

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

Appeal No. 65-11

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**DECISION ON REMAND**

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IN THE MATTER OF THE APPEAL OF:

**SILVER GUTIERREZ**, Appellant,

vs.

**DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT**

and the City and County of Denver, a municipal corporation, Agency.

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**I. INTRODUCTION**

This appeal returns to the Hearing Office to apply the correct standard in imposing discipline, following a remand from the Colorado Court of Appeals. City of Denver v. Gutierrez, 14CA1536 (Colo. App. 5/19/16). These are the pertinent facts, as found by the Court of Appeals. The original Decision, except for those specific portions reversed on remand, is incorporated herein.

Gutierrez is a captain in the Denver Sheriff's Department (Agency). Cheryl Arabalo was also a captain at the time of the incident at issue, but was later terminated for unrelated reasons. Both were on the board of the Denver Sheriff's Foundation, a non-profit organization independent of the Sheriff's Department. Members of the Foundation frequently engaged in sexual banter, and they would answer each other's phone calls with "what are you wearing?" Gutierrez and Arabalo were integral parts of that culture.

On August 26, 2010, Gutierrez was Acting Division Chief. Arabalo was off-duty but came to Gutierrez's office to pick up checks for the Foundation. Gutierrez was on the phone when Arabalo entered, but gestured to her to lift up her shirt to expose her breasts, then gestured for her to sit on his lap. Two months later, Arabalo filed a complaint with the Colorado Civil Rights division, alleging Gutierrez sexually harassed her on August 26. An investigation ensued by the Agency's Internal Affairs Bureau.

The Agency suspended Appellant's employment for 75 days. Gutierrez appealed to the Career Service Hearing Office. After a hearing, the undersigned Hearing Officer modified the suspension to 30 days. Both sides appealed to the Career Service Board who affirmed the Hearing Officer. The Denver District Court reversed. The Colorado Court of Appeals affirmed in part and reversed in part the District Court and remanded the case to the Board. The Board, in turn, remanded the case to the Hearing Office to determine the appropriate penalty in view of the holding of the Colorado Court of Appeals.

**II. COURT OF APPEALS DETERMINATION OF THE PROPER STANDARD  
TO ASSESS DISCIPLINE**

The Court of Appeals affirmed the portion of the District Court's determination that the Hearing Officer and the Board applied an incorrect legal standard to evaluate Gutierrez' conduct.

An objective standard governs Departmental Order (D.O.) 200.15, which prohibits disrespectful behavior, and D.O. 300.10, which prohibits other improper behaviors. Under an objective standard, Arabalo's perception of Gutierrez' behavior as inoffensive, as well as Gutierrez' intent, were not relevant. Instead the conduct must be viewed from the perspective of a reasonable person, irrespective of the "locker room culture" embraced by Foundation members. The policy underlying the Court's statement is that personnel rules should be able to change a culture, rather than to be defined by it. Gutierrez supra, at 10.

### **III. ISSUES ON REMAND**

The issues on remand are (1) whether the application of an objective standard in Agency's Department Orders 200.15, and 300.10, and 2420.1B<sup>1</sup> to Gutierrez' conduct on August 26, 2010 results in a violation of one or more of those rules and, (2) if so, what is the appropriate penalty.

### **IV. APPLICATION OF THE OBJECTIVE STANDARD**

**A. DO 200.15. Deputy Sheriffs and employees shall not willfully or intentionally display any disrespectful, insolent or abusive language or behavior towards any supervisor, Department employee, employee(s) of other official agencies or the public, while on duty.**

Gutierrez was a deputy sheriff under this rule. Arabalo was an employee, thus both fall within the respective duties and protections of the rule. Gutierrez' gestures, when removed from the permissive context of sexual banter between Foundation members,<sup>2</sup> and viewed instead from the perspective of a reasonable person, were offensive. It is apparent superior officers are expected to uphold Agency orders and set an example for their subordinates. Consequently, as acting division chief, Gutierrez's gestures toward a subordinate, Captain Arabalo, were particularly antithetical to the purpose of DO 200.15, to prohibit intolerable behavior between co-workers. When removed from the attitudes and circumstances in which they were made, Gutierrez' gestures toward Arabalo violated DO 200.15.

**B. DO 300.10. Deputy Sheriffs and employees shall not indulge in immoral, indecent or disorderly conduct that would impair their orderly performance of duties or cause the public to lose confidence in the Department.**

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<sup>1</sup> On appeal to the Court of Appeals, Gutierrez disputed the District Court's finding that his gestures toward Arabalo were demands for sexual favors under 2420 1B.5(C) and (G). The Court of Appeals reversed that finding as it relates to a demand for sexual favors from Ms. Arabalo, [Gutierrez, 14CA1536 at 15], thus there is no need to address it here. He admitted his behavior satisfied the definition of harassment found in subsection 5(J) of this rule, and my original finding on that basis stands.

<sup>2</sup> Witnesses were divided as to whether they found Gutierrez's conduct to be offensive. Foundation board member Curat testified he had observed "mildly sexual" banter between Gutierrez and Arabalo and did not find it offensive. Deputy Mazotti, a Foundation volunteer, said he observed "flirtatious banter" between Gutierrez and Arabalo and found it was "normal" and "not vulgar." He stated he was not offended by it. On the other hand, Chief Diggins testified he had counselled Gutierrez to act more professionally around subordinates instead of "playing around" with them. Director Wilson testified Arabalo's joking with Gutierrez would not justify his gestures to lift her shirt or to sit on his lap. In short, deputy-level witnesses found Gutierrez's conduct inoffensive, while management found to the contrary. Irrespective of any personal views, the Agency is entitled to use its rules to change a culture rather than to be defined by it.

Conduct violates this rule if it is (1) objectively immoral, indecent or disorderly, and (2) if such conduct impairs the disciplined performance of their duties or causes the public to lose confidence in the Agency. The culture in which the conduct arose is irrelevant to measuring whether a violation occurred.

Gutierrez's conduct was thoughtless, unprofessional, and antithetical to the City's efforts and policies attempting to insure a workplace free of immoral, indecent and disorderly conduct. See Gutierrez, 14CA1536 at 9. As such, his conduct violated the first element of this rule.

More is required, under this rule, however, than objective impropriety of the conduct; and more is required than imagined harm under the "would impair" and implied "would lose confidence" phrases of the rule. The two elements of the rule must both be satisfied. See U.S. v. O'Driscoll, 761 F.2d 589, 597-98 (10<sup>th</sup> Cir. 1985).

Gutierrez's actions toward Arabalo, a subordinate, violated his duty to set an example of professional conduct, particularly in his supervisory role. Gutierrez's superior and friend, Chief Diggins, was concerned enough about Gutierrez's behavior that he previously counselled Gutierrez several times to act more professionally and to abate his crude banter with his subordinates. [Decision p.3]. Gutierrez was, therefore, aware of his duty to set an example for his subordinates. The Agency proved Gutierrez indulged in indecent behavior that impaired the orderly performance of his supervisory duty to exemplify a high level of conduct, in violation of 300.10.

## **V. DEGREE OF DISCIPLINE**

The purpose of discipline is to correct inappropriate behavior, if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20. Discipline imposed by an appointing authority should be affirmed by a hearing officer unless that discipline has been imposed arbitrarily, that is, based substantially on considerations unsupported by record evidence, or given the proven rule violations the discipline is clearly excessive. In re Jenkins, CSA 54-14 (2/5/15), *aff'd In re Jenkins*, CSB 54-14A (11/9/15); see also In re Lacombe, CSA 10-14 (1/27/15), *modified In re Lacombe*, CSB 10-14A (7/16/15); In re Leyba, CSB 59-14A (2/5/16).

### **A. Severity**

The findings and conclusions in my Decision which were not appealed, or which were ultimately affirmed, remain a part of the consideration as to the appropriate degree of discipline here. The violations proven at hearing remain: Neglect of Duty (to set a professional example); D.O. 1100.4 (on-duty relations); D.O. 2420 1B.5.J (joking or behavior that could be offensive to third party); and 2440.1G (be proactive, set positive example, maintain self-discipline, strive for excellence). What changes here are findings that Gutierrez's conduct also violated DO 200.15 (disrespectful behavior) and 300.10 (indecent or disorderly conduct that would impair their orderly performance of duties). Since the same conduct violated all rules and the most egregious allegation – demand for sexual favors - was not proven, even upon remand, the severity of the offending behavior is not different now than before remand.

Gutierrez' gestures were inappropriate to his position. Further, he failed to heed the counsel of his friend and superior, Chief Diggins, to cease his sexual banter and to enforce compliance among his subordinates.

## **B. Past Record**

Gutierrez's superiors considered him, overall, to be an excellent captain. This discipline was his first. These are substantially mitigating factors in a discipline that does not otherwise call for dismissal.

## **C. Likelihood of Reform**

In his IA interview, when Gutierrez was asked how he planned to deal with widespread inappropriate banter in the workplace, Gutierrez answered he now tells his subordinates to be more careful, which, as Ashley Kilroy - the Deputy Manager of Safety and decision-maker in this case - aptly noted, misses the point of reform.

Gutierrez' acceptance of responsibility evolved. In his first meeting with Diggins, Gutierrez admitted only that he may have asked Arabalo "what are you wearing?" but professed ignorance of the other claims by Arabalo. Then, in the following days, he admitted to Diggins most of Arabalo's allegations against him were true, and he also admitted to Diggins that his conduct put the Agency in bad light. [Exhibit 11 at 244-248]. At that time, it appeared to Diggins that Gutierrez was genuinely remorseful and wanting to reform. After hiring legal counsel and leading up to and including hearing, Gutierrez again denied all wrongdoing. This progression leaves some question about Gutierrez' willingness to undertake significant change in his acceptance of crude banter in the workplace. On the positive side, Gutierrez's superiors consider Gutierrez to be an outstanding captain, capable of being "one of the best." [see e.g., Diggins testimony].

Gutierrez' conduct, while not a "severe form of sexual harassment," [see N. 3, below], was opprobrious based on his rank. While the proven conduct, alone, did not justify a 75-day suspension, Gutierrez' somewhat questionable commitment to reform, justified a significant penalty.

## **VI. ORDER**

For reasons stated above, the Agency's decision to suspend Gutierrez for 75 days is MODIFIED to a 30-day suspension.<sup>3</sup>

DONE May 10, 2017.



Bruce A. Plotkin  
Career Service Board Hearing Officer

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3. [See, e.g. Brim v. USPS, 49 M.S.P.R. 494 (Fed. Supp. 1991)(30-day suspension deemed maximum reasonable penalty for supervisor who did not engage in "any of the more severe forms of sexual harassment, such as offensive touching, or solicitation of sexual favors" but boasted to another supervisor of his sexual prowess loud enough to be overheard. Such conduct deemed to have violated that agency's sexual harassment policy which prohibited, *inter alia* "unsolicited remarks with a sexual connotation," which is similar to the Agency's D.O.s 2420 1. B. 5. J, ("joking or engaging in behavior that could be observed as offensive by a third party"), [Exhibit 10-2], D.O. 2440 1. G. 8., ("verbal conduct [based on gender] such as... jokes, sexual remarks....") [Exhibit 10-8]., and the more general charge of conduct unbecoming an employee, similar to the more general D.O.s 200.15 and 300.10 ("disrespectful, insolent or abusive language...towards any Department employee" and "indecent or disorderly conduct" respectively) .