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

Case No. 11 CSC 17A

Petitioner – Appellant: ROBERT FITZGIBBONS (97029),
Officer in the Classified Service of the Denver Police Department
v.

Respondent – Appellee: CHARLES GARCIA,
Former Manager of Safety, City and County of Denver

DECISION AND FINAL ORDER

Before Commissioners Neal G. Berlin, Anna Flores, Cecilia E. Mascarenas, Hillary Potter, and
Matthew W. Spengler.

INTRODUCTION

This appeal, from the decision of a panel of Hearing Officers in the disciplinary appeal of
Officer Robert Fitzgibbons, arises out of discipline imposed on Officer Fitzgibbons for carrying
an unauthorized firearm and discharging the firearm using unauthorized ammunition. One of the
shots fired by Officer Fitzgibbons resulted in the injury of an innocent bystander.

Manager of Safety Charles Garcia dismissed Officer Fitzgibbons for the use of the
unauthorized rifle and ammunition and issued lesser penalties for other rules violations. Officer
Fitzgibbons appealed the disciplinary order. A panel of Hearing Officers affirmed the
disciplinary order in all respects.

Officer Fitzgibbons timely filed an appeal of the Panel’s Finding’s Conclusions, Decision
and Order. We affirm.
FACTUAL BACKGROUND

The Commission adopts the material facts set forth in the Panel’s Findings, Conclusions, Decision and Order ("Panel’s Order"). The Panel’s Order describes the facts of this case in great detail. Panel’s Order at 3-10. For purposes of this decision, we will merely recite those facts material to the issues resolved in this decision.

During the early morning hours of July 2, 2010, Officer Fitzgibbons and Corporal John Schledwitz were monitoring the outflow of people from a nightclub at closing time. Officer Fitzgibbons had prepared for this task by donning a tactical vest and a Kevlar helmet. He was also armed with his personal AR-15 rifle. Id. at 3.

The AR-15 is similar to the M-16 rifle used by the United State armed forces. Id. Officer Fitzgibbons’ AR-15 was not issued by the Department. He had purchased the weapon from another officer. Id. at 3-4. At the time of the incident, the weapon was loaded with a magazine that Officer Fitzgibbons had also purchased from another officer. The magazine was loaded with unauthorized ammunition, including tracer rounds. Id. at 4. Departmental policy requires that any personal firearm must be inspected and approved by the Firearms Section before it can be used on the job. Id. at 6. In addition, Department policy requires that before an officer may use an AR-15 rifle on duty, the officer must first complete an urban rifle training course. Id.

While monitoring the crowd, the officers observed a disturbance. Shortly thereafter, an individual, Sorel Sheed, fired a handgun into the air 5 or 6 times. Sheed then pointed the weapon at the officers and fired a single shot. Officer Fitzgibbons and Cpl. Schledwitz returned fire. Sheed dropped his weapon and fled the scene. The officers gave chase and captured Sheed a short time later.
Officer Fitzgibbons fired 6 rounds at Shead – four hollow-point rounds and two tracer rounds. None of the rounds fired by Officer Fitzgibbons were issued by the Department, although the hollow point bullets were similar to Department-issued ammunition. Id. at 8.

Tracer rounds are unsuitable for use in an urban environment. Because tracer rounds are full metal jacketed, they could travel up to one mile.\(^1\) Moreover, tracer rounds ignite.

One of the rounds fired by Officer Fitzgibbons struck a bystander, Diamond Demmer. Ms. Demmer was hospitalized for treatment, which included exploratory surgery of her abdomen. Ms. Demmer still has scars on her legs and thighs from her wounds. She also has scars from her surgery. Ms. Demmer also now walks with pain as a result of nerve damage caused by the shooting. Id. at 9.

As noted above, in order to carry an AR-15 while on duty, an officer must successfully complete an urban rifle training class. The urban rifle class is a 40-hour class that covers a wide range of topics including basic safety, tactical training, proper firing stance, proper firing angles, multiple target scenarios, and use of the weapon in the dark. To maintain their certification, officers must complete an 8-hour in-service class every three years and qualify by shooting on a quarterly basis. Id. at 5-6. Officer Fitzgibbons had made several requests to take this course, all of which had been denied. Officer Fitzgibbons’ supervisors testified that they denied his requests based on concerns about his judgment and decision-making. It is undisputed that Officer Fitzgibbons never took this class. Id. at 6.

Officer Fitzgibbons testified he was trained to use the AR-15 based on his prior military service and certain one-day training courses, specifically a one-day familiarization assignment.

\(^1\) In contrast, hollow point bullets are designed to stop when they hit their target.
with the Department’s SWAT team and an Immediate Action Rapid Deployment training session following the Columbine High School shooting. *Id.* at 4.

Based on this incident, the Manager of Safety brought charges against Officer Fitzgibbons, who appealed those charges to a Panel of our Hearing Officers, which ruled as follows:

**Violation of the Operations Manual Sec. RR-102.1 Duty to Obey Departmental Rules and Mayoral Executive Orders as it pertains to OMS 105.07 Utility Firearms**

We find that Petitioner did violate this section of the Operations Manual by carrying his personal AR-15 while on duty monitoring the out-crowd at Club Vinyl in the early morning hours of July 2, 2010, without prior authorization of his Division Chief, and that the appropriate discipline for this violation is dismissal.

**Violation of the Operations Manual Sec. RR-105 Conduct Prejudicial**

We find that Petitioner did violate this section of the Operations Manual in that his actions in carrying his unauthorized personal AR-15 and discharging that weapon in a crowded parking lot resulted in serious bodily injury to an innocent civilian, and that the appropriate discipline for this violation is dismissal.

**Violation of the Operations Manual Sec. RR-102.1 Duty to Obey Departmental Rules and Mayoral Executive Orders as it pertains to OMS 105.07.9 Ammunition**

We find that Petitioner did violate this section of the Operations Manual on July 1 and 2, 2010, by loading his personal AR-15 with full-metal jacketed and tracer ammunition not issued or approved by the Firearms Section, and that the appropriate discipline for this violation is suspension for sixty days without pay.

**Violation of the Operations Manual Sec. RR-102.1 Duty to Obey Departmental Rules and Mayoral Executive Orders as it pertains to OMS 111.03(1) a & b Other Required Items**

We find that Petitioner did violate this section of the Operations Manual on July 1 and 2, 2010, by failing to properly display his police badge on his outermost garment, and that a fine of 16 hours is an appropriate discipline for this violation.
Violation of the Operations Manual Sec. RR-102.1 Duty to Obey Departmental Rules and Mayoral Executive Order as it pertains to OMS 111.05 (2)(e)(1) Optional Items – Uniform and Equipment

Since the discipline for this alleged violation is a written reprimand, it is not subject to appeal.

Id. at 14.

PROCEDURAL HISTORY

On June 14, 2011, then Manager of Safety Charles Garcia issued a Departmental Order of Disciplinary Action against Officer Fitzgibbons, in which Manager Garcia imposed a discipline of: dismissal for violations of RR-102.1 (Duty to Obey Departmental Rules) as it pertains to Operations Manual Section 105.07 (Utility Firearms); dismissal for a violation of RR-105 (Conduct Prejudicial); sixty suspended days for violations of RR-102.1 (Duty to Obey Departmental Rules) as it pertains to Operations Manual Section 105.07.9 (Ammunition); sixteen fined hours for violations of RR-102.1 (Duty to Obey Departmental Rules) as it pertains to Operations Manual Section 111.03(1)(a) and (b) (Other Required Items); and a written reprimand for violations of RR-102.1 (Duty to Obey Departmental Rules) as it pertains to Operations Manual Section 111.05(2)(e)(1) (Optional Items – Uniform and Equipment).2


Officer Fitzgibbons filed his Petitioner’s Notice of Appeal with the Commission on June 1, 2012. Officer Fitzgibbons filed his Opening Brief on August 27, 2012. The Manager of

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2 As the Panel properly noted, the charge for which the written reprimand was issued is not subject to appeal and so was not considered by the Panel.
Safety filed his Answer Brief on October 3, 2012. Officer Fitzgibbons filed his Reply brief on October 18, 2012.

After considering the briefs 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 Panel’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, Officer Fitzgibbons appealed the Panel’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. Officer’s Notice of Appeal at 1-2.

We find that the issues addressed in this appeal involve both the interpretation of departmental rules and policy considerations that may have impact beyond the case at hand. Accordingly, we find that this appeal is properly before the Commission.

B. Standard of Review

The Charter of the City and County of Denver (“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 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

C. Sufficiency of the Evidence

Officer Fitzgibbons alleges that the Manager failed to introduce sufficient evidence to sustain a finding that he violated Departmental Rules and Regulations concerning his use of his personal AR-15 rifle. We disagree.

The record provides ample support for the Panel’s conclusion that Officer Fitzgibbons did not have proper authorization to carry and use his AR-15. It was undisputed that an officer must complete an urban rifle class before he can carry an AR-15 while on duty. It was also undisputed that Officer Fitzgibbons never took the urban rifle course and that he had received no formal training or authorization to carry the AR-15. The fact that Division Chief Klee did not personally testify that she had not authorized Officer Fitzgibbons to carry the AR-15, in light of the overwhelming evidence that no one had authorized him to carry the weapon, does not render the Panel’s conclusion on this issue incorrect. Accordingly, we affirm the decision of the Panel on this issue.

D. Tacit Approval

Officer Fitzgibbons also argues that he received tacit approval from the Department to carry and use his AR-15 because his immediate supervisors saw him carrying the weapon during certain training exercises. Officer Fitzgibbons asserts that he reasonably relied on this tacit approval and therefore, the Department is equitably estopped from disciplining him for use of the weapon. The Panel rejected this argument. It determined that:

3 For example, the testimony of Lt. Phelan demonstrated that Officer Fitzgibbons’ temporary assignment to SWAT did not amount to his having received training and/or authorization to carry the AR-15.
Observation or lack of observation does not constitute approval to violate a clear rule regarding training, and a rule and requirement known by Officer Fitzgibbons. We therefore reject Officer Fitzgibbons’ argument that DPD supervision tacitly approved or condoned Officer Fitzgibbons’ carrying his personal AR-15.

Panel’s Order at 12.

We affirm the Panel’s decision on this point.

We determine that the manager is not equitably estopped from dismissing Officer Fitzgibbons based on his use of the AR-15. “The doctrine of equitable estoppel is premised upon principles of fair dealing and is designed to prevent manifest injustice.” Comm. for Better Health Care for All Colo. Citizens v. Meyer, 830 P.2d 884, 891 (Colo. 1992). A claim of equitable estoppel must be supported by the following elements: “the party to be estopped must know the facts and either intend the conduct to be acted on or so act that the party asserting estoppel must be ignorant of the true facts, and the party asserting estoppel must rely on the other party’s conduct with resultant injury.” Ward v. Dep’t of Natural Resources, 216 P.3d 84, 93 (Colo. App. 2008) (quoting Comm. for Better Health Care, 830 P.2d at 891-92). Further, “[o]ne of the elements of equitable estoppel is reasonable reliance on the representation on which the defense is based. . . . ‘A party . . . may not rely on the mere noncommittal acts of another in order to establish equitable estoppel.’” Premier Farm Credit PCA v. W-Cattle, LLC, 155 P.3d 504, 522 (Colo. App. 2006) (quoting Thurman v. Tafoya, 895 P.2d 1050, 1058 (Colo. 1995)). “Whether the circumstances of a particular case involve representation and reasonable reliance giving rise to equitable estoppel is a question of fact.” Id.

In this case, Officer Fitzgibbons’ purported reliance on having received tacit approval for use of his personal AR-15 is based only on his supposition that his immediate supervisors saw him carrying the weapon during certain training exercises is unreasonable. Mere observation,
without any further affirmative act by Officer Fitzgibbons’ supervisors to ratify the use of the weapon, is a noncommittal act and does not form an adequate basis for estopping the Department from disciplining Officer Fitzgibbons in this case.

E. Appropriateness of Dismissal as a Penalty

Officer Fitzgibbons also argues that the penalty of dismissal for his unauthorized use of the AR-15 is excessive. We disagree. We believe the penalty of dismissal was appropriate and supported by the record as found by our Panel.

A category F violation is one where it is foreseeable that the officer’s actions could have resulted in death or serious bodily injury, or amounted to a willful and wanton disregard of departmental values, or which demonstrates a serious lack of integrity, ethics or character related to the officer’s ability to hold his position. Panel’s Decision at 11-12. The Panel specifically found that it was foreseeable that firing an AR-15 with full-metal jacketed rounds in an out-crowd situation outside Club Vinyl could result in death or serious bodily injury to innocent bystanders. Id. at 11. We agree with the Panel.

The Panel also found that Officer Fitzgibbons’ actions constituted egregious misconduct because they showed a willful and wanton disregard of DPD rules and a lack of integrity. Id. Again, we agree. Petitioner deliberately ignored multiple departmental rules on what is perhaps a police officer’s most significant responsibility: the proper use of deadly force. As noted above, Officer Fitzgibbons’ actions resulted in serious injury to an innocent bystander. Compounding his extraordinarily poor judgment, Officer Fitzgibbons has refused to take responsibility for his actions. We find that the factual record provides ample support for the Panel’s conclusion that

4 The Panel did not abuse its discretion regarding the admission of testimony by Diamond Demmer as to her physical condition. We believe her testimony amply supports a conclusion that she suffered serious bodily injury.
Officer Fitzgibbons’ behavior constitutes a willful and wanton disregard for Department policy and a lack of integrity.

**F. Conduct Prejudicial**

Officer Fitzgibbons further argues that we should overturn the Panel’s finding that he violated RR-105 (Conduct Prejudicial). We decline.

Officer Fitzgibbons claims that this specification is not supported by sufficient proof and amounts to the improper “stacking” of charges. We disagree. The Panel properly noted that, contrary to Officer Fitzgibbons’ argument, the RR-105 violation did not cover the same conduct as the primary RR-102.1 charge. The latter involved Officer Fitzgibbons carrying of the unauthorized weapon; the R-105 charge, however, dealt with the deployment of that weapon with inappropriate ammunition in an inappropriate situation. *Panel’s Order* at 13. We concur with the Panel’s determination that such conduct “was prejudicial to the good order and police discipline of the Department” because it was in willful and wanton disregard of Department rules and because it resulted in serious injury to an innocent civilian.” *Panel’s Order* at 13.

Further, we find that the record supports the Panel’s conclusion that Officer Fitzgibbons engaged conduct prejudicial, in violation of RR-105. We find support in the record for the sustaining of this charge. We agree with the Panel that having been turned down on three separate occasions to take the Urban Rifle course, Officer Fitzgibbons’ choice to nevertheless utilize the unapproved weapon amounted to a willful and wanton disregard of Departmental rules. We also agree with the Panel that Officer Fitzgibbons’ decision to use unapproved ammunition, without even knowing what ammunition he was using, resulting in a use of rounds inappropriate for the situation, endangering officers and bystander alike, amounted to a text-book example of conduct prejudicial.
G. **Badge**

Officer Fitzgibbons claims that the Panel erred in finding that he violated RR-102.1 regarding the failure to display his badge. The Panel found as a matter of fact that by donning a Kevlar vest, Officer Fitzgibbons concealed his badge. *Panel’s Order* at 14. We are bound by the factual determination and, therefore, affirm the Panel’s finding concerning this charge.

**CONCLUSION AND FINAL ORDER**

For the reasons set forth above, the Panel’s findings are AFFIRMED in their totality. The Manager of Safety’s imposed discipline of dismissal and other lesser penalties is sustained.

Filed this 30th day of January, 2013.

FOR THE CIVIL SERVICE COMMISSION  
CITY AND COUNTY OF DENVER  

By: Earl E. Peterson  
Executive Director