

DECISION

IN THE MATTER OF THE APPEAL OF:

ANNE KELLY, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Anne Kelly, appeals her dismissal from employment by the Denver Sheriff's Department (Agency) on November 21, 2011, for alleged violations of specified Career Service Rules regarding her treatment of an inmate. A hearing concerning this appeal was conducted by Hearing Officer Bruce A. Plotkin on March 19 and 20, 2012. The Agency was represented by Jennifer Jacobson, Assistant City Attorney, while the Appellant was represented by Reid Elkus, Esq., and Don Sisson, Esq., Elkus & Sisson, P.C. Agency exhibits 1-7, 8-106, 8-107, 8-52 – 8-56, 8-130 – 8-151, 8-162 – 8-164, 8 (CDs), and Appellant's exhibits A-C were admitted by stipulation. Agency exhibits 8-223 – 8-225, 10-91 - 10-96, were admitted over objection. Exhibit 8 was admitted in its entirety for the limited purpose of establishing Deputy Manager Kilroy relied, in part, on this document to make her decision to dismiss Kelly. The following witnesses testified for the Agency: the Appellant; Deputy David Gardner; Deputy Sheldon Marr; Deputy Manager of Safety Ashley Kilroy; and Major Michael Than. The Appellant testified on her own behalf during her case-in-chief.

II. ISSUES

The following issues were presented for appeal:

whether the Appellant violated any of the following Career Service Rules: 16-60 A., B., E.3, L., M., P., Y., or Z;

if the Appellant violated any of the aforementioned Career Service Rules by preponderant evidence, whether the Agency's decision to dismiss her was clearly excessive.¹

¹ In *City of Denver v. Weeks*, 10CA1408 (Colo. App. 2011), the court announced the standard hearing officers must apply in assessing the degree of discipline (as opposed to whether any Career Service Rule was violated): whether the agency's choice in the level of discipline was "clearly excessive" or "based upon considerations that are not supported by the preponderance of the evidence." *Id.* at 10-11; 19-20.

III. FINDINGS

The relevant facts were undisputed. Ms. Kelly was a Denver deputy sheriff and Career Service employee from 2003 until her dismissal in 2011. Her primary duties were the care, custody, and control of inmates. She was on duty March 25, 2011, at the Denver Detention Center, when an arrestee, Felicity Tierney, was booked in for DUI. Pursuant to the Sheriff's Department policy, and in the presence of four other officers, Kelly ordered Tierney to remove her diamond ring, while telling Tierney she could keep her wedding band. When Tierney refused, Kelly ordered her several more times to remove the diamond, but the obviously-drunk² Tierney continued her obstreperous refusal.

Kelly and Tierney tousel while Kelly forcibly removed Tierney's eyeglasses. During the touse, Tierney scratched Kelly's left arm with three fingernails deeply enough to bleed. Kelly then forcibly turned Tierney around to face the wall and kicked Tierney's legs apart into a spread position in accordance with department policy. Kelly forcibly held Tierney's head against the wall while one of four other officers present, Deputy David Gardner, removed Tierney's ring.

In accordance with Department policy, Kelly instructed Tierney to remove her shoes. Tierney removed one of her shoes, but, in an act of inebriated defiance, tossed it across the room. Within the same second, Kelly slapped Tierney's face hard. The slap was 55 seconds after Tierney scratched Kelly. Gardner was looking directly at Tierney and flinched when he saw Kelly strike her. Kelly then turned her back to Tierney and retrieved the wayward shoe. [Exhibit 8 CD video].

Following a complaint by Tierney, the Agency's Internal Affairs Bureau (IAB) undertook an investigation into the incident. [Exhibit 8]. A pre-disciplinary meeting was held on October 27, 2011. Kelly attended with her attorney, who made a statement on her behalf. Kelly denied any wrongdoing. Her denial of wrongdoing continued throughout the hearing.

The Agency notified Kelly of her termination on November 21, 2011. Kelly filed her appeal the following day.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A.1.a., as the direct appeal of a dismissal. I am required to conduct a *de novo* review of the alleged Career Service Rule violations, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

² Appellant testimony; Gardner testimony; Exhibit 8-192; Exhibit 8-76; CD interview with Sgt. Garcia.

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to dismiss the Appellant from employment complied with CSR 16-20.

C. Career Service Rule Violations

1. Kelly's use of force on inmate Tierney.

Since the parties agree Kelly struck Tierney, the central issue is whether that force was justified under Agency and Career Service rules. The same determination will also decide whether Kelly's claim - that force was justified in response to Tierney's threat - was dishonest.

The video recording of the incident was the most convincing evidence. The recording shows Kelly slapping Tierney in reflexive reaction to Tierney's throwing her shoe.

Kelly claimed she slapped Tierney proactively out of fear that Tierney may have possessed some weapon that gouged her arm. Even if Kelly's concern were genuine, it makes little sense that Kelly turned her back to an inmate in possession of a weapon in order to retrieve a shoe. Moreover, Kelly just finished frisking Tierney when Tierney threw her shoe, and she did not re-frisk Tierney after she was "gouged," further diminishing the likelihood that Kelly was concerned about a weapon. [Exhibit 8 video]. Also, as evident from Kelly's handling of Tierney, Kelly had no fear of Tierney striking out with a weapon, either before or after Tierney scratched her.

Kelly's subsequent explanation, that other officers who were present would have covered any further assault by Tierney, only adds to the improbability of the explanation. If Kelly believed other officers would have protected her from an attack by Tierney, then there was no justification for Kelly's pre-emptive assault. Finally, when explaining the incident to her supervisor immediately after the incident, Kelly said nothing about why she felt the use of force was necessary. [Garcia interview CD].

Kelly also argued her slap of Tierney was a direct, proportionate response to an assaultive inmate. If Kelly had reacted immediately to Tierney's scratching, Kelly's use of force to restrain her would have been appropriate. [Kilroy cross-exam]. However, nearly one minute elapsed between the moment Kelly was scratched and the moment when Kelly slapped Tierney. That delay was crucial to the case, because the delay severed a connection between the scratch and the slap. Consequently the slap was unjustified, particularly as Tierney had ceased all aggression, and was compliant, other than tossing her shoe. [Exhibit 8 CD video; Marr testimony; Gardner testimony]. Notably, Tierney's hands were at her sides when Kelly slapped her.

Finally, Kelly argued her slap induced Tierney's compliance and therefore was justified. As Kilroy noted, however, shooting Tierney would also have enforced compliance, [Kilroy testimony], the evident point being the ends of compliance do not justify the use of any means to achieve it.

2. CSR 16-60 A. Neglect of duty.

A violation under this rule occurs where an employee neglects to perform a job duty which the employee knows she is supposed to perform. In re Campos, CSA 56-08, 2 (CSB 6/18/09).

One of Kelly's primary duties was the care of inmates. [Kilroy testimony]. Kelly violated that duty when she slapped an inmate in the face out of retribution for the inmate's throwing a shoe, and not for legitimate inmate control. This violation is established by a preponderance of the evidence.

3. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

A violation under this rule occurs for performing poorly, rather than neglecting to perform, an important duty. In re O'Meallie, CSA 92-09, 4 (6/18/10). Kilroy testified Kelly was careless in turning her back on Tierney when Kelly retrieved the errant shoe. [Kilroy testimony]. However, Tierney presented no threat at that time, as four other officers were in the immediate area. Also, even if it seems evident a jailer should never turn her back on an inmate who just gouged her, the Agency failed to identify that it was a duty. Consequently this violation is not established.

4. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

An agency establishes an employee's failure to observe a rule by providing notice to the employee of a clear, reasonable, and uniformly enforced rule, and that the employee failed to follow it, regardless of the employee's intent. In re Mounjim, CSA 87-07, 6 (CSB 1/9/09). The Agency claimed Kelly violated the following internal rules and orders, none of which Kelly denied were enforceable rules of which she had notice.

Department Order 5011.1J – Use of Force

...The amount of force used will be reasonable and appropriate in relation to the threat faced...It is important for officers to bear in mind that there are many reasons a suspect/inmate may be resisting or may be unresponsive. A person's reasoning ability, including but not limited to mental condition...are some examples...The force applied must reflect the totality of circumstances surrounding the immediate situation. The officer need only select a force option that is within the range of "objectively reasonable" options. ...Use of force that is not lawful, reasonable and appropriate will not be tolerated.

As found above, Tierney posed no threat at that time Kelly slapped her. Also, Kelly failed to account for Tierney's drunken state as a reason she may have been non-compliant. Thus, Kelly's violence was unreasonable and inappropriate, in violation of D.O. 5011.1J.

Department Order 2441.1F – Violence in the Workplace

...Violence has no place at any Denver Sheriff Department (DSD) location, ... and is strictly prohibited. Moreover, violence committed by Denver Sheriff Department (DSD) employees, whether on or off-duty reflects poorly on the

Department and the City and County of Denver and is strictly prohibited... Employees who perpetrate violence, whether on-duty or off-duty... may be subjected to disciplinary action, up to and including dismissal and possible criminal action... Violence is defined as, but not limited to: The actual or attempted physical... striking... The following list contains some examples of conduct which will not be tolerated... assault... Acting out while on the job in an abusive manner... assaulting... or abusing another person....

For reasons found above, Kelly's slap of Tierney was a violent act, in violation of D.O. 2441.1F.

Department Rule (D.R.) 400.6 Abuse of Prisoners

Deputy Sheriffs and employees shall not subject inmates to physical abuse... Physical injury or physical harm is not required to violate this rule.

Even though the Agency did not prove injuries to Tierney's face resulted from Kelly's slap, Kelly's slap was physical abuse in violation of this rule.

D.R. 300.22 Inappropriate Force

Deputy Sheriffs and employees shall not use inappropriate force in ...dealing with a prisoner....

For reasons stated above, Kelly was unjustified in slapping Tierney where, even if she was threatened by Tierney's initial violence, 55 seconds elapsed from the time Tierney ceased any action, i.e., gouging Kelly, which might have justified Kelly's use of force. Consequently, Kelly's belated face slap was an inappropriate use of force in dealing with an inmate, in violation of this rule.

D.R. 00.4.2 Commission of a Deceptive Act... including departing from the truth.

Since Kelly used inappropriate and unreasonable force on an inmate, her claim, during the IAB investigation, that her use of force was a reasonable, anticipatory defensive action to the potential use of a weapon, was a departure from the truth, particularly where honesty is a core value of the Agency. [Kilroy testimony]. Each of these internal rule and policy violations constitutes a separate violation under CSR 16-60 L.

In addition to those Agency rules and orders already discussed above, the Agency claimed Kelly violated D.R. 300.11.1 Conduct Prohibited by Law, including the Charter for the City and County of Denver, City ordinances, and state or federal statutes. Since violations have been found under specific Career Service Rules and Agency Orders and Rules, no further discussion is warranted under this catchall rule.

5. CSR 16-60 E. Any act of dishonesty...

The same evidence which proved Kelly departed from the truth, under D.R. 200.4.2., above, also proves a violation of this rule.

6. CSR 16-60 M. Threatening, fighting with, intimidating, or abusing employees or officers of the City, or any other member of the public for any reason.

As inmates are neither City employees, nor members of the public, they are not members of those classes for which the rule provides protection. See In re Carothers, CSA 13-11, 15 (1/5/12). Thus, no further consideration is due.

7. CSR 16-60 P. Conviction of or being charged with a crime. Prior to imposing discipline under this subsection, the department or agency shall follow the guidelines contained in subsection 16-61.

Here, the Agency must establish, by a preponderance of the evidence, that Kelly engaged in the conduct which forms the factual basis for the underlying crime, and that the conduct impacted her ability to perform her position. CSR 16-61; In re Mitchell, CSA 05-05, 6 (6/27/05). Kelly was charged with third degree assault for slapping Tierney, under Colorado Revised Statutes (CRS) § 18-3-204. [Exhibit 2-6; Kilroy cross-exam]. Third degree assault requires proof, *inter alia*, that Kelly caused bodily injury to Tierney. Kilroy, the only Agency witness on the subject, was unable to conclude that Kelly caused Tierney's injuries, a scratch to her left eye and redness on her cheek. Kilroy acknowledged the injury could have resulted when Tierney ran her car into a pile of dirt after driving straight through a stop sign, earlier in the day. This violation was, therefore, not established.

Kelly was also charged with harassment. That crime requires, in pertinent part, proof of striking another person with intent to harass, annoy or alarm. CRS 18-9-111. Kelly acknowledged she struck Tierney, establishing the first element. Her anticipatory self-defense claim was not supported by the evidence. On the other hand, it was not shown Kelly's retaliatory slap was intended to harass, annoy, or alarm Tierney. Consequently this violation is not established by a preponderance of the evidence.

8. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.

A violation of this rule occurs where the employee's conduct causes some actual or reasonably perceived harm not specifically provided for in the agency's evidence under other, more specific Career Service Rules. In re Abbey, CSA 99-09, 11 (8/9/10). Since specific violations have been found under Career Service Rules and Agency Orders and Rules, no further discussion is warranted under this rule.

9. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

To sustain this violation, the agency must prove the Appellant's conduct caused actual harm to the Agency or to the City. In re Jones, CSA 88-09, 3 (CSB 9/29/10). Kilroy testified Tierney filed suit against the City as a result of the incident; however it was unclear what harm, if any resulted. This violation is not established.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. In assessing discipline, appointing authorities are directed 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.

A. Severity of the established offenses.

The Agency established that a deputy's care of inmates and honesty are core values. A drunk inmate's annoying non-compliance does not justify violence against her. Additionally, the Agency has made it clear it will not tolerate dishonesty during the course of an investigation. These factors escalated what might otherwise have been a minor disciplinary matter, into a substantial departure from Agency norms.

B. Past record.

Kelly was disciplined for almost exactly the same conduct previously. She slapped an inmate who had just thrown a shoe. [Kilroy testimony]. At the same time, Kilroy acknowledged Kelly could be very considerate and effective, and often had a good rapport with inmates. Since the Agency has made it clear that inmate abuse and dishonesty will be dealt with harshly, Kelly's past good conduct did not obligate the Agency to moderate its decision in light of Kelly's dishonesty and repeated inmate abuse.

C. Penalty most likely to achieve compliance.

Kelly's failure to acknowledge wrongdoing at any time during the investigation made it impossible for the Agency to determine if a lesser degree of discipline might have been successful in reforming Kelly's misconduct.

For these reasons, the Agency's election to dismiss the Appellants was within the range of reasonable alternatives available to it, and therefore was neither clearly excessive nor based upon considerations which were not supported by the preponderance of the evidence.

VI. ORDER

The Agency's termination of the Appellant's employment on November 21, 2011, is AFFIRMED.

DONE April 26, 2012.



Bruce A. Plotkin
Career Service Board Hearing Officer