CIVIL SERVICE COMMISSION
CITY AND COUNTY OF DENVER, COLORADO
201 W. Colfax Avenue, Dept. 1208
Denver, Colorado 80202-5332

Case No. 11 CSC 012A & 013A

Respondent –
Appellant:

CHARLES GARCIA
Former Manager of Safety, City and County of Denver

v.

BRYAN O’NEILL (99025)
Sergeant in the Classified Service of the Denver Police Department

and,

DAREN CIEMPA (96001)
Lieutenant in the Classified Service of the Denver Police Department

Petitioners –
Appellees:

INTRODUCTION

This appeal of the consolidated disciplinary appeals of Lt. Daren Ciempa and Sgt. Bryan O’Neill arises from an ill-conceived investigation of a prisoner abuse complaint conducted by Sgt. O’Neill with the approval of Lt. Ciempa. Not seeing any need for the investigation at all, Sgt. O’Neill, with the approval of Lt. Ciempa, made up a long list of questions for the IAB Commander John Burbach and the Independent Monitor, Richard Rosenthal, despite the fact that they were not witnesses to, nor involved in the incident being investigated. Sgt. O’Neill entered the interview with Commander Burbach with an audio/video recorder (shaped like a pen) in his pocket, running. Commander Burbach, suspecting that he was being surreptitiously recorded,
inquired of Sgt. O’Neill as to whether he was. Sgt. O’Neill confessed to secretly recording the conversation. This discipline followed.

Both officers were charged with violating RR-105 (Conduct Prejudicial). Both officers were also charged with violating RR-102.1, which requires officers to obey all Departmental rules, duties, procedures, instructions, and orders; the provisions of the Operations Manual; and Mayoral Executive Orders. While the Hearing Officer found that each officer had violated RR-105, she reduced the Manager of Safety’s imposed discipline of 30 suspended days for Sgt. O’Neill down to two fined days, and the imposed discipline of 40 suspended days for Lt. Ciempa down to 4 suspended days. She also determined that the Manager of Safety had not sustained his burden of proving that either officer had committed violations of RR-102.1.

While we agree with the Hearing Officer’s conclusion that the officers violated RR-105, we disagree with her rationale supporting her reduction in the imposed penalty. In addition, we believe that the facts found by the Hearing Officer support a finding that both officers violated RR-102.1 as alleged by the Manager of Safety. Accordingly, we reverse the decision of the Hearing Officer with respect to her modifications of the RR-105 penalty and findings concerning RR-102.1 and affirm the Manager of Safety’s disciplinary order in this case in all respects.

**FACTUAL BACKGROUND**

The Commission adopts the material facts set forth in the Hearing Officer’s *Findings, Conclusion and Order* (“Hearing Officer’s Order”).

The Denver Police Department came into possession of a video involving a Denver Police officers and an arrestee. The video was viewed by the Commander of the Internal Affairs Bureau, John Burbach, and Denver’s Independent Monitor, Richard Rosenthal. Commander Burbach and Monitor Rosenthal determined that the situation they viewed warranted an
investigation as a possible prisoner abuse by the involved officers in that what they viewed raised concerns about the manner in which the officers lifted the suspect from the ground.

The incident, having occurred within the boundaries of DPD District 6, was referred to the Commander of District 6, Tony Lopez, for investigation. Commander Lopez assigned Lt. Ciempa to perform the required investigation. Lt. Ciempa, however, was unable to perform the investigation in the time allotted him by the Commander, so he, in turn, assigned the investigation to Sgt. O’Neill.

As it turned out, both Lt. Ciempa and Sgt. O’Neill were familiar with the incident shown on the video. Sgt. O’Neill, in fact, had already reviewed information gathered by IAB, including the subject officers’ Use of Force Report and had discussed the matter and scope of the investigation referencing the videotape with Lt. Ciempa.

Both officers had concerns with the request to perform a follow-up investigation. In addition, Lt. Ciempa had openly expressed frustration with the DPD disciplinary process. Ciempa and O’Neill agreed that they did not comprehend the rationale behind the consideration of charges and the continued investigation.

Sgt. O’Neill developed an investigation plan, which included a set of 40 questions that he planned to use in questioning Commander Burbach and the Independent Monitor, because they had reviewed the video and opened the IAB investigation for “abuse of prisoner.” Lt. Ciempa reviewed the proposed questions and the two discussed the investigation plan, including the recording of the interviews. Lt. Ciempa advised Sgt. O’Neill that there was no need to secretly record the interviews.

Sgt. O’Neill attempted to set up meetings with Commander Burbach and the Independent Monitor and a member of his staff (Deputy Monitor Greg Crittenden), in an attempt to get
written statements from them. An IAB lieutenant responded on behalf of the Monitor, informing Sgt. O’Neill that neither Mr. Rosenthal nor Mr. Crittenden were witnesses and did not need to be interviewed. Commander Burbach personally responded, also indicating that there was no need for him to be interviewed for O’Neill to complete his investigative work, and further reminding Sgt. O’Neill that by virtue of his position, he has been listed as a complainant on many internally generated cases. Commander Burbach further advised Sgt. O’Neill, that if he wanted to drop by for a visit, he was free to do so.

Undeterred, Sgt. O’Neill, armed with a running video/audio recorder shaped like a pen, went to Commander Burbach’s office (located within a “Restricted Access” area of the DPD) and commenced his interview of Commander Burbach. Commander Burbach again explained to Sgt. O’Neill how he was the complainant on many cases, and also offered his views on the issues of the case and the seriousness of those issues. When Sgt. O’Neill pressed Commander Burbach on whether he would give a written statement, Commander Burbach suspected something was amiss, and asked Sgt. O’Neill if he was recording their conversation. Sgt. O’Neill admitted that he was, and, at Commander Burbach’s requested, turned over the recording device to Commander Burbach. (All above at Hearing Officer’s Order p. 6)

The actions of Sgt. O’Neill and Lt. Ciempa were investigated. The press obtained information about Sgt. O’Neill’s interaction with Commander Burbach. Sgt. O’Neill and Lt. Ciempa were transferred out of District 6; Sgt. O’Neill to the Identification/Records Bureau, and Lt. Ciempa to Denver International Airport. (Hearing Officer’s Order, p. 7) This discipline followed.
Specifically, The Manager of Safety suspended Sgt O’Neill for thirty days each for violations of RR-105, Conduct Prejudicial; RR-102.1 as it pertains to OMS 8.02; and RR-102.1 as it pertains to OMS 8.07; the suspensions to be served concurrently. The Manager suspended Lt. Ciempa for forty days for violations of RR-105, Conduct Prejudicial; and thirty days for violations of RR-102.1 as it pertains to OMS 7.02; and RR-102.1 as it pertains to OMS 7.12; with the suspensions to be served concurrently.

**PROCEDURAL HISTORY**

On May 24, 2011, Manager of Safety Charles Garcia (“Manager Garcia”) issued a Departmental Order of Disciplinary Action against Sgt. Bryan O’Neill, in which Manager Garcia suspended Sgt. O’Neill for thirty (30) days without pay for violations of RR-105 (Conduct Prejudicial); RR-102.1(Officers Shall Obey All Rules, etc.) as it pertains to OMS 8.02; and RR-102.1 as it pertains to OMS 8.07. On the same day, Manager Garcia issued a Departmental Order of disciplinary action against Lt. Darren Ciempa in which Garcia suspended Lt. Ciempa for forty (40) days without pay for violations of RR-105, RR-102.1 as it pertains to OMS 7.02 and RR-102.1 as it pertains to OMS 7.12. On June 2, 2011, both O’Neill and Ciempa filed appeals of their respective disciplines. On June 9, 2011, the Manager filed an unopposed Motion to consolidate the two appeals. Said Motion was granted by the Hearing Officer on June 16, 2011.

A hearing on the appeals was held on November 14, 15 and 16, 2011. The Hearing Officer issued her decision on February 27, 2012.

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1 The Manager imposed a penalty of thirty days suspended without pay for each of the three violations, with the penalties to be served concurrently.
2 The Manager imposed a 40-day suspension for each violation, with the penalties to be served concurrently.

The Commission heard oral argument from the parties on September 21, 2012. After considering the briefs and argument and reviewing the record and decision below, we rule as follows:

DECISION

A. Basis for Appeal

The Charter of the City and County of Denver (“City Charter”) limits our review of the Hearing Officer’s Order to certain defined circumstances. See City Charter § 9.4.15(F); Woods v. City & County of Denver, 112 P.3d 1050, 1052 (Colo. App. 2005). In this case, the City appealed the Hearing Officer’s Order on two separate grounds: (1) the Order involves an erroneous interpretation of Departmental or Civil Service rules, and (2) the Order involves policy considerations that may have effect beyond the case at hand. (City’s Appeal at 2-7.)

The Hearing Officer’s Order turns upon its interpretation of RR-102.1 and RR-105 of the Denver Police Department’s Operations Manual, as well as various OMS provisions. In addition, the Order addresses significant policy considerations associated with the application of those rules, as well as policy considerations concerning the City Charter and the Manager of Safety’s Disciplinary Matrix. Accordingly, we conclude that this appeal is properly before the Commission.

B. Standard of Review
The City Charter and Commission Rule 12 address the standard of review for appeals to this Commission. The Hearing Officer’s findings of evidentiary fact are binding upon the Commission. City Charter § 9.4.15(F); Commission Rule 12 § 11(J)(5). The City Charter expressly states that the Commission may not resolve contested issues of fact. City Charter § 9.4.15(F). The Commission is not bound by the Hearing Officer’s findings of ultimate fact, conclusions of law, or mixed findings of law and fact; these findings are subject to de novo review. See Vukovich v. Civil Service Com’n of City and County of Denver, 832 P.2d 1126, 1128 (Colo. App. 1992) (citing Blaine v. Moffat County School District RE No. 1, 748 P.2d 1280, 1287 (Colo. 1988)).

C. RR-105 – Reduction of Penalties

Initially, the Hearing Officer found that both Officers’ actions constituted violations of RR-105, Conduct Prejudicial. The Manager determined that these violations fell within Category E of the Disciplinary Matrix. A Category E offense is one that involves “the serious abuse or misuse of authority, unethical behavior, or an act that results in actual serious harm. (DPD Discipline Handbook, Appendix F, p. 6). The Hearing Officer disagreed with the Manager, finding for Lt. Ciempa that his actions which violated RR-105 more appropriately fall within the Matrix Category D, and that for Sgt. O’Neill, Category C. We reverse these findings.

It appears to us that the Hearing Officer, in reducing the penalties, improperly substituted her judgment for that of the Manager, in violation of our Rule 12 § 9(B)(3). The Hearing Officer reduced both penalties based on her belief that Matrix categories, other than the Category E

\[\text{\textsuperscript{3} Category D conduct is conduct substantially contrary to the values of the department or that substantially interferes with its mission, operation or professional image, or that involves a serious risk to officer or public safety. (Matrix, Appendix F, p. 5)}\]

\[\text{\textsuperscript{4} Category C conduct has a pronounced negative impact on the operations or professional image of the department or the relationships with other officers, agencies or the public. (Id., p. 4)}\]
utilized by the Manager, "more appropriately" identified the Officers' misconduct. But it is not the province of the Hearing Officer to modify the Manager's discipline and interpretation of the Matrix until she believes she has obtained the best fit possible. Rather, we believe that if the Manager's use and interpretation of the Matrix is reasonable, it must be sustained. And based on the facts found by the Hearing Officer, we believe that the Manager's use and interpretation of the Matrix was ultimately reasonable and should have been sustained.

We believe that further evidence, that the Hearing Officer improperly substituted her judgment for that of the Manager, can be found at the discussion located at the bottom of page 7, continuing onto page 8 of her Order, where she essentially calls into question the qualifications, and thereby the judgment of, Manager Garcia. The Hearing Officer found it important that Manager Garcia was only recently appointed to the position, that he was only a public defender before becoming the Manager of Safety, that he had no prior police experience, and that others with police experience disagreed with his assessments.

But as we have held before, the City Charter unambiguously establishes a system of civilian oversight of the Denver Police Department and the Denver Fire Department. City Charter § 2.6.1 (“There shall be and hereby is created a Department of Safety which shall have, subject to the supervision and control of the Mayor, full charge and control of the departments of police and fire . . . .”); id. § 2.6.1 (“The Manager of Safety shall be the officer in full charge of said department, subject to the supervision and control of the Mayor . . . .”). (In the matter of Garcia v. Devine and Nixon,) It is immaterial how long the Manager has been on the job. It is equally immaterial that the Manager does not have prior police experience. The Hearing Officer

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5 See Hearing Officer decision p. 9, "Category C more appropriately identifies the actions of Sgt. O'Neill" and page 10, "Due to Lt. Ciempa's higher rank, his actions which violated RR-105 more appropriately fall within the Matrix Category D."
is prohibited from substituting her judgment for that of the Manager’s on issues of discipline, regardless of her personal opinions concerning his qualifications to hold the position.

We further believe the Hearing Officer’s substitution of her own judgment for that of the Manager’s on this disciplinary issue amounted to her failure to follow the Charter and give due weight to the Manager's need to maintain administrative control over the Department, as required by Charter Section 9.4.15(D). It is evident that the Hearing Officer, rather than giving due weight to the Manager's determinations, gave undue weight to the opinions of various Police Officers. At page 7 of the Hearing Officer's Order, the Hearing Officer finds it "worthy of note" that disciplinary recommendations varied, and that the "duty officers" who reviewed the case thought much lower levels of discipline were appropriate. Those officers, including the Chief, however, are not disciplinary decision makers and are not, per Charter, vested with the final authority to issue discipline to Denver Police Officers. The Hearing Officer's findings regarding this penalty improperly elevate the opinions of line officers and non-decision-makers over that of the Manager of Safety, thereby usurping and improperly diminishing the authority granted him by the Charter.

As has been noted, a Category E violation is one which involves “the serious abuse or misuse of authority, unethical behavior, or an act that results in actual serious harm. (DPD Discipline Handbook, Appendix F, p. 6.) Based on the Hearing Officer's findings, it is clear that neither Lt. Ciempa nor Sgt. O'Neill would have been placed into a position where they would have had the ability to "investigate" the IAB Commander and the Independent Monitor, but for the authority granted them by District 6 Commander Lopez, to investigate the prisoner abuse incident. The Hearing Officer further determined that advice had been given that there was no need to "investigate" the IAB Commander or the Independent Monitor because they were not
witnesses to the event being investigated. The unnecessary list of 40 questions to be asked of the unnecessary witnesses, coupled with Sgt. O'Neill's and Lt. Ciempa's stated beliefs that they could not understand the need for investigation at all, on top of the openly-expressed hostility to the disciplinary process, capped by the surreptitious recording of Commander Burbach leads us to conclude that Sgt. O'Neill, in carrying out a plan that had all the hallmarks of an in-your-face-political statement to higher authorities, and Lt. Ciempa, for approving it, both committed acts which evidenced abuse of their authority and unethical behavior. Consequently, we reinstate the Manager of Safety's penalties of 30-suspended days for Sgt. O'Neill and 40 suspended days for Lt. Ciempa.6

D. RR-102.1

The Hearing Officer held that neither Officer violated RR-102.1. The Hearing Officer appears to base this decision upon her conclusion that there is no specific rule prohibiting the specific misconduct committed by the officers (Hearing Officer’s Order, p.8). But courts have long acknowledged that administrative rules need not be written so as to specifically envision, reference, or otherwise deal with every type of misconduct imaginable before those rules can be validly applied against an individual. See, e.g., Watso v. Colorado Dept of Social Services, 841 P.2d 299, 309 (Colo.1992) (mere “generality” does not render a provision unconstitutional because “broad terms” are often necessary to cover “varied circumstances”); Piscottano v. Murphy, 511 F.3d 247, 281 (2d Cir.2007) (“generalized language may appropriately be used to

6 At page 10 of her Order, the Hearing Officer finds that Lt. Ciempa is entitled to mitigation (per her decision) of his category D violation. We find this to be a misinterpretation of the Matrix. There is no authority requiring that any officer's penalty be mitigated, regardless of the circumstances. The language of the Disciplinary Handbook makes it clear that the decision to mitigate is permissive, or discretionary, not mandatory. See, e.g., Handbook Section 19.5 (“Mitigating circumstances may justify a penalty less than the presumptive. However, the presence of mitigating circumstances does not automatically require the imposition of a penalty in the mitigated range.”) We find that the Hearing Officer overreached her authority by mitigating Ciempa's penalty.
set out standards of conduct for [government] employees”); . Brighton Pharmacy, Inc. v. Colo. State Pharmacy Bd., 160 P.3d 412, 420 (Colo.App. 2007) (agency rule need not define statutory terms with linguistic precision in order to withstand a vagueness challenge, nor does a rule or statute have to specify every conceivable boundary of its application); Colo. State Bd. of Accountancy v. Paroske, 39 P.3d 1283 (Colo.App.2001) (same); People ex rel. City of Arvada v. Nissen, 650 P.2d 547, 550 (Colo.1982) (due process of law has never required mathematical exactitude in legislative draftsmanship; statute must be “sufficiently specific to give fair warning of the proscribed conduct, it also must remain sufficiently general to be capable of application under varied circumstances.”). We believe, based on the facts found by the Hearing Officer, that both officers violated RR-102.1.

1. Sgt. O’Neill

The Manager of Safety charged Sgt. O’Neill with violating RR-102.1 as it pertains to OMS 8.02 and 8.07. Those provisions read as follows:

**RR-102.1 – Duty to Obey Departmental Rules and Mayoral Executive Orders**

Officers shall obey all Departmental rules, duties, procedures, instructions, and orders; the provisions of the Operations Manual; and Mayoral Executive Orders.

**OMS 8.02: Duties and Responsibilities for Supervisory Officers**

A supervisory officer is not only responsible for their own conduct and performance of police duties, but for that of subordinates as well. They shall set an example in sobriety, dignity, courtesy, discretion, initiative, industry, diligence, truthfulness, courage, attention to duty and observance of proper discipline. They shall at all times, appear neatly attired and clean in person and equipment.
**OMS 8.07: Duties and Responsibilities for Supervisory Officers**

They shall follow the departmental rules of discipline and disciplinary procedures in all cases of misconduct on the part of their subordinates.

The Hearing Officer, without performing a specific analysis of these charges, found them not sustained. We disagree.

We conclude, based on the facts found by the Hearing Officer, that Sgt. O'Neill's attempted unnecessary questioning of the Independent Monitor and the Commander of IAB, as well as the surreptitious recording of Commander Burbach, motivated by his objection to the need for an investigation in the first instance, constitutes evidence that Sgt. O'Neill did not set an example of dignity, courtesy, discretion or truthfulness,7 as required by OMS 8.02. Similarly, we do not see the Hearing Officer take issue with the credited testimony of Commander Burbach, who had advised O'Neill that he, as IAB Commander, is quite often listed as the complainant for investigations, and that there is no need for him to be interviewed for the investigation to be completed successfully or thoroughly. Consequently, we believe the evidence, as found by the Hearing Officer, supports the Manager's finding that O'Neill violated OMS 8.07 in that he did not follow disciplinary procedures when he insisted on interviewing Commander Burbach, despite knowing that Burbach was not a witness to the event being investigated and that there was no need for him to interview Burbach or to attempt to interview the Independent Monitor; especially as his motivation was to make a point concerning his disagreement on the need for an investigation. Finally, we note, as the Hearing Officer did, that Sgt. O'Neill's conduct did violate RR-105; so we believe that the underlying rule violation to

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7 We believe O'Neill's failure to disclose to Burbach at the outset of their meeting, the fact that O'Neill was recording the encounter, raises an issue of truthfulness on the part of O'Neill.
support an RR-102.2 violation, is present. As a result, we reverse the Hearing Officer and reinstate the discipline to Sgt. O'Neill regarding the charged 102.1 violations.

2. Lt. Ciempa

The Manager of Safety charged Lt. Ciempa with violating RR-102.1 as it pertains to OMS 7.02 and 7.12. Those provisions read as follows:

**OMS 7.02 Duties and Responsibilities of Command Officers**

Commanding Officers have direct supervision and control, subject to the orders of the Chief of Police and their Division Chief, over all officers and CSA employees of the department assigned to their command. They are responsible for the efficiency and effectiveness and shall coordinate the functions and activities of the various units of their command. They shall promote harmony among the members of their command and are responsible for the cooperation of their command with all other districts, divisions, and bureaus of the police department.

**OMS 7.12 Duties and Responsibilities of Command Officers**

They are responsible for the efficiency, discipline and morale of all members of their command. They shall investigate, or cause to be investigated, all complaints of citizens and reports by members of the police department of misconduct, incompetence, neglect of duty, or any violations of the Rules and Regulations on the part of anyone under their command in accordance with departmental rules and procedures relating to discipline. They shall also report to their Division Chief, any incompetent member who may be detailed to their command. This report shall include recommendations as to the action to be taken.
As was the case with Sgt. O'Neill, the Hearing Officer determined that Lt. Ciempa's conduct violated RR-105. Consequently, there is an underlying rule violation sufficient to support an RR-102.1 charge.

In addition, we believe that the facts found by the Hearing Officer demonstrate that violations of the OMS sections listed above did occur. Approving the list of 40 unnecessary questions to be asked of Commander Burbach, and approving the plan to question him when such questioning was plainly uncalled for, and approving a plan hatched in connection with a belief that there was no need for an investigation, as well as an expressed displeasure with the disciplinary process stemming from management's treatment of other District 6 officers, leads us to conclude that Ciempa's actions amounted to the antithesis of cooperation between members of his command and other bureaus of the DPD, especially, in this case, the Internal Affairs Bureau; in violation of OMS 7.02.

Further, approving the plan to have his subordinate waste his time and the time of others by questioning individuals who had no knowledge of the matters that were tasked to be investigated violated Ciempa's duty to be responsible for the efficiency of the members of his command, in violation of OMS 7.12.

CONCLUSION AND FINAL ORDER

For the reasons set forth above, the Hearing Officer's finding of ultimate fact with respect to the Officers' violation of RR-102.1 is reversed. The Hearing Officer's order reducing the two penalties for the sustained RR-105 violations is reversed. The Manager of Safety’s Departmental Orders of Disciplinary Action in this case are affirmed in all respects.
Filed this 13th day of December, 2012.

FOR THE CIVIL SERVICE COMMISSION
CITY AND COUNTY OF DENVER

[Signature]

By: Earl E. Peterson
Executive Director