

DECISION AFFIRMING DISMISSAL FROM EMPLOYMENT

JEREMY SIMONS, Appellant,

v.

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

I. INTRODUCTION

Appellant Jeremy Simons appeals his dismissal from the Denver Sheriff's Department (Agency) on November 21, 2016, for alleged violations of specified Career Service Rules, and Agency regulations. A hearing to determine the propriety of the dismissal was conducted by Bruce A. Plotkin, Hearing Officer, on March 28, 2017. The Agency was represented by Richard Stubbs, Assistant City Attorney, while the Appellant was represented by Marcy Ongert, Esq. and David Canter, Esq., of Foster, Graham, Milstein & Calisher, LLP. Agency exhibits 1-12 and Appellant's exhibits A – K, M – S, U – X, and AA were admitted. The following witnesses testified for the Agency by telephone: inmates SK; and JB. Civilian Review Administrator Shannon Elwell also testified for the Agency. The Appellant testified on his own behalf during his case-in-chief, and presented the testimony of Deputy Samuel Shuder and Sergeant James Sanford.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant violated any of the following Career Service Rules (CSRs): 16-60 A; or 16-60 L.¹ as it pertains to Agency Rules and Regulations 400.2 and 400.5.

B. if the Appellant violated either of the aforementioned Career Service Rules, whether the Agency's decision to dismiss him conformed to the purposes of discipline under CSR 16-20.

III. FINDINGS

Simons was a Deputy Sheriff in the Agency for two years. His primary duties were the care and custody of inmates. Between January and April of 2016, he was assigned, in part, to the Downtown Detention Center (DDC) residential pod 3A, which houses violent inmates.

Pod 3A holds 64 inmates in eight cells with eight inmates in each cell. To reduce conflict, inmates are assigned in equal numbers of White, Black, and Hispanic inmates to each cell. Tier porters² are assigned to a single cell where they are released for their duties without the risk of opening several cells. Tier porters are also assigned to their cell evenly by race.

¹ Since this appeal was filed, the Career Service Rules have been revised. Because the previous version of the rules was in effect at the time discipline was assessed, that version controls the outcome in this appeal.

² Tier Porters are inmates who have been afforded certain privileges. In re Steckman, CSB 30-15A, 1 (1/19/2017).

One of the 3A inmates, SK, has been in jail since his involvement in an armed conflict, which ended when he was shot by Denver Police Department (DPD) officers. In April 2016, SK's aunt submitted a complaint, claiming Simons taunted SK by telling him he was lucky to have been shot by a DPD officer instead of by a deputy sheriff because police aim to wound while deputies aim to kill. [Exh. 5-2, 5-3].

During the ensuing investigation, Internal Affairs (IA) found SK previously filed a grievance against Simons for racially-motivated slurs and other derogatory comments. Four other inmates also filed grievances against Simons, alleging racially-motivated slurs and other derogatory comments, including (1) Simons uttered "them monkeys got to stay in the room," (2) called inmates "snitches," and (3) often told SK and other inmates SK was "lucky DPD shot him, not DSD who would have killed him." [Exh. 11].

Inmate AA³ said Simons told inmate KH that, while DPD officers shoot a hand or leg, DSD officers shoot to kill. [Exh. 8]. AA also claimed KH told him Simons called inmates "monkeys," but provided no details surrounding the allegation. In a pre-hearing deposition, AA recanted his statement to IA, and denied having heard any of the comments. AA explained he was afraid of SK and felt pressured to back his story. [Exh. U].

IA also interviewed inmate JB who claimed Simons referred to Black inmates as "monkeys" and told SK "if I would have been there, I would have shot you too." [Exh. 9].

Inmate KH also claimed Simons called Black inmates "monkeys." KH also told IA Simons told him he kept a light to shine on inmates because "if you go into a corner you'll disappear [because of your dark skin]." KH also claimed Simons told inmates "suck [my] dick," and threatened to call inmates "snitches" who filed grievances against him. [Exh. 10].

Inmate MG told IA that Simons used "racist slurs" including referring to "monkeys upstairs." MG also claimed Simons told SK he was "lucky it wasn't DSD that shot [you] because if it had been [a DSD deputy who shot you], you would have been dead." MG added Simons called him a "snitch" for filing grievances. [Exh. 12].

Two contemplation of discipline meetings were held regarding Appellant's conduct, on June 16, 2016 and September 15, 2016, and Appellant attended with legal counsel. The second meeting was convened after the decision-maker requested IA to conduct additional interviews.

On November 21, 2016, the Agency sent its notice of termination to the Appellant. This appeal followed timely on November 29, 2016.

IV. ANALYSIS

The central fact issues of this case are whether Appellant: (1) made inappropriate comments about shooting an inmate; (2) referred to inmates as "snitches" when they file grievances; or (3) called inmates racially-offensive names including "monkeys." If those allegations are true, then the danger to inmates, harm to the Agency's purpose, and potential liability to the Agency and City justified termination.

³ To protect the privacy of this individual, he is referred to as AA rather than by his initials as he was referred to during hearing.

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A.1.a., as a direct appeal of a dismissal. 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 its decision to dismiss Appellant complied with the purposes of discipline under 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

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

To sustain a violation under CSR 16-60 A, the Agency must establish that appellant failed to perform a known duty. In re Gomez, CSA 02-12 (5/14/12) *citing* In re Abbey, CSA 99-09, 6 (8/9/10). The Agency claimed the Simons violated this rule by making four racially-offensive or otherwise inappropriate remarks to inmates in his pod in violation of his duty to treat inmates with dignity and respect. Simons responded he made no such comments, or the comments were taken out of context.

Civilian Review Administrator Shannon Elwell was the decision-maker in this case. The duties she alleged to be violated derive from the Agency's guiding principles of conduct for deputy sheriffs found in the Agency's personnel handbook at Appendix A. [Exh. 4-50]. She specified Simons violated his duty to treat inmates with respect when he described SK, who is Black, [Exhibit 11; SK testimony], and other Black inmates with the racially derogatory term "monkeys." She also claimed that conduct as well as the act of making inappropriate remarks about fatally shooting SK and referring to inmates as "snitches" violated the guiding principles of fairness, judgment, integrity, accountability, and professionalism under the guiding principles. [Elwell testimony; Exh. 4-50].

Simons denied he ever called any inmate a monkey, denied he referred to any of them as snitches, and denied he said he would have killed SK if he [Simons] had shot him. Both witnesses for Appellant declared it would be out of character [Sanford testimony; Shuder testimony]; however neither was present for any of the alleged incidents.

For reasons stated at length, below, the inmates' accusations were credible, and Simons failed to raise a significant rebuttal to their claims. Simons' derogatory language and other comments lacked respect for inmates and was unfair treatment, lacked integrity, good judgment and professionalism, all duties known to him, in violation of 16-60 A. This violation is established by a preponderance of the evidence.

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

To prove a violation of this rule, the Agency must prove only that there was a clear and reasonable written policy, and the employee was aware of the policy but failed to follow it. In re Rodriguez, CSA 12-10, p. 13 (10/22/10); In re Mounjim, CSB 87-07 (1/8/09). The Agency claimed Simons violated DSD Rules 400.2 when he referred to inmates as "monkeys" and 400.5 when he called inmates "snitches" and said he would have shot inmate SK.

RR 400.2 – Discrimination, Harassment, or Retaliation against Prisoners

Deputy Sheriffs and employees shall not engage in any form of discrimination, harassment or retaliation in the treatment of prisoners or in the manner in which they perform their duties due to race, color, creed, national origin, gender, sexual orientation, age, ancestry, physical or mental disability, marital status, military status, political affiliation, religion or any other status protected by federal, state, or local laws. They shall not extend favors, liberties or privileges to any prisoner except as provide by law, department policy and established written procedures.

Monkeys

Elwell found Simons violated RR 400.2 when he repeatedly referred to black inmates as “monkeys,” a racial epithet used for African Americans. [Elwell testimony; Exh. 1].

SK claimed Simons, at some unspecified time and place said “them monkeys gotta stay in the room,” referring to Black and Mexican inmates. [SK testimony]. SK cited another unspecified occasion when Simons referred to inmates as “monkeys” when only Blacks were present.

Inmate JB, who is Black, told IA that Simons referred to Blacks as monkeys. [Exh. 9]. At hearing, JB additionally recalled Simons referred to SK when he made that reference. [JB telephone testimony].

In his interview with IA, Inmate KH also recalled hearing Simons refer to “people” as monkeys. [KH telephone testimony] and also recalls asking Simons for permission to get a razor. Simons replied, “it’s dark outside, if you go into a corner you’ll disappear.” [Exhibit 10].

Inmate MG, a Hispanic inmate, testified he heard Simons call inmates “monkeys.” He did not know specifically to whom Simons referred, but was certain the reference was racist. [MG telephone testimony].

Together, the inmate statements demonstrate discrimination or harassment against prisoners due to their race, color, or ancestry, in violation of DO 400.2. Their statements are largely consistent with each other, and there was no evidence of collusion.

Simons replied he never referred to inmates as monkeys and declared the inmates’ statements are untrustworthy. He claimed SK held sway over the others as he was a lead gang member. On the other hand, Simons acknowledged he never had an issue with inmates JB or MG both of whom recalled Simons using the word “monkeys” in racist fashion.

Deputy Shuder and Sgt. Sanford testified they believed Simons to be honest, and never heard him call inmates “monkeys.” However, neither was present at the time of the alleged violations.

Simons also claimed SK became angry when Simons replaced him as tier clerk with a former tier clerk who returned. Simons claimed SK controlled other inmates and prompted them to file grievances against him, the inference being there was collusion with respect to the “monkeys” complaints against him. At least one inmate, JB, testified he got along well with Simons and never filed a grievance against him. Under the totality of circumstances, the Agency proved Simons called one or more inmates “monkeys.” The reference was discriminatory and harassing based on the race of the inmates, and therefore violated DO 400.2

and 400.5 when he referred to inmates as monkeys. Whether Simons intended his “monkeys” comment to be non-racist, as he claimed, is irrelevant to the common perception that it has racist effect when referring to dark-skinned people.

RR 400.5 – Harassment of Prisoners

Deputy Sheriffs and employees shall not taunt or harass any prisoner or encourage or permit others to do so. Deputy Sheriffs and employees shall not maliciously embarrass, intimidate or threaten any person or encourage or permit others to do so.

Shooting of inmate

Elwell found Simons violated RR 400.5 when he repeatedly made comments to SK that SK was “lucky DSD didn’t shoot him, we would have killed him.” [Elwell testimony; Exh. 1].

SK alleged Simons told him “if he [Simons] was the one that shot me, he would have killed me.” [SK testimony; Exh. 11]. JB corroborated, recollecting that he overheard Simons tell SK “If I would have been there, I would have shot you too.” [JB testimony; Exh. 9; Exh. U]. JB added Simons was generally not the kind of person to say such things, was not that way with him, but singled out SK. [Id].

RW recalled Simons saying DSD officers shoot to kill instead of shooting in the hand or leg, as DPD officers do. He remembers Simons bragging about DSD officers being “better shooters” than police officers. [Exhibit 8].

Inmate KH had a similar recollection. He told IA “We were talking about the gun range or whatever, and he [Simons] was saying they were way better shooters than DPD and DSD shoots to kill, and SK was lucky it wasn’t DSD that shot him, because [Simons] would have killed [SK].” [Exhibit 10].

Inmate MG also remembers Simons telling SK “he’s lucky it wasn’t DSD that shot him, because if it was him [Simons who fired], SK would have been dead.” MG was fairly certain SK heard the statement because “he was pissed off after that.” He recalled a number of inmates present when Simons made the comment. [Exhibit 12].

These statements are highly consistent. Simons failed to raise a credible rebuttal of collusion or other reason why the statements were not reliable. For reasons as stated above, Simons failed to establish that SK intimidated or coerced other inmates into making false reports about his statements that deputies shoot to kill. His witnesses’ testimony, that it is a frequent internal topic of conversation that DSD officers are more accurate than DPD, was unpersuasive in light of the pointed reference to SK’s injuries. In short, Simons repeated references to SK being lucky DPD shot him instead of DSD was taunting and harassing to an inmate who had been shot by DPD, in violation of DO 400.5.

Snitches

Elwell found Simons violated RR 400.5 when he referred to inmates who filed grievances against him as “snitches.” Simons’ and his witness, Sgt. Sanford, underlined the gravity of accusing an inmate of being a “snitch.” Sanford said “to an inmate, a snitch is almost as bad as a child molester... it can cause a problem in the pod because the other inmates might go after the ‘snitch.’” [Sanford testimony].

In addition to SK's claim that Simons accused him of being a snitch, and calling grievances against him "snitch paper," KH stated when an inmate requests a grievance form, Simons asks "[are] you asking for a snitch book?" and "are you snitching now?" Further, KH stated Simons asked [rhetorically] "who put a grievance in lately? Marcos did." [Exhibit 10].

MG told IA he wrote a grievance just a week before his IA interview. Simons called him a snitch for doing so.

Simons denied the accusation, but the inmate's statements are consistent, there was no established collusion, and Simon's claim that SK held sway over the others was demonstrably not to be the case, as at least two inmates stated, without rebuttal, that they got along well with both Simons and SK. Given the danger imposed by accusing an inmate of being a snitch, the Agency established Simons' accusations were harassing and threatening, in violation of DO 400.2 and 400.5 by a preponderance of the evidence.

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. Seriousness of the proven offenses

Elwell found Simons violations of Agency rules fell into the presumptive category of termination under the Agency's disciplinary matrix. She also found mitigation, but determined it was insufficient to offset the egregiousness of the violations under the matrix. Under the Career Service Rules, a reasonable administrator could find Simons' conduct justified a range of penalties including dismissal. His taunting comment about monkeys was demeaning and unlawfully harassing. Further, accusing inmates of being snitches for filing grievances - something that is their absolute right to do - put inmates in danger. Finally, making comments about fatally shooting inmates, even if jokingly, was threatening and harassing conduct. These were significant departures from the Agency's - and deputies' obligation - to treat inmates with dignity and respect.

B. Prior Record

Simons has no prior instances of discipline. [Exh. 1-9]. His 2015 - 2016 PEPR rated him as Exceeds Expectations, and in his two years at the Department he has been recognized for saving the life of an inmate, and received a letter of thanks for helping an inmate move his car while the inmate was stuck in jail. [Exh. V; Exh. W; Exh. X]. Given this exemplary record, a reasonable administrator could have chosen to offset the severity of proven violations with this exemplary record and imposed a lesser discipline. However, that the Agency chose not to do so was within its discretion.

C. Likelihood of Reform

Since Simons denied engaging in any of the conduct which formed the basis of discipline, it is unknown if he would reform his behavior.

VI. ORDER

The Agency's termination of the Appellant's employment on November 21, 2016, is AFFIRMED.

DONE May 5, 2017.



Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.