

DECISION AFFIRMING 10-DAY SUSPENSION

RICHARD SAWYER, Appellant,

v.

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

I. INTRODUCTION

This is an appeal of Appellant's 10-day suspension for alleged violations of specified Career Service Rules (CSRs). A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on May 20, 2016. The Agency was represented by Jessica Allen, Assistant City Attorney, while the Appellant was represented by Doug Jewell, Esq. Agency exhibits 1-10 and 11-13 were admitted. Appellant's exhibits A-S were admitted. One witness testified for the Agency, Deputy Director of the Department of Safety Jess Vigil. The Appellant testified on his own behalf, and presented no additional witnesses.

II. ISSUES

The following issues were presented for appeal:

A. Whether the Appellant violated any of the following Career Service Rules (CSRs):¹ 16-60 A.; 16-60 L. via Sheriff's Department Rules 300.19.1 as it pertains to Departmental Order 2000.11, subsections 1, 2, 4, 5, 6A., 7C.1, 14A., 14E.1., 2, 8, 15.A., 15B., 15C., and 15.E.1.

B. If Appellant violation one or more of the aforementioned rules, whether a 10-day suspension was reasonable under CSR 16-20.

III. FINDINGS

The Appellant, Deputy Richard Sawyer, is a 22-year veteran of the Agency. He is well-trained in detention and arrest procedures, [see, e.g. Exhibit 12], including the limitations on detention and arrest during secondary employment. During secondary employment, in the absence of exigent circumstances, a deputy sheriff has no more authority than a citizen to stop, detain, investigate, or arrest someone.

Sawyer worked off-duty at a Denny's restaurant for 18 years. On November 29, 2014, Sawyer was working at Denny's in uniform and armed, as is customary for off-duty deputies during their secondary employment shifts. His shift was from midnight to 4:00 a.m.

At about 1:00 a.m. two women and a man, E.R., entered. About 20 minutes later, a group of six entered. As that group passed by E.R.'s table one member of the newly-arrived

¹ The Career Service disciplinary rules were revised and renumbered, effective February 12, 2016. Since the violations alleged in this appeal occurred before that date, this Decision is based upon, and refers to, the prior version and numbering of the rules.

group gestured and otherwise communicated with E.R. before sitting with his group at another table. Two minutes later the unidentified male approached E.R. and began striking him repeatedly. Sawyer heard the commotion from the rear of the restaurant where he was seated and went to investigate. Seeing the unidentified male striking E.R., he yelled "stop," "cut it out," and placed himself between the two, but the assailant did not comply. Sawyer attempted to restrain the assailant and both fell to the floor while the assailant continued to resist. The Assailant managed to escape and ran out of the restaurant. Sawyer pursued him.

Outside, Sawyer caught the assailant and "attempted to gain control to handcuff him." [Agency exhibit 000573; Appellant testimony]. Sawyer perceived a group was closing in on him and he disengaged. The assailant fled. Someone said E.R. has a gun, and Sawyer immediately returned inside to check, found out E.R. was unarmed, then decided to review the security camera recording.

An employee told Sawyer that one of the women, S.M., who had entered with the assailant had returned to the restaurant. Sawyer questioned her about the assailant and the group she was with. [Exhibit 7]. She denied any involvement. He told her "I'm going to detain you until I can get a [police] car here and let them sort it out." He handcuffed her, told her to sit in one of the booths, and when she stood up to approach him a few minutes later, he told her to sit down. He called Denver Police dispatch and requested a response car. He told the dispatcher the assailant had fled, but a woman who had been with him was in the restaurant. S.M. did not interact with anyone until after Sawyer handcuffed her. A Denver Police officer arrived in response to Sawyer's call. S.M. had been handcuffed and not free to leave for 16 minutes when Sawyer gestured for her to follow him outside. Sawyer talked with the officers then handed over S.M. to them.

An investigation ensued into Sawyer's conduct. He was interviewed by the Agency's Internal Affairs Bureau on December 18, 2014. [Exhibit 5]. The Agency convened a pre-disciplinary meeting on February 22, 2016, and served its notice of discipline on March 10, 2016. Sawyer filed a timely appeal on March 25, 2016.

Deputy Director of the department of Safety Jess Vigil was the decision maker in this case. He reviewed the entire IA file, video from Denny's, and audio recordings of interviews.

IV. ANALYSIS

A. Jurisdiction and Review

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

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 the degree of discipline complied with CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations.

The Agency alleged Sawyer substantially exceeded the scope of his authority, as an off-duty Denver Deputy Sheriff, when he investigated the assailant at Denny's restaurant, attempted to

arrest him, and detained and investigated S.M. Sawyer denied he acted outside the scope of his authority. The Agency claimed Sawyer's actions violated the following Career Service Rules.

1. CSR 16-60 A. Neglect of Duty.

Aside from violations of specified Agency rules and orders, it was difficult to determine how the Agency believed Sawyer violated this Career Service Rule. The Agency's notice of discipline, Exhibit 1, did not make any particular connection between Sawyer's conduct and this rule. Vigil, stated Sawyer violated this rule by failing to follow Departmental Order 2000.11, addressed below. As stated in other decisions, a violation of another specified rule does not automatically establish a violation under CSR 16-60 A. In re Robinson, CSA 03-13, 4 (6/18/13); see also In re Mitchell, CSB 57-13A, 3 (11/7/14). No other evidence tended to establish a violation of this rule. The Agency failed to prove this violation.

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

300.19. 1. Disobedience of Rule

Deputy Sheriffs and employees shall not violate any lawful departmental rule (including CSA rules), duty, procedure, policy, directive, instruction, order (including Mayor's Executive Orders), or Operations Manual section.

Departmental Order (DO) 2000.11 – Exercise of Authority as Peace Officers to Stop and Arrest Suspects:

1. Purpose: The Sheriff and Denver Deputy Sheriffs are peace officers under the laws of the State of Colorado. The purpose of this order is to formalize certain practices in existence and to prescribe clarifying written policy and guidelines for the Sheriff and Denver Deputy Sheriffs in exercising their authority as peace officers to stop or arrest persons suspected of violating the laws of the State of Colorado and the Charter and Ordinances of the City and County of Denver.

2. Policy: It is the policy of the Denver Sheriff Department (DSD) that, when the Sheriff and Denver Deputy sheriffs exercise their authority as peace officers to stop suspects or effect arrests, they do so in compliance with relevant federal state and local laws, Department Orders, rules, regulations, policies, procedures, directives, and the Denver Sheriff Department (DSD) Personnel Manual.

4. Explanation: It is recognized that the Sheriff and Denver Deputy Sheriffs are often involved in situations in which the exercise of their authority as peace officers to stop or arrest suspects is reasonably necessary in order for them to effectively fulfill their duties and responsibilities as Denver Deputy Sheriffs. It is further recognized that it is specifically authorized by the Executive Director of Safety.

5. Definitions:

Authorized Secondary Employment – Off-duty employment authorized by the Denver Sheriff Department in accordance with all Department policies and procedures related to secondary employment.

6. Authority:

A. Related City Charter Provisions:

...the Sheriff and the Sheriff Department shall exercise and perform the powers and duties now required or that may hereafter be required by the Constitution or the general laws of the state to be performed by the county sheriff, to the extent any such powers or duties are approved by the Manager of Safety.

The Agency presented no evidence specific to the above rules, at least as punishable violations. Instead, it appears these rules were contextual to other subsections of D.O. 2000.11. No violation was found hereunder.

7. Specific Grant of Authority by the Executive Director of Public Safety:

C. The Sheriff and Denver Deputy Sheriffs are specifically authorized by the Executive Director of Safety to exercise their authority as peace officers to effect arrests while on duty, in uniform and within the City and County of Denver when acting as a result of exigent circumstances.

1. Exigent circumstances exist when there is probable cause to believe that an offense has been or is being committed which involves a substantial risk of death or serious bodily injury to another and immediate action is reasonably necessary to prevent or mitigate such harm or to apprehend or prevent the escape of any person for whom probable cause exists to believe that person has committed such an offense.

Vigil found Sawyer effected an arrest of S.M., yet did not consider this a part of his wrongdoing. Based on the bulleted findings, below, Sawyer arrested S.M. However, since the Agency chose not to enforce that violation against Sawyer, no more attention is devoted to the violation here. However, the finding of an improper arrest under this order is a factor in the degree of discipline, below.

14. Limitations on the Authority Granted by this Department Order

A. This policy is not intended to convey the responsibility for general law enforcement authority to deputies of the Denver Sheriff Department regarding all offenses occurring within the City and County of Denver. The authority granted is expressly permitted and limited by the provisions of this department order.

E. In exercising the authority granted by this order, Denver deputy Sheriffs shall not engage in the following activities:

1. General patrol duties;
2. General investigative duties;

According to decision-maker Deputy Executive Director Vigil, this portion of D.O. 200011 was at the core of the Agency's case. Specifically, Vigil found Sawyer undertook general investigative and patrol activities in violation of this order. Vigil found Sawyer did not violate this rule when he attempted to stop the assailant from assaulting E.R., [Vigil response to H.O. question], nor did Vigil find Sawyer violated this rule based on Sawyer's arrest of S.M., Vigil based his finding of a violation, under this subsection, on his determination that, for 10-12 minutes, Sawyer conducted improper investigations to solve crimes, including the assault by the assailant, his detention and questioning S.M., and his review of Denny's security tapes. Sawyer denied he undertook any investigative activity.

As a starting point, this rule forbids deputies from engaging in any peace officer function except as specifically authorized within the order. [Exhibit 12-12]. The term "general investigative duties" is not defined within the rule. Vigil defined the term as it applies to law enforcement officers to investigate crimes, including interviewing witnesses, detaining and arresting suspects, and gathering evidence for criminal prosecution. [Vigil testimony]. Vigil's definition is consistent with the plain and ordinary meaning of those words, in the context of law enforcement. Thus a "field investigation" includes the temporary detention of a person who the peace officer reasonably suspects has committed or is about to commit a crime. People v. Cruz, 526 P.2d 1315, 1317 (Colo. 1974), *citing*, inter alia, Stone v. People, 485 P.2d 295 (1971).

The following factors were determinative in concluding Sawyer conducted one or more investigations in violation of this subsection.

- Sawyer told IAB he was not aware of S.M.'s involvement in the assault of E.R. but wanted to detain her for "an investigatory" regarding the assault.
- Sawyer confronted, handcuffed, and questioned S.M. about the assailant and her connection to him. Sawyer kept S.M. handcuffed for 16 minutes until DPD arrived. She was not free to leave during that time. There was no indication that S.M. committed a crime or was about to commit a crime, either of which may have provided Sawyer cause to detain S.M. to question her under this rule.
- Sawyer pursued the assailant outside.
- He attempted to handcuff the assailant.
- He confronted E.R. and conducted a pat-search for weapons. In response to the question whether he returned to investigate if E.R. had a weapon, Sawyer answered "yes."
- He asked Denny's manager to review the security recordings.
- He reviewed the Denny's security recordings and did not contact DPD. Asked why he did not wait for DPD to do that, he replied "I don't have an answer to that." [Sawyer cross-exam].
- Sawyer asked E.R. if he wished to press charges against the assailant.

While Sawyer claimed he restrained S.M. because she was creating a disturbance, the video evidence, contained within exhibit N, showed she did not interact with other patrons until about three and one half minutes after she was handcuffed. The server with whom S.M. allegedly argued, did not testify and, at most, S.M. was arguing with other patrons and a server which is insufficient justification to handcuff her "for safety reasons."

Sawyer claimed S.M. was being “verbally assaultive” which he deemed to consist of not answering his questions. [Exhibit 5-22]. This explanation failed to justify her detention and investigation.

Sawyer also claimed S.M. “was involved with the situation of the assaulting of [E.R.],” [Exhibit 5-22], but Sawyer had no basis to believe S.M. had any involvement beyond her presence at the same table as the assailant. As such, she was no more than a potential witness to a crime, an insufficient basis to restrain her for investigation, whether under this rule or law.

Sawyer had many opportunities to call DPD, but did not, instead continuing to conduct his own investigation. Sawyer’s response, that he felt he needed more information before contacting DPD was unpersuasive in view of many indicia that Sawyer’s “information” gathering, above, was, in reality, an investigation.

Also, regarding his detention and questioning of S.M., Sawyer stated he was “just getting information.” [Sawyer testimony and cross-exam]. At the same time, Sawyer acknowledged he did not know if S.M. was involved in the assault on E.R. or on him² when he questioned her.

Sawyer admitted that, had anyone with the assailant been present when he gave chase outside, he would have attempted to detain them as well “because they had information about the assault.” He said he would have asked who was present during the assault and the assailant’s identification. [Sawyer cross-exam]. A commonsense application of the word “investigate” includes questioning those who might have information about a potential crime, whether by detaining them or not, and whether rightly or wrongly detaining them.

Sawyer sought and obtained permission to review the security recording of the incident. Asked why he did not wait for DPD to undertake that activity, Sawyer testified “I don’t have an answer for that.”

After withdrawing from his encounter with the assailant outside, when Sawyer was told E.R. might have a gun, he immediately went back into the restaurant, and pat-searched E.R. This action also was an investigation under this rule.

Sawyer based his pursuit and attempt to handcuff the assailant in large measure on his statement to DPD and to IA, [Exhibit 5-24], that the assailant assaulted him. That statement was not credible in light of his later acknowledgment that he fell against a table, that he was struggling with the assailant and was struck in the back as they both fell to the floor, making it unlikely the assailant would have hit him from behind, and Sawyer’s acknowledgment that he did not know what struck his back as he fell.

8. The exercise of any authority as a peace officer while off-duty except as specifically authorized in Section 15 of this Order (Limitations on Peace Officer Authority while Engage in Authorized Secondary Employment);

The proscription in this subsection was addressed immediately above, as the specified prohibition against conducting investigations under subsection 14. E. 2.

² Sawyer claimed he thought the assailant struck him when they struggled, but he concluded, after seeing the security recording, that he simply fell and struck his back on an object during the scuffle.

15. Limitations on Peace Officer Authority while Engage in Authorized Secondary Employment:

A. Secondary employment may be authorized by the Denver Sheriff Department and must be in accordance with all policies, procedures, directives or orders which govern secondary employment.

The violation alleged under this rule was addressed more specifically above. No other violations were alleged or established under this subsection.

B. Denver Deputy Sheriffs engaging in secondary employment shall be considered off-duty. Denver Deputy Sheriffs engaged in secondary employment shall be considered employed by their off-duty employer and not by the City and County of Denver.

No violation was alleged or established under this subsection.

C. Any action taken by Denver Deputy Sheriffs in the course of and in furtherance of the duties and responsibilities of their secondary employment shall be considered actions taken on behalf of the secondary employer and shall not be considered the actions of the City and County of Denver.

No violation was alleged or established under this subsection.

E. ... by this order of the Executive Director of Safety, the authority of Denver Deputy sheriffs to act as peace officers while engaged in activities in furtherance of their authorized secondary employment is expressly limited to the practice in existence prior to the effective date of this order of stopping suspects pursuant to CRS 16-3-103 (Stopping of Suspect) as described in section 6 of this order.

1. Denver Deputy Sheriffs shall not have the authority to effect arrests while engaged in authorized secondary employment, unless an exigent circumstance exists, but must contact the Denver Police Department to do so.

Vigil stated that, while he found Sawyer effected an arrest of S.M., he did not base discipline on the arrest per se, but as part of his improper investigative activities. I deem Vigil's testimony as a withdrawal of the Agency's claim under this rule, except as a factor in assessing the degree of discipline.

Sawyer testified he had detained people during his secondary employment at Denny's many times, always reported it to the Agency, and was never disciplined for it before. [Sawyer testimony]. If true, this allegation may point out a hole in the Agency's secondary employment oversight, but it does not relieve Sawyer from complying with the requirements of Agency rules. Repeating the same rule violation does not make it right.

Finally, Sawyer claimed discipline was unfair because of the length of delay between the Denny's incidents and the date of notice of discipline, some 16 months later. Some of the delay was attributed to the internal discussions concerning who would be the decision maker, and Deputy Director Vigil's schedule. Part of the delay was due to a lawsuit filed against the city,

arising out of the incident at Denny's in which Sawyer was a witness or potential witness. Part of the delay was also due to settlement discussions, and Appellant counsel's availability. [Vigil testimony]. Some of the delay was due to Sawyer. He began settlement discussions directly with the City Attorney's office before procuring counsel. [Vigil cross-exam]. He was unable to attend the originally-scheduled pre-disciplinary meeting in early June 2015 due to his daughter's graduation, causing the meeting to be rescheduled to the end of the month. Consequently, while there was a long period between the incident underlying this case and the assessment of discipline, I do not find the Agency failed to investigate and decide this case timely.

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.

A. Severity of the proven offenses

Sawyer acknowledged he told S.M. he was keeping her detained until DPD arrived because she had "pertinent knowledge" about the incident. [Sawyer cross-exam]. He required her to sit, handcuffed in a booth. The preponderant evidence did not indicate S.M. was creating a disturbance, or at least not sufficient to permit Sawyer to detain her. Although not charged as such by the Agency, his actions were an arrest of S.M., which was outside the scope of his authority and could expose the City to liability for wrongful detention.

The wrongdoing by Deputy Sawyer, particularly, without backup, in pursuing and attempting to arrest the assailant after he fled Denny's, unnecessarily and in violation of DSD rule, placed Sawyer and others at unnecessary risk. He was alone, wrestling with a suspect while, as he acknowledged, wearing an exposed gun and in a crowd of people closing in on him. When he was told E.R. had a gun, he did not call DPD, but immediately returned to the restaurant and confronted E.R. It does not take much extrapolation to envisage a sorry outcome to those actions.

B. Prior Record

Vigil determined that, while Sawyer had many prior violations, none was significant to this case. He did not find any aggravation caused by Sawyer's prior record.

C. Likelihood of Reform

Sawyer denied he engaged in any wrongdoing throughout the investigation and hearing. It is, therefore, unknown to what degree it is likely he will reform his behavior if he continues to engage in secondary employment. The Agency allowed him to return to secondary employment, indicating it is not highly concerned with this factor. [Sawyer testimony].

VI. ORDER

Appellant's 10-day suspension, from April 4, 2016 through April 14, 2016, is affirmed.

DONE June 17, 2016.



Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements that follow CSR § 19-60, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

Career Service Board
c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.