FINDINGS, CONCLUSION AND ORDER

INTRODUCTION


The Hearing Officer heard and considered the statements and arguments on behalf of the Petitioners and on behalf of the City, the Prehearing Statements, the exhibits admitted at the hearing, and the sworn testimony of the individuals identified supra. On December 30, 2011 Sgt. O’Neill and Lt. Ciempa submitted Petitioners’ Findings of Fact and Conclusions of Law. On the same day, the City submitted Respondent’s Closing Argument, Including Proposed Findings of Fact and Conclusions of Law.

¹ Exhibits E (Ex. 11 at B-20), F (Ex. 11 at B-22), and JJ (Ex. 18 at H-3) are duplicates of and were admitted as Respondent’s Exhibits as noted.
Pursuant to Rule 12, Section 9 of the Rules and Regulations of the Civil Service Commission of the City and County of Denver, the Hearing Officer issues these Findings, Conclusions and Order.

THE APPEALS

A. Bryan O'Neill

On May 24, 2011, the former Manager of Safety, Charles Garcia issued a Departmental Order of Disciplinary Action in Case No. P2010-10-015 to Sergeant Bryan O'Neill. The Order stated in relevant part:

You are hereby suspended without pay for thirty (30) days for violation of RR-105, Conduct Prejudicial; suspended without pay for thirty (30) days for violation of RR-102.1 as it pertains to OMS 8.02; and suspended without pay for thirty (30) days for violation of RR-102.1 as it pertains to OMS 8.07. The suspension without pay shall be served concurrently. . . .

See Ex. 1.

B. Daren Ciempa

On May 24, 2011, Manager of Safety, Charles Garcia issued a Departmental Order of Disciplinary Action in Case No. P2010-10-015 to Lieutenant Daren Ciempa. The Order stated in relevant part:

You are hereby suspended without pay for forty (40) days for violation of RR-105, Conduct Prejudicial; suspended without pay for thirty (30) days for violation of RR-102.1 as it pertains to OMS 7.02; and suspended without pay for thirty (30) days for violation of RR-102.1 as it pertains to OMS 7.12. The suspension without pay shall be served concurrently . . . .

See Ex. 6.

On June 2, 2011, the Petitioners each timely appealed their respective discipline. The Hearing Officer consolidated the two officers’ appeals on June 16, 2011.
RULES AND REGULATIONS

The Rules and Regulations at issue in this appeal are:

**RR-105 Conduct Prejudicial**
Officers shall not engage in conduct prejudicial to the good order and police discipline of the Department or conduct unbecoming an officer which
(a) May or may not specifically be set forth in Department rules and regulations or the Operations Manual; or
(b) Causes harm greater than would reasonably be expected to result, regardless of whether the misconduct is specifically set forth in Department rules and regulations or the Operations Manual.

**RR-102.1**
Officers shall obey all Departmental rules, duties, procedures, instructions, and orders; the provisions of the Operations Manual; and Mayoral Executive Orders.

**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.

**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.

**ISSUES**

The Respondent contends that the Manager properly found that Petitioners violated all three rule specifications in their respective May 24, 2011 letters of discipline. Respondent likewise contends that Lt. Ciempa’s forty day suspension and Sgt. O’Neill’s thirty day suspension were appropriate. Petitioners contend that neither Sgt. O’Neill nor Lt. Ciempa violated any explicit departmental policy; that disciplining either of the officers for violating the spirit of the law violates due process; that the Manager of Safety failed to prove a violation of conduct prejudicial for either officer; that the Manager failed to prove a violation of RR-102.1 as to Sgt. O’Neill’s conduct; that the Manager failed to prove a violation of RR-102.1 as to Lt. Ciempa’s conduct; and, that the Manager failed to provide sufficient evidence to sustain his chosen level of discipline.

**FINDINGS OF FACT**

The facts in this case are essentially undisputed. On October 6, 2010, the Internal Affairs Bureau (“IAB”) assigned case number P201009104 for investigation to District 6. The Denver Police Department, IAB Complaint Summary for P201009104 identified the “Type of Complaint” as “Mistreatment of Prisoners/ Suspects” and the “Requesting Station Officer” as IAB Commander “Burbach, John.” Ex. 21. The requested investigation pertained to the arrest of an intoxicated male captured on HALO video which Commander Burbach and Independent Monitor Richard Rosenthal had reviewed together and determined needed to be investigated as a possible prisoner abuse issue. In Complaint Summary P201009104, the “Incident Summary” included that “[t]he manner in which the [subject] officers lifted the suspect from the ground did not appear to be proper when viewed on existing videotape.” *Id.*

At District 6, Commander Tony Lopez assigned the informal investigation, to be completed within five days, to Lt. Ciempa. See Ex. B at § 503.01(5)(a). Lt. Ciempa had scheduled vacation at the time and he re-assigned the investigation to Sgt. O’Neill, who was also going to be acting in his absence. Sgt. O’Neill and Lt. Ciempa were already familiar with the September 2010 arrest incident which occurred on 1900 Blake Street, an area encompassed within District 6. Sgt. O’Neill reviewed the IAB information, including the subject officers’ Use of Force Report and discussed the matter and scope of the investigation referencing the videotape with his direct supervisor, Lt. Ciempa. Both officers had concerns with
the requested follow-up investigation and Lt. Ciempa admittedly had expressed his recent frustration with the DPD disciplinary process. After viewing the video, Lt. Ciempa and Sgt. O'Neill discussed that they did not understand the bases for the mistreatment of prisoner specification.

Sgt. O'Neill developed an investigation plan, drafted a set of 40 questions that he planned to use, and Lt. Ciempa reviewed the proposed questions. See Ex. 20. Sgt. O'Neill planned to interview Commander Burbach as the “complaining” party, Independent Monitor Richard Rosenthal, and Deputy Monitor Gregg Crittenden because they had reviewed the video and opened the IAB investigation for “abuse of prisoner.” Sgt. O'Neill also planned to interview the involved officers, the suspect, and Corporal Richard Stensgaard, the DPD use of force training expert. Sgt. O'Neill and Lt. Ciempa discussed his investigation plan including his concern about a need to record the interviews. Sgt. O'Neill was nervous about interviewing an individual of Commander Burbach’s rank, while Lt. Ciempa was concerned that any time an interview of a supervising officer was conducted, the potential for an allegation of discourtesy or insubordination existed. Lt. Ciempa advised Sgt. O'Neill that there was no need to record his interviews surreptitiously.

On October 7, 2010, Sgt. O'Neill sent Commander Burbach, Independent Monitor Rosenthal, and Deputy Independent Monitor Crittenden an email requesting a meeting to obtain written statements in IAB Case P201009104. Lt. Marcus Fountain responded that Messrs. Rosenthal and Crittenden were not “witnesses” and did not need to be interviewed. See Ex. 18 at H-3. Commander Burbach’s responsive email stated, “Stop by if you want to visit – but I am the listed complainant on many internally generated cases – there is no need for me to provide a statement for you to complete your work.” Id. at H-4.

In preparation for his meeting with Commander Burbach, Sgt. O'Neill borrowed a recorder shaped like an ink pen from another District 6 officer. On the afternoon of October 7, 2010, Sgt. O'Neill went to Commander Burbach’s office in IAB, a “Restricted Access” area of the Denver Police Department. See Ex. 19. Sgt. O'Neill turned on the borrowed recorder before he entered the secured area and the receptionist allowed him access to Commander Burbach’s office. After a brief prefatory exchange, Sgt. O'Neill told Commander Burbach he was assigned the investigation and that he hoped the Commander would give him a statement about the IAB complaint. Commander Burbach explained to Sgt. O'Neill that he was the complainant on many cases, his feelings about the issues in the case, and the serious nature of the issues.

Sgt. O'Neill specifically asked Commander Burbach whether he would provide a written statement and Commander Burbach then asked Sgt. O'Neill if he was recording their conversation. Sgt. O'Neill admitted that he was and Commander Burbach ordered him to turn over the recording device and to draft a written statement. Sgt. O'Neill complied with Commander Burbach’s orders and took no further action on the IAB assigned investigation. See e.g., Ex 14 at D-7.
On the evening of October 7, 2010, Lt. Marcus Fountain interviewed Lt. Ciempa about IAB P201009104 and his knowledge of Sgt. O’Neill’s actions. See e.g., Ex. 13. The DPD also immediately placed both officers on investigatory leave. Although the issue was essentially contained to these few actors, news of Sgt. O’Neill’s contact with Commander Burbach as part of the IAB investigation was leaked to the press.²


As to Sgt. O’Neill, Lt. Daryl Miller found that he violated RR-105, Conduct Prejudicial because “his actions did not provide considerate and fair treatment nor was it appropriate in his dealing with Cmdr. Burbach, as defined in the Matrix Handbook regarding values/respect.” Ex. 2, p. 8. Lt. Miller recommended two fined days for Sgt. O’Neill. Ex. 3, p. 4. Division Chief Tracie Keesee concurred in the finding of a violation of RR-105 but increased the penalty to four fined days. Id. at p. 7. Chief of Police Whitman sustained the charge of Conduct Prejudicial, as well as two additional violations for RR-102.1, specifically as to OMS 8.02 and 8.07. Ex. 4, p. 10. Chief Whitman fined Sgt. O’Neill 32 hours for Conduct Prejudicial and provided no penalty for the additional two violations. See id. at p. 1.

As to Lt. Ciempa, Captain Gallagher recommended disciplining Lt. Ciempa for Conduct Prejudicial and a violation of RR-102.1. Ex. 8, p. 3. Captain Gallagher recommended a twenty day suspension for Lt. Ciempa’s violation of Conduct Prejudicial, and a written reprimand for RR-102.1. See id. at p. 7. Division Chief Klee recommended sustaining only a violation of RR-102.1, Duties and Responsibilities of Command Officers, and recommended a four-day suspension. See id. at pp. 14-15. Chief of Police Gerald Whitman sustained violations against Lt. Ciempa for Conduct Prejudicial and RR-102.1, specifically OMS 7.02 and 7.12. Chief Whitman determined his penalty for the Conduct Prejudicial, RR-105 violation would be six fined days, and determined to impose no penalty for the RR-102.1 violations. Ex. 9, p. 1.

Manager of Safety Garcia found that both Officer O’Neill and Officer Ciempa’s actions in relation to IAB P2010009104 violated RR-105 and RR-102.1.

² The Hearing Officer finds credible both Sgt. O’Neill and Lt. Ciempa’s hearing testimony that neither of them provided a statement when a member of the press contacted each of them.
Exs. 1 & 6. Manager Garcia imposed discipline for each of them under Category E, “conduct that involves the serious abuse or misuse of authority, unethical behavior, or an act that results in an actual serious and adverse impact on officer or public safety or to the professionalism of the department.” See Ex. 1, p. 2; Ex. 6, p. 2; see also, Ex. 28, App. F, Category E, p. 6. The former Manager used the presumptive penalty for a first violation for Sgt. O'Neill and suspended him for thirty days (concurrently for all three violations). Ex. 1. The former Manager aggravated the penalty for a first violation for Lt. Ciempa and suspended him for forty days (concurrently for all three violations). Ex. 6. Manager of Safety Garcia found no mitigating factors for either officer.

**CONCLUSIONS**

The Hearing Officer has independently reviewed the matter *de novo* and taken into consideration the totality of the circumstances of Sgt. O'Neill and Lt. Ciempa’s actions. The Hearing Officer considered the evidence and witnesses on both sides, the perception and first hand knowledge of the witnesses, the experience and knowledge of the DPD Officers, and the decisions at each point in the chain of command.

Worthy of note is that the discipline recommendations from the respective chains of commands as to Sgt. O’Neill and Lt. Ciempa’s actions in relation to IAB P201009104 are widely variant. See Exs. 2, 4, 5, 7, 8 & 9. However, the duty officers who reviewed the essentially undisputed facts of this case concur that some lower level of suspension or fined days (2-6 days) is the more appropriate discipline, while Captain Gallagher alone determined that Lt. Ciempa should receive a 20 day suspension for his violation of Conduct Prejudicial.

Notably, none of the command officers testified at hearing as to any specific rule violation. In fact, in Sgt. O’Neill’s contemplated discipline, Lt. Miller found he violated no specific rules and only at the Chief Level did the Department even consider any RR-102.1 violation. See *e.g.*, Exs. 2 & 4. In Lt. Ciempa’s case, Cpt. Gallagher included both RR-105 and RR-102.1 specifications, but Division Chief Klee then only sustained one of the RR 102.1 specifications. Accordingly, without direct testimony from these officers who had varied positions on the rule violations, the most direct evidence the City presented on the RR-102.1 violations was Manager of Safety Garcia’s articulation that the two officers’ conduct violated the “spirit of the rules.” Both Petitioners testified as to their years of service, their experience on the police force, their experience in conducting investigations, their knowledge and understanding of the rules and regulations of the DPD, their stellar performance evaluations, their promotions, and the fact of minimal discipline throughout their respective careers.

Conversely to their respective chains of command and the two officers’ experience, the Manager of Safety had recently come to hold his position before
issuing the respective suspensions of 30 and 40 days. He had no specific police experience but had spent the majority of his career as a public defender. With his limited experience and despite his testimony that he took the chain of command recommendations seriously, the Manager overlooked the years of experience that guided the two officers’ chains of command in their role as reviewers of these events and decision makers in police disciplinary matters.

Based on this record, the Hearing Officer finds that no rule, regulation or provision of Denver Police Department Operations Manual explicitly prohibits the investigative conduct in which Sgt. O’Neill and Lt. Ciempa engaged and for which they received disciplined. No written policy at the time prohibited the recording of a conversation between two members of the police department. Instead after this incident and before he determined their discipline, on April 28, 2011, Manager of Safety Garcia issued the “Department of Safety Recording Policy.” See Ex. N. Further, the DPD Operations Manual specifically provides that anyone working for IAB possesses the authority to interview another member, regardless of rank. See Ex. B at § 503.01(3)(c)(1). Likewise, the Manual did not prohibit an officer from conferring with or interviewing anyone in the Office of the Independent Monitor. See id. at (d); see also, § 503.01(5)(b)(9). The Manual required every officer conducting an investigation, whether formal or informal, to provide any member they were interviewing a Garrity advisement. Id. § 503.01(5)(b)(8); see also, Ex. 2, p. 6-7 (Lt. Miller noting that Sgt. O’Neill’s actions did not violate written policy or procedure). The Manual also required any officer conducting an informal investigation to discuss with the investigated officers the perceptions of the complainant. See e.g., Ex. B at § 503.01(5)(a)(1)(a).

Although Manager Garcia testified that the officers’ conduct violated the “spirit” of the rules, he provided no specific support for his conclusion that these officers violated rules sufficient to sustain the RR 102.1 violation against either of them. The hearing evidence fails to show that either of their actions rose to the level of a rule violation.

Instead, the Hearing Officer concurs with Chief of Police Whitman’s ultimate decision that each of the two officers’ conduct violated RR-105, Conduct Prejudicial, subpart (a) as described, infra.

As to the RR-105 violations, Manager Garcia testified that the two officers’ actions were Category E violations, specifically that their conduct was unethical, was a serious abuse or that they misused their authority. The Hearing Officer however, found while the two officers exercised poor judgment, neither of them abused any person or other officer nor misused their authority during the investigation. Additionally, Manager Garcia provided no specifics as to how either of them acted unethically and admitted he had no substantiation for a conclusion that either of them lied. The evidence shows the officers reviewed the rules before proceeding, and although they did not use the best judgment, they began to conduct this investigation. However, IAB immediately stopped the
assigned investigation when Sgt. O’Neill admitted he was recording his interview with Commander Burbach. The Officers took no further action. Although the Manager of Safety testified the two officers’ actions seriously impacted IAB, other than his statement, the record evidence does not support such a finding. Further, the Manager testified their actions created a mistrust between IAB and officers outside of Internal Affairs. Again, other than his conclusion, no testimony or record evidence exists to support such a finding of mistrust.

A. Sgt. O’Neill

As to Sgt. O’Neill, as Lt. Miller determined (with whom Deputy Chief Keesee and then Chief of Police Whitman concurred), Sgt. O’Neill did not “inform Cmdr. Burbach of his intent to record the interview before speaking with him. Thus Sgt. O’Neill’s actions did not provide considerate and fair treatment nor was it appropriate in his dealings with Cmdr. Burbach, . . .” Ex. 2, p. 8. This conduct violated RR-105 that delineates “[o]fficers shall not engage in conduct prejudicial to the good order and police discipline of the Department . . . which may or may not specifically be set forth in Department rules and regulations or the Operations Manual.” See id. at p. 7. Further, this action when sustained “pertains to the Department’s Mission, Vision, and Values/Respect–Matrix Handbook: Respect is achieved by acting properly and showing due regard for all those with whom an officer has contact. Respect means that all officers give courteous, considerate, and fair treatment to everyone.” Id. and at p. 9.

Likewise, consistently throughout the chain of command disciplinary process for Sgt. O’Neill, Lt. Miller, Deputy Chief Keesee and Chief of Police considered this RR-105 violation under Category C. The Hearing Officer concurs with these officers that Category C more appropriately identifies the actions of Sgt. O’Neill: “[c]onduct that has pronounced negative impact . . . on relationships with other officers. . . .” Although arguably mitigating factors exist, due to the negative impact Sgt. O’Neill’s actions had on his relationship with IAB Commander Burbach plus Chief Whitman’s reassignment of him out of District 6, the Hearing Officer likewise concurs with Lt. Miller and Chief Whitman’s determination that the presumptive penalty of 2 fined days (16 hours) is appropriate on these facts. The thirty day suspension which Manager of Safety Garcia imposed in this case appears unreasonable. See e.g., In re Matter of Cruz, Civil Service Commission, Case No. 00 CSC 03.

B. Lt. Ciempa

As to Lt. Ciempa, the Hearing Officer finds that Division Chief Mary Beth Klee’s January 28, 2011 analysis within the Disciplinary Findings Rationale Form reflects evidence presented at the hearing of this matter. The Hearing Officer specifically adopts her findings as supported in the hearing record that:
Lt. Ciempa failed to properly direct the informal investigation and allowed his admitted frustration with the disciplinary process to cloud his judgement. He failed to act as a command officer and properly evaluate what the sargeant [O’NEILL] proposed to do, he failed to re-direct his subordinate and prevent the inappropriate conduct [surreptitious recording of Commander Burbach].

Ex. 8, p. 15 with Hearing Officer’s additions in brackets. However, as stated supra, the Hearing Officer finds Lt. Ciempa’s actions violated no specific DPD rule or regulation for the same reasons stated supra, but instead were a RR-105(a), Conduct Prejudicial violation.

Due to Lt. Ciempa’s higher rank, his actions which violated RR-105 more appropriately fall within the Matrix Category D, as his judgment in this case was “[c]onduct that substantially interferes with [the Department’s] mission, operations. . . .” Ex. 28, App. F, p. 5. The Hearing Officer however finds mitigating circumstances included in the Disciplinary Handbook 19.6, specifically subsections .4, .6, and .7, existed and should be applied. Specifically, Lt. Ciempa had no previous discipline in his 15 years of service to DPD absent an SSR entry in 1998, exemplary performance evaluations, commendations, and awards. See e.g. Ex. 7, p. 7; Ex. 8, p. 15; Exs. S, T, U, V, W & X. Accordingly, under the matrix, the mitigated penalty under Matrix Category D is a four day suspension, as Division Chief Klee imposed (albeit for a rule and regulation violation.) See, Ex. 28, App. F., Penalty Table, see also, Ex. 8, p. 15. The forty day suspension which Manager of Safety Garcia imposed in this case appears unreasonable. See e.g., In re Matter of Cruz, Civil Service Commission, Case No. 00 CSC 03.

DECISION

A. Bryan O’Neill

RR-105 Conduct Prejudicial
The Hearing Officer sustains the specification of RR-105, Conduct Prejudicial.

RR-102.1 as it pertains to OMS 8.02
The Hearing Officer does not sustain RR-102.1 as it pertains to OMS 8.02.

RR-102.1 as it pertains to OMS 8.07
The Hearing Officer does not sustain RR-102.1 as it pertains to OMS 8.07.

B. Daren Ciempa

RR-105 Conduct Prejudicial
The Hearing Officer sustains the specification of RR-105, Conduct Prejudicial.
**ORDER**

As to Bryan O'Neill, the Departmental Order of Disciplinary Action, Case No. P2010-10-015, dated May 24, 2011, is reversed, modified, and/or sustained as follows: the decision regarding a violation of RR-105, Conduct Prejudicial is modified with the imposition of two fined days, regarding a violation of RR-102.1 as it pertains to OMS 8.02 is reversed as not sustained; and, regarding a violation of RR-102.1 as it pertains to OMS 8.07 is reversed as not sustained.

As to Daren Ciempa, the Departmental Order of Disciplinary Action, Case No. P2010-10-015, dated May 24, 2011, is reversed, modified, and/or sustained as follows: the decision regarding a violation of RR-105, Conduct Prejudicial is modified with the imposition of suspension of four days; regarding a violation of RR-102.1 as it pertains to OMS 7.02 is reversed as not sustained; and, regarding a violation of RR-102.1 as it pertains to OMS 7.12 is reversed as not sustained.

Respondent shall restore all days Sgt. O'Neill and Lt. Ciempa lost either with compensatory time or back pay, whichever is appropriate.

Dated this 27th day of February, 2012.

/s/Rhonda Rhodes
Rhonda Rhodes
Hearing Officer

**Notice of Appeal Rights**

Pursuant to Charter § 9.4.15(E), and Rule 12 § 11 (1) and (2), the decision of the Hearing Officer may be appealed to either the Civil Service Commission, or directly to District Court. Any appeal to the Commission shall be initiated by filing a Notice of Appeal with the Commission, within fifteen (15) calendar days of the date noted on the Commission’s certificate of service/mailing of the Hearing Officer’s decision. Any appeal to District Court shall be initiated in accordance with the Colorado Rules of Civil Procedure currently in effect.