CIVIL SERVICE COMMISSION, CITY AND COUNTY OF DENVER, COLORADO

Case No. 07 CSC 02

IN RE: THE MATTER OF:

KENNETH JOHNSON (94037)
Sergeant in the Classified Service of the Denver Police Department,
Petitioner.

HEARING OFFICER’S DECISION

I. HEARING PROCEDURE

I, Michelle K. Walters, Esq., presided over an evidentiary hearing in the above-captioned matter on January 7 and 8, 2008 in the Career Services Hearing Room of the Webb Municipal Building. David J. Bruno, Esq. of Bruno, Colin, Jewell & Lowe, P.C. represented the Petitioner, Sgt. Kenneth Johnson. Robert A. Wolf, Esq., of the Office of the City Attorney represented the Respondent, Manager of Safety Alvin J. LaCabe and the City and County of Denver, jointly. I heard the sworn testimony of the following individuals: Lt. Angelo Martinelli, Sgt. Perry Speelman, Sgt. Richard Laber, Off. Mark Beluscak, Mgr. Alvin LaCabe, and Sgt. Kenneth Johnson. Petitioner’s Exhibits G and J through O were admitted,¹ and Respondent’s exhibits 1 through 19 were admitted. The parties elected to provide oral closing arguments. Subsequent to the hearing, I listened to Respondent’s Exhibit 19, which is an audio recording of the pre-disciplinary meetings conducted by Chief Gerald Whitman. I requested certain portions of the hearing transcript, which I received on Friday, February 1, 2008.² I closed the hearing by order filed Monday, February 4, 2008. Thirty days from such closure is March 5, 2008.

¹ Petitioner’s Exhibits D and F were withdrawn; Petitioner’s Exhibits A, B, C, E, H and I were not offered as they were duplicates of Respondent’s exhibits.
² Although the transcript was e-mailed to me on Thursday, January 31, 2008, I was out of the office until Monday, February 4, 2008.
II. **ISSUES PRESENTED**

In his pre-hearing statement and opening argument, Petitioner raised a due process issue based on Chief Whitman's modification of a charge following an initial pre-disciplinary meeting. Specifically, Petitioner was originally notified that discipline was being contemplated based on violations of RR-112 (Departing from the Truth) and RR-102 (Violation of any Department Rule). After an initial pre-disciplinary meeting, Chief Whitman took the matter under consideration. At a subsequent pre-disciplinary meeting, Chief Whitman withdrew the RR-112 (Departing from the Truth) charge and proceeded instead under RR-105 (Conduct Prejudicial) based on the same underlying events. Following the presentation of evidence at hearing, Petitioner's counsel conceded that at the second pre-disciplinary meeting with Chief Whitman, Petitioner was afforded at least minimally sufficient notice and opportunity to be heard concerning the RR-105 (Conduct Prejudicial) charge. Petitioner's counsel elected not to argue the due process issue in closing argument and withdrew the issue. Therefore, this Decision is limited to the following issues:

*Did Petitioner violate RR-105 (Conduct Prejudicial) of the Denver Police Department Operations Manual? If so, should the 10-day suspension received for such violation be affirmed, reversed, or modified in whole or in part?*

III. **FINDINGS OF FACT**

1. Petitioner is approximately 47 years of age.

2. Petitioner became an Officer of the Denver Police Department (“DPD”) in January, 1994. As of the hearing date, Petitioner had received 12 commendations and 6 disciplinary actions. The 6 disciplinary actions were comprised of 1 SSR entry, 4 oral reprimands, and 1 written reprimand.
3. Petitioner’s professional history includes, but is not limited to: service in the United States Air Force as a security police Officer; employment in a halfway house and a psychiatric hospital, both involving work with children; and employment as a stock broker.

4. Petitioner earned a bachelor’s degree in political science from the University of Colorado in 2003.


7. The annual work schedule for Officers within the DPD is divided into 13 periods per year with 28 calendar days per period.

8. Pursuant to the applicable collective bargaining agreement, the days off schedule\(^3\) must be posted at least 7 days prior to the commencement of the period that the schedule covers.

9. It is customary within the DPD for a Lieutenant to delegate to a Sergeant the preparation of the days off schedule for each period subject to the Lieutenant’s review and approval of the days off before they are posted.

10. It is customary for Lt. Martinelli to rotate the assignment of preparing the days off schedule among the Sergeants under his command.

11. The preparation of the days off schedule, or Attendance Record, involves several steps\(^4\), summarized as follows: The Sergeant must ascertain the names of Officers who will be working in his district during the upcoming work period. The names are written on a

\(^3\) In the record, this “days off” schedule is also referred to as a green or white sheet. The formal name for this document is an “Attendance Record.” It is posted on green paper during the work period then finalized on white paper for payroll purposes.

\(^4\) The method of preparing the days off schedule has since been modified.
board in a Lieutenant’s office and are typically finalized on a Thursday or Friday before the Sunday on which the days off must be posted. The names on the board must be written down and are then taken back to the Sergeant’s work station, where the Sergeant enters the names by seniority onto an Excel spreadsheet. Next to each Officer’s name in the spreadsheet are 28 boxes, each box representing one day within the period. The Sergeant then reviews each Officer’s day-off request form and enters each Officer’s requested days off in the 28 boxes next to that Officer’s name, indicating an “X” for a day off. The Sergeant then reviews the Excel spreadsheet to determine whether the schedules as requested by the Officers result in any staffing problems. The Sergeant resolves any staffing conflicts by considering various factors including seniority, whether the day off requested is necessary due to training or other reasons, and other staffing and coverage requirements. Following a Lieutenant’s approval of the days off as entered on the Excel Spreadsheet, the Sergeant then enters the information from the Excel Spreadsheet into the day off schedule, or Attendance Record, which is a Word document. This Word document indicates not only days off, but also contains detailed information about the work assignments and reasons for time off. This Attendance Record is posted on green paper. Amendments to the green Attendance Record are made as needed during the 28-day work period, following which it is printed on white paper as the final Attendance Record.

12. Because the preparation of the days off schedule is a detail-oriented task, it is customary within the DPD for Sergeants to seek the assistance of other Sergeants in the preparation of the days-off schedule. Such assistance typically involves reading off the names and data necessary for the line-by-line and box-by-box entry of information into the computer. In District 6 specifically, Lt. Martinelli has encouraged the Sergeants
under his command to seek assistance from one another in preparing the days off schedule.

13. It is not customary within the DPD for a Sergeant to seek the assistance of an Officer in the preparation of the days off schedule. In District 6 specifically, Lt. Martinelli did not give any express directive to the Sergeants under his command concerning whether they should or should not ask an Officer to assist in the preparation of the days off schedule.

14. It is customary for an Officer to return to administrative offices during their shifts for certain reasons, such as personal breaks, counseling or training of the Officer, or the completion of the Officer’s paperwork.

15. Since being promoted to Sergeant, Petitioner completed the days off schedule approximately 6 to 10 times and routinely sought assistance from other Sergeants.

16. The events giving rise to the investigation of Petitioner’s conduct occurred on these dates:

   Wednesday, July 5, 2006;
   Thursday, July 6, 2006;
   Friday, July 7, 2006,
   Saturday, July 8, 2006.

17. On or about 7/5/06 or 7/6/06, Lt. Martinelli asked Petitioner to prepare the days off schedule for Period 8, covering 7/16/06 through 8/12/06.

18. The deadline for posting the Period 8 days off schedule was 7/9/06.

19. Because Sgt. Johnson had a scheduled day off on 7/9/06, he needed to complete the days off schedule before the end of his shift on 7/8/06.
20. On 7/6/06, Sgt. Anthony Martinez assisted Sgt. Johnson in preparing the days off schedule by obtaining a list of Officers’ names for entry into the Excel spreadsheet. This list of Officers’ names was not final on 7/6/06, so Sgt. Johnson did not proceed significantly with the preparation of the Excel spreadsheet.

21. Sgt. Martinez was off duty on 7/7 and 7/8/06.

22. On 7/7 and 7/8/06, both Petitioner and Sgt. Perry Speelman were on duty in District 6. Sgt. Speelman’s shift was between 5:30 p.m. and 3:00 a.m., resulting in an overlap between his shift and Petitioner’s of nine hours per shift or eighteen hours across both shifts.

23. On 7/7 and 7/8/06, Sgt. Speelman was available to assist Petitioner with the days off schedule and did not communicate otherwise to Petitioner.

24. On 7/7 and 7/8/06, Petitioner did not ask Sgt. Speelman to assist him with the days off schedule. Petitioner did not contact Sgt. Speelman in person or by radio or telephone to ask for assistance in preparing the days off schedule. Petitioner did not ask any Officers to help him locate Sgt. Speelman.

25. On 7/7/06, during or shortly after roll call at 5:30 p.m., Petitioner and Off. Beluscak discussed the possibility of Off. Beluscak assisting Petitioner with the days off schedule at some point during Off. Beluscak’s shift.

26. At approximately 8:40 p.m. on 7/7/06, Petitioner called Off. Beluscak via radio and asked him to return to the station to assist Petitioner with the days off schedule. Off. Beluscak assisted Petitioner with the preparation of the Excel spreadsheet for 80 minutes between 8:40 and 10:00 p.m. Off. Beluscak noted this activity in his Daily Activity Log. Off. Beluscak monitored dispatch during these 80 minutes and did not receive any calls.
27. On 7/7/06, Petitioner presented the completed Excel spreadsheet to Lt. Martinelli. After directing Petitioner to make a few modifications for staffing purposes, Lt. Martinelli approved the days off as set forth in the Excel spreadsheet. Lt. Martinelli was off duty on 7/8 and 7/9/06.

28. At approximately 9:00 p.m. on 7/8/06, Petitioner contacted Off. Laber via radio and asked him to return to the station to assist Petitioner with the days off schedule. Off. Laber assisted Petitioner with the preparation of the days off schedule for 90 minutes between 9:00 p.m. and 10:30 p.m. Off. Laber noted this activity in his Daily Activity Log. Off. Laber monitored dispatch during these 90 minutes and did not receive any calls.

29. Before the end of his shift on 7/8/06, Sgt. Johnson asked Sgt. Speelman to post the days off schedule on the following day, as Sgt. Johnson had a scheduled day off on 7/9/06. Sgt. Speelman did post the Period 8 days off schedule on 7/9/06.

30. On 7/10/06, Lt. Martinelli return to work following his days off and reviewed the Period 8 days off schedule for the first time since it had been posted. Lt. Martinelli was dissatisfied with the appearance of the schedule. Generally stated, Lt. Martinelli believed the schedule contained mistakes and was not as orderly as he expected it to be.\(^5\) As Sgt. Johnson was on a day off, Lt. Martinelli directed Sgt. Speelman to correct the days off schedule and re-post it.

31. On or about 7/10/06, Lt. Martinelli became aware that Officers Beluscak and Laber assisted Petitioner in the preparation of the days off schedule.

32. On 7/13/06, Lt. Martinelli called Petitioner into his office and discussed his dissatisfaction with the days off schedule that Petitioner had prepared. Petitioner

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\(^5\) Petitioner received an oral reprimand for violation of RR-102 based upon the quality of the posted days off schedule. Because such oral reprimand is not under review here, it is unnecessary to provide any further detail about the quality deficiencies identified by Lt. Martinelli.
offered to fix the days off schedule, but this was unnecessary because Sgt. Speelman had already done so. Lt. Martinelli then questioned Petitioner about the role any Officers played in the preparation of the days off schedule. (Because there is a material factual dispute as to this conversation, it will be discussed in more detail in the Conclusions of Law section.)

33. Because Lt. Martinelli believed Petitioner had not been truthful to him on 7/13/06, he sought the guidance of Commander Deborah Dilley. Under the ongoing supervision of Commander Dilley, Lt. Martinelli conducted an investigation that involved reviewing DPD records and obtaining written statements as follows:

Petitioner Sgt. Johnson, 7/19/06;
Sgt. Martinez, 7/20/06;
Off. Beluscak, 7/25/06,
Off. Laber, 7/28/06,
Sgt. Speelman, 7/28/06; and
Petitioner Sgt. Johnson, 7/28/06

34. Petitioner admitted at hearing that he was not as forthcoming in his written statements of 7/19 and 7/28/06 as he could have been.

35. On 7/31/06, Petitioner sent an e-mail to Lt. Martinelli concerning the timing of Off. Beluscak’s assistance on 7/7/06.

36. On 8/25/06, Lt. Martinelli submitted a written report to Commander Dilley sustaining a violation of RR-112 (Departing from the Truth.)

37. The evidence gathered by Lt. Martinelli was then subject to a review by Sgt. Scott Murphy, Internal Affairs Bureau Investigation. Sgt. Murphy prepared a Contemplation of Discipline Letter, dated 4/10/07, based on the violations: RR-112 (Departing from the Truth); and RR-102 (Violation of any Departmental Rule), specifically with respect to
Operations Manual 109.01 (Quality Requirements). Sgt. Murphy recommended a 90-day suspension for the RR-112 violation, and an 8-hour fine for the RR-102 violation.

38. The Contemplation of Discipline letter was reviewed and approved by Lt. Mark Chuck, IAB on 4/10/07, by Commander John Lamb, IAB on 4/10/07, and by Division Chief of Patrol Mary Beth Klee on 7/19/07.

39. On 7/25 and 7/27/07, Chief Gerald Whitman conducted pre-disciplinary meetings, culminating in his recommendation that Petitioner receive an oral reprimand for the RR-102 violation pertaining to the quality of the days off schedule and a 10-day suspension for violation of RR-105 (Conduct Prejudicial).

40. On 8/9/07, Manager of Safety Alvin LaCabe ordered the oral reprimand and 10-day suspension as recommended by Chief Whitman, and Petitioner thereafter timely appealed the Manager’s decision.

IV. CONCLUSIONS OF LAW

RR-105 (Conduct Prejudicial) of the DPD Operations Manual provides, “Officers shall not engage in conduct prejudicial to the good order and police discipline of the department or conduct unbecoming an Officer which may not specifically set forth in department rules.” I reject Respondent’s position that Petitioner’s conduct in calling Officers Beluscak and Laber off the street rises to the level of Conduct Prejudicial, but agree that Petitioner’s lack of complete and honest disclosure during the ensuing investigation does constitute Conduct Prejudicial.

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6 Petitioner’s argument that a Conduct Prejudicial charge is only proper where the conduct at issue is not covered by another rule is rejected. I find that the phrase “which may not be set forth in department rules” is permissive in nature and only refers only to the second “conduct unbecoming” concept in RR-105.
A. Respondent’s conduct in asking Officers Beluscak and Laber for help in preparing the days off schedule for Period 8, 2006 does not rise to the level of Conduct Prejudicial.

The most compelling evidence in support of the foregoing conclusion is that when Lt. Martinelli first learned that Officers Beluscak and Laber assisted Petitioner in preparing the days off schedule, Lt. Martinelli had no intention of pursuing disciplinary action over it. When Lt. Martinelli asked to speak to Petitioner on July 13, 2006, he “intended the meeting to be [a] counseling session...” Ex. 7, p. 2. Had Petitioner admitted that the Officers assisted him and explained why, Lt. Martinelli would have advised Petitioner as to the error of his ways, and that would have been the end of it.

To be clear, I believe it was an error in judgment for the Petitioner to take Officers Beluscak and Laber off patrol for the purpose of helping him with his administrative work. Indeed, Respondent presented a number of legitimate reasons that Officers should not be pulled off the street for such a purpose. Based on the testimony of Sgt. Speelman, Lt. Martinelli, and Petitioner, it is not an accepted practice for Officers to assist Sergeants with the preparation of days off schedules. To the contrary, Lt. Martinelli had specifically instructed his Sergeants to seek help from one another with this task. It was not reasonable for Petitioner to believe he could also ask subordinate Officers for such assistance, particularly where Sgt. Speelman could have assisted Petitioner if only he had asked. Petitioner’s effort to gain the help of Sgt. Speelman appears to be limited to looking around his immediate physical vicinity. Petitioner was willing to call Officers over the radio in order to gain their assistance, but strangely, was unwilling to contact Sgt. Speelman in the same manner. While I agree that Petitioner should not have pulled Officers Beluscak and Laber off the street in the manner he did, I am simply not persuaded that this conduct, which Lt. Martinelli intended to handle with a quick counseling session, should now be considered a violation of RR-105 (Conduct Prejudicial).
B. Petitioner’s failure to provide complete and honest answers during the ensuing investigation does constitute Conduct Prejudicial.

At hearing, Respondent’s counsel said that is a case of the “cover-up being worse than the crime.” What has troubled me with this theory is the question of why Petitioner would try to cover up the fact that the Officers assisted him. After all, both Officers Beluscak and Laber documented their assistance in their respective Daily Activity Logs, and such logs were readily available to both Lt. Martinelli and Petitioner. He further testified that he did not believe the Officers would get in trouble for following his orders, so he had no reason to cover up their involvement. Based on these circumstances, I do not agree that Petitioner actively sought to “cover up” the fact that he completed the days off schedule with the assistance of subordinate Officers.

Instead, I believe Petitioner’s answers during the investigation had less to do with a desire to “cover up” the truth and more to do with his negative attitude toward Lt. Martinelli. At hearing, Petitioner testified that he does not engage with Lt. Martinelli on any kind of social or personal basis whereas the other District 6 Sergeants do socialize with Lt. Martinelli. In his pre-disciplinary hearing, Petitioner went so far as to say he dislikes Lt. Martinelli and does not get along with him. Whatever the case, it is clear that Petitioner and Lt. Martinelli do not have the best of working relationships. I believe this situation led to an early misunderstanding followed by the Petitioner being too annoyed to do all he could to clear up the misunderstanding when he had the chance.

The “early misunderstanding” occurred in the first conversation Petitioner and Lt. Martinelli had about whether Officers assisted Petitioner with the days off schedule. Lt. Martinelli claims that on July 13, 2006, he asked, “Did you have any Officers come in and help you with the days off?” When Petitioner answered “No,” Lt. Martinelli claims he then asked if anyone helped Petitioner with the days off and that Petitioner said “No.” Lt. Martinelli testified that he was “shocked” because he thought
Petitioner was lying to him. By contrast, Petitioner claims Lt. Martinelli remarked, “I heard you had some Officers do the days off for you.” Petitioner claims that when Lt. Martinelli used the phrase “do the days off,” Petitioner thought Lt. Martinelli was suggesting that the Officers prepared the days off schedule without Petitioner’s involvement. Petitioner testified that he was “offended” at the suggestion that he had not done his own work, but instead had allowed Officers to do it.

Because on my observation of Lt. Martinelli and Petitioner at hearing, I am inclined to believe that Petitioner’s version of the conversation is the more likely one. I do not believe Petitioner lied to Lt. Martinelli on July 13, 2006. Rather, I believe a genuine misunderstanding occurred in which Petitioner thought he was asked if Officer completely did the days off for him and Lt. Martinelli believed he asked if anyone had merely helped with the days off schedule.

No matter what the reason for the misunderstanding, Petitioner could have cleared it up when he was subsequently questioned on July 19 and 28, 2006, and he should have made an earnest effort to do so. Instead, as he admitted at hearing, Petitioner was not as forthcoming as he could have been. I conclude that Petitioner’s conduct in answering Lt. Martinelli’s questions after July 13, 2006 form an independent basis for sustaining the Conduct Prejudicial charge.

I have reviewed all of Petition’s answers in his written statements of July 19 and 28, 2006 as well as his hearing testimony concerning why he answered each question as he did. Ultimately, there were three misleading responses:

1. In the first paragraph of his written statement of 7/19/06, Petitioner stated that Off. Beluscak assisted him with the days off schedule and describes the specific ways that Off. Beluscak assisted him. Petitioner failed to state that Off. Laber also assisted him. Instead, Petitioner stated that Off. Beluscak helped Petitioner transfer the names from the Excel worksheet onto the days off sheet showing Teams A, B, C
and D, when it was Off. Laber who helped Petitioner do this. At hearing, Petitioner offered no reasonable explanation for why he failed to identify Off. Laber and why he misrepresented the manner in which Off. Beluscak had assisted him.

2. In his written statement of 7/19/06, Petitioner was asked, “Did you call him [Off. Beluscak] off the street to assist you?” Petitioner answered, “No,” which was not true.

3. In his written statement of 7/19/06, Petitioner was asked, “Did anyone else help you with the days off?” Petitioner answered, “No.” Again, Petitioner failed to acknowledge the fact that Off. Laber had assisted him. At hearing, Petitioner claimed that he was answering the previous question Lt. Martinelli had asked him on 7/13/06 as to whether the Petitioner had anyone “do the days off” for him. This testimony by Petitioner stretched his credibility to the breaking point, in my view. I observed Petitioner at hearing to be an intelligent, articulate individual. I find no legitimate reason for his failure to answer the simple question, “Did anyone else help you with the days off?” in a fully accurate manner.

I agree with Manager LaCabe that honesty should be a fundamental core value of a law enforcement officer. I conclude that in this case, when Petitioner either lied to, or failed to affirmatively disclose material information to, Lt. Martinelli, Petitioner engaged in conduct prejudicial to the good order and police discipline of the DPD. When Lt. Martinelli became aware that Petitioner pulled Officers off patrol in District 6, it was reasonable for Lt. Martinelli to wish to discuss this with Petitioner. It is difficult to imagine how the DPD could maintain good order if its supervisory employees are permitted to dance around simple questions about work schedules and the whereabouts and activities of officers during their shifts. Moreover, by not providing fully accurate and forthcoming information about
matters involving Officers Beluscak and Laber, Petitioner set a poor example for these subordinate officers and placed them in a difficult position.

V. PENALTY

The penalty assessed must be consistent with discipline received by other members of the department in “similar circumstance,” which under Commission Rule 12, means similar factual situations and similar disciplinary histories. Having reviewed each of the twenty-seven “Conduct Prejudicial” cases submitted by Petitioner, I conclude that none of them is a similar circumstance under the Commission definition.

Accordingly, the Petitioner’s appeal is DENIED. The 10-day suspension ordered by the Respondent Manager LaCabe is AFFIRMED.

SO ORDERED THIS 5TH DAY OF MARCH, 2008.

/s/ Michelle K. Walters

Michelle K. Walters, Esq.

HEARING OFFICER

NOTICE OF APPEAL

Any appeal of this Decision shall be initiated by filing a Notice of Appeal with the Commission within 15 days after completion of service of this Decision by the Commission.