., CSC000848) Appellant rejected the recommended penalty and opted to complete the review process and have a hearing. (Bates Ex., CSC000849) On February 10, 2015, Appellant also signed a document informing Appellant that he may voluntarily review the case file on a specific date and that a pre-disciplinary hearing was scheduled. (Bates Ex., CSC000851)

Appellant attended the pre-disciplinary hearing, also known as the Chief's hearing, with his attorney. (Hearing Officer Order, CSC000334 at ¶ 21-22.) Appellant was given the opportunity to explain why the proposed action should not be taken. Id. At the hearing Appellant was told that he would not face immediate termination. Id. at 22.

Commander Michael Battista, acting on behalf of the Chief of Police, issued a written command dated February 23, 2015. (Bates Ex., CSC000853-861) The Chief's command concluded that, by a preponderance of the evidence, Appellant violated department rules. (Bates Ex., CSC000861) The Chief recommended the presumptive penalty of termination for violation of RR-306 and two thirty-day suspensions for RR-102.1 and RR-105. Id. In regards to RR-306, the command noted that the presumptive penalty is termination. (Bates Ex., CSC000858)

The Departmental Order of Disciplinary action was issued and signed by Deputy Director of Safety Jess Vigil [hereinafter DDOS Vigil] acting on behalf of the Executive Director on March 4, 2015. (Hearing Officer Order, SCS000334 at ¶ 23; Bates Ex., CSC000862) DDOS Vigil found that there was sufficient evidence to establish that Appellant violated RR-306, RR-102 and RR-105. Id. DDOS Vigil agreed with the Chief that the two thirty-day suspensions for violating RR-102 and RR-105 were appropriate. Id. However, DDOS found that, pursuant to the Department's disciplinary matrix, the appropriate penalty was dismissal. Id.

Appellant appealed his dismissal and suspension to the Hearing Officer. (Hearing Officer Order, CSC000341) On July 29, 2015, *nunc pro tunc* to July 24, 2015, Hearing Officer Terry

Tomsick found that the evidence was sufficient to support a finding that Appellant violated RR-306, RR-102.1 and RR-105. Id. However, Hearing Officer Tomsick determined that Appellant's due process rights were violated by DDOS Vigil when she increased the penalty for RR-306 from a discharge that was to be held in abeyance to dismissal. (Hearing Officer Order, CSC000335-341) Hearing Officer Tomsick reduced Appellant's penalty to the recommended penalty of discharge to be held in abeyance for two years. Id.

DDOS Vigil appealed the Hearing Officer's decision to the Civil Service Commission and Appellant cross-appealed. (Notice of Appeal CSC000345-350; Notice of Cross-appeal, CSC000354) On March 15, 2016 the Civil Service Commission issued their decision and final order. (CSC Decision, CSC000454-469) The Commission found that Appellant's use of force was inappropriate. (CSC Decision, CSC000458) The Commission found that Appellant's due process rights were not violated because the Executive Director has the right to accept, reject, decrease or increase the Chief's recommended punishment. (CSC Decision, CSC000467) The Commission reinstated the penalty of discharge originally imposed by DDOS Vigil. *Id.*

On August 9, 2016 Appellant filed his opening brief, arguing that he was fired for exercising his right to challenge the allegations against him, not for violating department rules, that his due process rights were violated, and that the Commission's decision was an abuse of discretion because it was unsupported by the record and applicable law. On September 8, 2016 the Civil Service Commission filed its answer, asserting that the Commission did not abuse its discretion because its findings were supported by competent evidence in the record. On September 22, 2016 Appellant filed his reply brief.

II. Standard of Review

The standard for review in a Rule 106(a)(4) proceeding is "limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer." C.R.C.P. 106(a)(4)(I). Moreover, administrative proceedings are accorded a presumption of validity and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency. Hadley v. Moffat County School Dist. RE–1, 681 P.2d 938, 944 (Colo. 1984); U–Tote–M of Colorado, Inc. v. City of Greenwood Village, 563 P.2d 373, 376 (Colo. App. 1977).

"Abuse of discretion" means the ultimate decision of the administrative body is so devoid of evidentiary support that it is an arbitrary and capricious exercise of authority. Widder v. Durango School Dist. No. 9-R, 85 P. 3d 518 (2004). In ascertaining whether an abuse of discretion has occurred, a reviewing court looks to see if the agency has misconstrued or misapplied applicable law, DeLong v. Trujillo, 25 P.3d 1194, 1197 (Colo. 2001), or whether the decision under review is not reasonably supported by competent evidence in the record. Van Sickle v. Boyes, 797 P.2d 1267, 1272 (Colo. 1990). Lack of competent evidence occurs when the administrative decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. Ross v. Fire & Police Pension Ass'n, 713 P.2d 1304, 1308–09 (Colo. 1986); see also Widder v. Durango School Dist. No. 9-R, 85 P. 3d 518 (2004)(finding that "abuse of discretion" means the ultimate decision of the administrative body is so devoid of evidentiary support that it is an arbitrary and capricious exercise of authority).

III. Analysis

A. The Commission did not abuse its discretion by finding that Appellant violated Denver Police Department rules.

i. RR-306, Inappropriate Force

Appellant first asserts that the Commission abused its discretion by finding that he violated RR-306, Inappropriate Force. Appellant argues that there is no evidence in the record to support the Commission's ruling that Appellant had other options available rather than physical force. Appellant contends he was required, per department policy, to remove Ms. Trujillo's shoes and belt. Appellant also argues that there was no other officer available to assist him and, per policy, he alone was responsible for Ms. Trujillo.

Appellee argues that Appellant knew Ms. Trujillo was physically aggressive and failed to employ tactics to prevent that situation in the holding cell. Appellee contends that monitoring Ms. Trujillo on video was viable to Appellant because Ms. Trujillo never presented as someone who would harm herself.

RR-306 states that "[o]fficers shall not use inappropriate force in making an arrest or in dealing with a prisoner or any other person." (Discipline Handbook, CSC001028) The Commission found that "given the circumstances, [Appellant] had options other than force

available to him (such as enlisting the assistance of another office), that is, he did not need to go 'hands on' with Ms. Trujillo when he did in the manner in which he did" and that it was Appellant who turned the incident into a physical altercation. (CSC Decision, CSC000458) The Commission found that Ms. Trujillo's physical response of slumping to the floor was a direct result of Appellant's application of force. Id. The Commission also noted that Appellant's "use of his leg on Ms. Trujillo's [body] could have caused serious bodily injury and was disproportionate to the legitimate objective of attempting to remove her belt and shoes . . . ." (CSC Decision, CSC000459 at n. 7.)

The Commission did not indicate what other officer was available to assist Appellant at the time in question. However, the Commission's decision did not rest upon that fact alone. The Commission was clear that Appellant's use of physical force was unnecessary and disproportionate in the situation. In reaching its conclusion the Commission reviewed the record, including the Hearing Officer's Order and the video of the incident.

For these reasons, the Commission's decision that Appellant violated RR-306, Inappropriate Force, was not an abuse of discretion.

ii. RR-102.1, Duty to Obey Departmental Rules

Appellant argues that the Commission abused its discretion in finding that Appellant violated RR-102.1, Duty to Obey Departmental Rules, by failing to report his use or force and by failing to request medication attention for Ms. Trujillo.

Appellant contends that the Commission's ruling is contrary to the plain language of the rules and contrary to the facts of the case. Appellant asserts that Ms. Trujillo did not have any obvious injuries and, therefore, Appellant was not required to request medical attention for Ms. Trujillo. Specifically, Appellant contends that Ms. Trujillo's physical response to Appellant's use of force did not amount to an obvious injury. Appellant notes that the term "obvious injury" is not defined in the applicable policy. Appellant contends that there is no evidence Ms. Trujillo lost consciousness and, even if she did, a loss of consciousness is not explicitly defined as an obvious injury. Appellant also notes that faking a loss of consciousness is not an obvious injury.

In response, Appellee contends Ms. Trujillo's act of going limp and slumping to the floor is an obvious injury and, therefore, Appellant had a duty to report his use of force. Appellee further argues that Appellant's interpretation of Ms. Trujillo's injury does not excuse him from requesting medical attention.

RR-102.1 requires an officer to obey all departmental rules. (Discipline Handbook CSC001021) Pursuant to Operations Manual 105.02(1)(a)(5), an officer is required to complete an use of force report when "an officer encounters and individual with obvious injuries . . . ." (Agency Ex. 20, CSC001062) An officer is required to request medication attention "[a]ny time there is an injury or an alleged injury as a result of force used . . . ." pursuant to OMS 105.02(2). (Agency Ex. 20, CSC001064)

The Commission found that, regardless of whether Ms. Trujillo actually lost consciousness or not, her physical response of slumping to the floor constituted an obvious injury and required Appellant to seek medical attention for her. (CSC Decision, CSC000485-86) As Appellant correctly points out, what constitutes an obvious injury is not defined by the relevant rules or policy. Therefore, it was not an abuse of discretion for the Commission to find that Ms. Trujillo's physical response was an obvious injury triggering the duty to report. As such, the Commission did not abuse its discretion by finding Appellant violated RR-102.1, Duty to Obey Departmental Rules.

iii. RR-105, Conduct Prejudicial

The Commission found that the issue of Appellant's violation of RR-105, Conduct Prejudicial, was moot based upon the remainder of its decision. (CSC Decision, CSC000459 at n. 8.) Specifically, the Commission found that the issue was moot due to the termination of Appellant, a more severe penalty than violation of RR-105 would have warranted. Appellant requests this Court revisit the issue if this Court reverses the Commission's decision as to termination of employment. Appellee contends that the issue is moot.

This Court agrees with the Commission that Appellant's alleged violation of RR-105, Conduct Prejudicial, is moot. Therefore this Court will not address the issue.

B. The Commission did not abuse its discretion when it ruled that Officer Medina's due process rights were not violated.

Appellant contends that his due process rights were violated in both the pre-termination and post-termination process. In regards to the pre-termination process, Appellant argues (a) he did not receive adequate notice, (b) there no as explanation of the employer's evidence, and (c) he had no opportunity to present his side of the story. Appellant also argues that the post-termination process was inadequate in light of the pre-termination process.

i. Pre-termination process was proper

"An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Babi v. Colo. High School Activities Ass'n, 77 P.3d 916, 922 (Colo. App. 2003) (citations omitted). Prior to termination, an employee "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1085).

a. Appellant received proper notice.

Appellant makes two primary arguments in regards to proper notice. Appellant argues (i) notice was insufficient because he did not receive specific notice that termination was a possible penalty and (ii) the pre-termination process was defective because the Chief himself did not issue the command.

(i) Due process does not require specific notice of the penalty contemplated.

Appellant argues that he did not receive proper notice because the notice provided to him prior to the Chief's hearing did not state that immediate termination of employment was to be imposed on him. Appellant contends that constructive notice of the possibility of termination pursuant to the matrix is not sufficient. Appellant contends that if constructive notice is all that due process requires, there would be no need for specific notice.

Appellee asserts Appellant received proper notice. Appellee contends that neither the Charter nor due process requires notice of the specific discipline contemplated. Appellee also

asserts that Appellant knew termination was possible because Appellant is charged with knowledge of the discipline matrix.

Due process requires written notice of the charges against the employee. Loudermill, 470 U.S. at 546. Conversely, due process does not require written notice of the specific penalty contemplated. See id.; see also Farrell v. Dept. of Interior, 314 F.3d 584, 593 (D.C. Cir. 2002) ("[t] there is no constitutional requirement that an agency provide advance notice of the possible range of penalties. Due process does not require that an agency post the specific penalties to which an employee could be subject for any particular violation."); see also White v. Golder, 245 Fed.Appx. 763 (10th Cir. 2007) (stating that "notice of potential penalties is not one of the requirements of due process.").

On January 22, 2015, Commander Battista, acting for Chief White, issued a report by the Conduct Review Office. (Bates Ex., CSC000835-846) The report analyzed each potential violation, reviewed the evidence, and set forth evidence that the presumptive penalty for RR-306 was termination and recommended that termination be held in abeyance for two years. Id. On February 9, 2015 Appellant signed a notice of discipline and requested 24 hours to contemplate the recommended penalty. (Bates Ex., CSC000846) On February 10, 2015 Appellant signed the Contemplation of Discipline Letter. (Bates Ex., CSC000847-849) The letter described each violation and the recommended punishment. Id.

It is clear from the record that Appellant received ample written notice of the charges against him prior to the written command and the pre-termination Chief's hearing. Further, Appellant was also aware that the presumptive penalty for a violation of RR-306 was termination. Therefore, the Commission did not abuse its discretion by finding that Appellant received all the pre-deprivation process he was due.

(ii) There was no defect in the pre-termination process.

Appellant further asserts that the written command violated the Denver City Charter because Commander Battista, not the Chief of Police, issued the command. As a result, Appellant argues that the pre-termination process was defective and his due process rights were violated. Appellant contends that, pursuant to the Charter, the written command must come from

the Chief of Police, not from his designee, as was done here. Appellant argues that the departure from the Charter insulates the Chief from the direct accountability envisioned by the Charter and was a defect in his pre-termination process.

Appellant asserts, in light of Commander Battista's issuance of the command, that the Commission abused its discretion when it found that Appellant received all the pre-termination process he was due. Appellant also asserts that the Charter and OMS are in direct conflict with each other. Appellant contends that the Charter states that the Chief, and only the Chief, may institute disciplinary action by issuing the written command while the OMS allows the chief or his designee to initiate disciplinary action. This conflict, Appellant asserts, is a part of the defect in his pre-termination process.

Appellee argues that Commander Battista had the proper authority to issue the command. Appellee asserts that the Charter and OMS are not in direct conflict. Appellee states that Charter is merely a general description of disciplinary procedures, while the OMS provides more detail. Appellee also asserts that the section of the OMS Appellant relies upon as a contradiction applies after the Chief's hearing.

As stated above, Appellant received proper notice of the charges against him; Appellant received the process he was due. Whether Commander Battista or Chief White signed the command does not affect whether Appellant received notice for the purposes of due process. Further, prior to the written command, Appellant received notice of the charges against him in the form of the Conduct Review Office report. Therefore, the Commission did not abuse its discretion by finding Appellant received proper notice of the charges against him.

b. Appellant received an explanation of the evidence supporting termination.

Appellant argues that he was given was no explanation of the specific evidence that supported the violation of RR-306 and his subsequent termination prior to his pre-disciplinary Chief's hearing. Appellant contends that the Commission abused its discretion when it held that Appellant received a full explanation of the evidence supporting the charges.

As previously noted, on January 22, 2015, the Conduct Review Office issued their report signed by Commander Battista on behalf of Chief White. (Bates Ex., CSC00045) The report states "the circumstances surrounding [Appellant's] use of force are not disputed and are clearly depicted in a video record." (Bates Ex., CSC000839) The report found that "[t]he level of force [Appellant] used by placing his leg on Ms. Trujillo's neck was not commensurate with the level of resistance she offered." Id. The report provides that "[t]he recommended penalty of termination for violation of RR-306 . . . will be held in abeyance . . ." (Bates Ex., CSC000840) The report includes a summary of the evidence, detailed the sequence of events in the holding cell video and summarized Sergeant Hauser's interview with Ms. Trujillo. (Bates Ex., CSC000837) The Chief's hearing was held on the week of February 23, 2015, a month after the Conduct Review Office report was issued. (Hearing Officer Order, CSC000333)

Further, on February 10, 2015 Appellant received and acknowledged the Contemplation of Discipline Letter. The letter stated that the recommended penalty for violation of RR-306 was termination to be held in abeyance for two years. (Bates Ex., CSC000847) Also on February 10, 2016 Appellant received and acknowledged a letter stating that he may voluntarily review the case file prior to the pre-disciplinary Chief's hearing. (Bates Ex., CSC000851).

The record is clear that Appellant received notice of the evidence used against him and had an opportunity to review that evidence prior to termination. As such, the Commission did not abuse its discretion when it found Appellant received notice of the evidence against him.

Appellant also argues that the Commission abused its discretion when it reversed the Hearing Officer's decision that there was no evidence to support the penalty of termination. Appellant contends that the Hearing Officer was correct in finding that there was no evidence to support termination because no new facts arose between the written command, which recommended termination to be held in abeyance for two years, and the Departmental Order of Disciplinary Action, issued by DDOS Jess Vigil, recommending termination. Therefore, Appellant contends, the Commission abused its discretion by enforcing the penalty of termination. Appellant states he was penalized for exercising his right to contest the allegations. In response, Appellee maintains that DDOS Vigil was not bound by Conduct Review Office report and notes that termination was the presumptive penalty for the RR-306 violation.

"The . . . Civil Service Commission [has] the power . . . to exercise its discretion to affirm, reverse, or modify the disciplinary action in whole or in part." Ramirez v. Civil Service Commission, 594 P.2d 1067, 1068 (Colo. App. 1979). The Charter provides that "[t]he Commission may affirm, reverse or modify the Hearing Officer's decision provided that the Commission shall not have the authority to impose a level of discipline more severe than that imposed by the Hearing Officer or the Manager of Safety." (CSC Decision, CSC000465)

The Commission determined that they had the authority to modify the Hearing Officer's order. (CSC Decision, CSC000465) The Commission reversed the Hearing Officer's order in regards to the penalty of termination and reinstated DDOS Vigil's recommendation of termination. In reaching this decision, the Commission noted that, while DDOS Vigil was bound to consider the recommendations made by the Chief, he had "the right to accept, reject, decrease or increase the recommended punishment, and impose the discipline he or she determines to be appropriate under the circumstances." (CSC Decision, CSC000467). In his decision, the Hearing Officer also noted that the Charter grants the Executive Director of Safety the power to "order, approve, modify or disapprove the written order of disciplinary action." (Hearing Officer Order, CSC000339)

In summary, DDOS Vigil was not bound by the recommendations made in the written command or the Conduct Review Office report. Further, the Commission was not bound to accept the Hearing Officer's decision. Therefore, it was not an abuse of discretion for the Commission to reverse the Hearing Officer's decision regarding Appellant's termination.

c. Officer Median had an opportunity to present his version of events prior to termination.

Appellant's also asserts in regards to the pre-termination process is that he did not have an opportunity to present his version of events. Appellant asserts the Commission abused its discretion in finding that his due process rights were not violated because he did not receive an opportunity to present his "side of the story." Specifically, Appellant contends he did not have notice that he would be terminated for failure to take responsibility, and, therefore, he did not have an opportunity to present his "side of the story." Appellee asserts that Appellant was not

terminated for failure to take responsibility because failure to take responsibility was not a charge against him.

Appellee is correct. The Commission reinstated the penalty of termination because Appellant's "use of force on Ms. Trujillo was inappropriate" and that Appellant did not need to deal with Ms. Trujillo in a "hands on" manner in which he did. (CSC Decision, CSC000458). The Commission did not reinstate the DDOS Vigil's recommendation for Appellant's purported failure to take responsibility. DDOS Vigil also did not terminate Appellant for "failure to take responsibility." The Deputy Director found that "[Appellant] used a level of force that was not objectively reasonable in relation to Ms. Trujillo's actions . . . ." (Bates Ex., CSC000187) It is true that DDOS Vigil noted that Appellant did not take responsibility for his actions but that was not the crux of his recommendation to terminate Appellant. Further, Appellant was given the opportunity to offer his "side of the story" at the pre-disciplinary Chief's hearing. (Hearing Officer Order, CSC000334 at ¶ 21-22. As such, the Commission did not abuse its discretion in finding that Appellant's due process right were violated.

ii. The post-termination process was adequate.

Appellant alleges the post-termination procedure was inadequate and violated his due process rights because his pre-termination process was inadequate. Namely, Appellant alleges the pre-termination process was inadequate because he was never given pre-termination notice that he would be terminated for failure to take responsibility. Appellant asserts that "forcing" him to bear the burden of proof in the post-termination hearing was a violation of his due process rights due to the deficiencies in the pre-termination process. Appellant notes that the adequacy of the post-termination process is analyzed in light of the pre-termination process.

Appellant looks to Benavidez v. City of Albuquerque, 101 F.3d 620 (10th Cir. 1996) to support his argument that the pre-termination hearing is of greater importance than the pre-termination process. Appellant is correct in that "[w]hen the pre-termination process offers little or no opportunity for the employee to present his side of the case, the procedures in the post-termination hearing become much more important." Benavidez 101 F.3d at 626.

Appellant's argument that his post-termination process was inadequate rests on whether the pre-termination was adequate. As stated previously, the pre-termination process Appellant received was adequate. Appellant was given due notice, provided with due process and an opportunity to be heard, and was not terminated for failing to take responsibility for his actions. As such, the post-termination process Appellant received was adequate and the Commission did not abuse its discretion by finding as such.

C. The Commission did not abuse its discretion when it rejected Appellant's argument regarding inconsistency of discipline.

Appellant contends that the Commission abused its discretion by finding that Appellant did not point to or explain similar cases to warrant a reduction of his discipline based upon comparability. Appellant also asserts that the Commission abused its discretion by failing to provide any substantive analysis of consistent discipline. Appellant maintains that he provided the Commission with specific citations to the record on the issue of inconsistent discipline and the Commission failed to analyze his case in context to those cases. In response, Appellee contends that Appellant did not provide any analysis or explanation as to why the similar cases warranted a reduction based upon comparability.

As Appellant correctly points out, one of the bases for appealing the decision of a Hearing Officer to the Commission is inconsistency of the discipline received. CSC Rule 12 11(D)(4). "For discipline to be deemed inconsistent, it must be outside of a reasonable range for discipline imposed in similar circumstances." CSC Rule 12 11(D)(4)(b). When assessing the consistency in discipline, the Commission should consider, among other factors, similar factual situations, similar disciplinary histories, and whether the facts are the same or similar. CSC Rule 12 11(D)(4)(a)(i)-(vi).

In Appellant's opening brief to the Commission, Appellant stated "[s]ubstantial evidence presented at the hearing showed that out of thirty recent cases with charges similar to those against [Appellant], only two were given harsher discipline than that imposed against [Appellant.] (Opening Brief, CSC000410) Appellant provided a citation to the record, including a block of 28 pages. Id. Appellant did not include a discussion of those cases in his brief, nor did Appellant list what cases he was referring to. In Appellant's reply brief, Appellant offered two

specific examples of similar cases to show the discipline imposed in his case was inconsistent and he provided the corresponding citations to the record. (Reply Brief, CSC000447) Appellant's discussion of the examples was less than one page. Id.

The Commission recognized that Appellant "admitted into evidence numerous cases of past discipline of other officers" but found that "nowhere in his brief does [Appellant] point to even a single case, and explain how that case is sufficiently similar to his own so as to warrant reduction of discipline based upon comparability." (CSC Decision, CSC000459) The Commission went on to find that Appellant did not demonstrate that his discipline was outside the range of reasonable discipline alternatives to satisfy Rule 12. Id.

The Commission was incorrect in their assertion that Appellant did not point to any specific cases in his briefs. Contrary to Appellant's position, the Commission's decision did not rest on that fact alone. The Commission noted that Appellant admitted numerous cases into evidence, and found that Appellant failed to explain how these cases were sufficiently similar to warrant a reduction of discipline. For this reason, the Commission did not abuse its discretion when it rejected Appellant's argument regarding inconsistency of discipline.

D. The Commission did not abuse its discretion by not addressing Officer Medina's policy arguments.

Finally, Appellant asserts that the Commission abused its discretion by not addressing his policy arguments. Appellee contends that Rule 12 does not require the Commission the Commission to reverse a finding based on policy reasons.

Rule 12 states that "Policy Considerations that may have effect beyond the case at hand" are grounds for reversal of a Hearing Officer's Decision. CSC 12 Rule 12 (11)(3). "To establish such basis for appeal, any specific policy consideration involved must be identified and clearly stated. An explanation of how the policy consideration may have effect beyond the case at hand must also be provided." Id.

The Commission was within its discretion to consider the Appellant's policy arguments, such as inconsistency of discipline, and to decline to accept the same. The failure to address Appellant's policy arguments in the written decision was not an abuse of discretion.

E. Conclusion

For the aforementioned reasons, the Commission's Decision is AFFIRMED.

So ORDERED this 9th day of November, 2016.

BY THE COURT:

David H. Goldberg

Denver District Court Judge