CIVIL SERVICE COMMISSION, CITY AND COUNTY OF DENVER, COLORADO  
Case No. 13 CSC 08

In the matter of:

JAMES T. NUANES (86006)  
Officer in the Classified Service of the Denver Police Department  
Petitioner

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FINDINGS, DECISION AND ORDER

Hearing was held in the above-captioned matter on January 15, 2014, before Hearing Officer Daniel C. Ferguson. Petitioner was represented by Sean T. Olson, Esq., and Respondent by John-Paul C. Sauer, Esq.. The Respondent offered Exhibits 1(a) through 1(v), which were received in evidence. The Respondent called no witnesses. Petitioner James T. Nuanes was called to testify by his Counsel, and was cross-examined by Respondent Counsel. No other witnesses were called to testify regarding the underlying evidence contained in the Internal Affairs Bureau investigation, as shown in Respondent’s Exhibits.

In his appeal Officer Nuanes requested a de novo hearing pursuant to Denver Charter Sec. 9.4.15, and Rule 12 of the Civil Service Commission. This request was not articulated at the hearing herein. Further, Respondent did not present any witnesses in support of the Disciplinary Action of the Manager of Safety herein. Rather, in response to the Hearing Officer, Respondent Counsel Sauer stated that Respondent was relying upon the evidence contained in the Exhibits 1(a) through 1(v) to prove the appropriateness of the discipline herein. Therefore, I make no findings with regard to the issue of the Amendments to Rule 12, effective March 9, 2013, and whether Petitioner is entitled by the Charter of the City and County of Denver to a de novo hearing in this appeal.

Petitioner was found to have violated RR-127, Responsibilities to Serve Public, of the Denver Police Department Operations Manuel, which provides that,

Members shall serve the public by direction, counsel, and in other ways that do not interfere with the discharge of their police responsibilities. They shall respect the rights of individuals and perform their services with honesty, zeal, courage, discretion, fidelity, and sound judgment.
FINDINGS

Ex. 1.a., the Departmental Order of Disciplinary Action, dated September 20, 2013, sets forth the decision of the Manager of Safety, and his basis therefor. It states:

Officer Nuanes engaged in conduct that violated this departmental rule in the course of two traffic stops he made of Ms. Anaya. Ms. Anaya was driving in excess of the posted speed limit when she came within range of the radar device Officer Nuanes was using to monitor the speed of traffic. In response, Officer Nuanes activated the overhead lights of his patrol car and pulled out of his parking spot to pull Ms. Anaya's vehicle over. There is disagreement regarding whether Officer Nuanes pulled out of his parking spot abruptly, almost striking Ms. Anaya's vehicle. Everyone agrees, however, that when Officer Nuanes handed Ms. Anaya the initial citation, she asked him for a business card and complained that he almost struck her vehicle when he pulled out of his parking spot to stop her. Soon thereafter, Officer Nuanes ordered Ms. Anaya not to drive. Officer Nuanes had already determined that Ms. Anaya was a licensed driver and he had already issued a citation that contained a charge for not having her driver's license in her possession. Thus, the order not to drive was unnecessary and was likely made in response to Ms. Anaya's complaint about his driving behavior. Moreover, Officer Nuanes' statement, "I knew she was going to drive anyway," calls into question whether Officer Nuanes himself felt the order not to drive was superfluous. When he pulled her over, instead of issuing her a second citation for driving without a license in her possession, he escalated the violation from an infraction that the law requires be dismissed upon presentation of a valid driver's license in court, to a criminal offense violation that carries substantial jail and/or fine as a penalty. In doing so, Officer Nuanes abused his discretion, if not his authority. He also failed to "perform [his] services with ... discretion, fidelity and sound judgment."

This disciplinary action continues by setting forth the basis for finding that the presumptive penalty for the violation found was a three day suspension, as recommended in the Written Command, noting that "An aggravated penalty is not appropriate, however, given the low level nature of the misconduct involved in this case."

Ex. 1.q., the Contemplation of Discipline Letter in this case, states:

On May 20, 2013, after checking for a driver's license under the name provided to you during an initial traffic stop, you cited the driver for speeding and a driver's license violation. But, you also warned the driver (Ms. Anaya) not to drive further because she did not have her license with her, a questionable discretionary action. If you were sure enough of her identity to issue a citation under the name she provided, the more appropriate action in this scenario would have to been to allow her to continue to drive so long as a valid license existed. Conversely, if you were unsure of her identity, a citation should not have been issued under the
name given in order to avoid the possibility of an innocent person having en-
forcement action taken against their name.

DECISION

As noted, the Respondent presented no witnesses in this case. Further, the ex-
hibits contain no information regarding the training of officers regarding the proper pro-
cedure to follow when a driver is unable to provide a valid license or identification during
a traffic stop.

Here, Petitioner stated he was on routine traffic enforcement using stationary
radar on the Southeast corner of 14th Street at Madison Street, a location required in
the Department Manual. 14th Street is one-way east bound and has three traffic lanes.
Using his radar Petitioner detected Ms. Anaya driving 52 mph in a 30 mph zone in the
left lane. He stated he activated his overhead lights and turned onto 14th Street in the
right lane and pulled Ms. Anaya over after she had turned North onto Monroe Street.
He requested Ms. Anaya’s driver’s license, and was told that she did not have it with
her. Petitioner then requested her date of birth and vehicle registration, which were
provided, and which he took back to his patrol car to use his MDT (mobile data terminal)
to verify the information. Upon verifying that there did exist a valid driver’s license for a
Brittany Anaya with the date of birth given to him, Petitioner returned to her vehicle and
issued Ms. Anaya a citation for speeding and for failure to have her driver’s license in
her possession. He stated that he told Ms. Anaya not to drive, and that she responded
that she would call her mother. He also stated that at her request he provided a busi-
ness card to Ms. Anaya. He stated that he then returned to his patrol car and left the
scene. In his IAB statement he stated that he drove mid-block on Monroe street to turn
around to go Southbound on Monroe back to his sitting location on the Southeast corner
of 14th Street and Madison Street, and that as he passed Ms. Anaya she was out of her
car talking on a cell phone. In his testimony herein he stated that arriving back to his
sitting position he felt that Ms. Anaya was going to continue driving, and he therefore
proceeded North on Madison Street to Colfax Ave, and stopped at the stop sign, where
he observed the vehicle which he had just pulled over make a right turn off Monroe
Street and go Eastbound on Colfax Ave. He stated he followed the vehicle to Colorado
Blvd., where it turned Southbound on Colorado Blvd., at which time he again turned on
his overhead lights. He stated that he could see Ms. Anaya in her rear-view mirror
mouth the statement “Oh shit!” as he again pulled over Ms. Anaya who had stopped on
Albion Street. At that time he issued Ms. Anaya a citation for “54-55 Obedience to Po-
lice Officer.” (Ex. 1.f.) This exhibit also states: “D told not to drive. D stated ‘Okay I’ll
call my Mom’. D observed at Monroe & Colfax going EB on Colfax off Monroe.”

When called by his Counsel, Petitioner testified that he has been a traffic patrol
officer since 1991, that he issues some 2000-3000 traffic citations per year, that he rou-
tinely encounters drivers who are upset at being stopped, that he did tell Ms. Anaya not
to drive, but that he was not upset at Ms. Anaya, and did not yell at her or open her car
door. He did agree that he told Ms. Anaya that she had started this, and explained that
he meant’ that she started it by her speeding.
The phone recordings of Ms. Anaya, Ms. Angela Harris, and Ms. Zenya Packer are part of the Internal Affairs file submitted by Respondent as Exs. 1.c., d., and e, as well as 1.h, the call made by Ms. Harris to 911 Dispatch.

I find that the Respondent has failed to provide evidence regarding the training given to Police Officers regarding violations of C.R.S. 42-2-101, where a driver fails to provide a valid driver's license during a traffic stop.

C.R.S. 42-2-101 states:
(5) No person who has been issued a currently valid driver's or minor driver's license or an instruction permit shall operate a motor vehicle upon a highway in this state without having such license or permit in such person's immediate possession.

C.R.S. 42-2-101 further states:
(7) A charge of a violation of subsection (5) of this section shall be dismissed by the court if the defendant elects not to pay the penalty assessment and, at or before the defendant's scheduled court appearance, exhibits to the court a currently valid license or permit issued to such person or an officially issued duplicate thereof if the original is lost, stolen, or destroyed.

Neither party clarified the issue of whether a driver may be ordered not to drive when they do not have a license. The Manager of Safety however referred to the issuance of the second citation as an abuse of Petitioner's discretion and as the basis for a finding of a violation of RR-127. At the hearing herein Petitioner explained that the basis for the second citation was for the protection of the public, since he did not have a basis for an arrest, but also did not know whether the driver he was citing was in fact the Brittany Anaya identified in his computer database.

Revised Rule 12 Sec. 8 and 9 of the Denver Civil Service Commission states:

Sec. 8.D.2. The Department of Safety shall proceed first and, acting through the City Attorney as counsel, shall offer evidence in justification of the departmental action, (fn. 3. See Charter Sec. 9.4.15(C)), that is, the Department of Safety shall present sufficient evidence to create a reasonable inference of the correctness of the sustained Rule violation(s) and the imposed penalty(s) as contained in the Departmental Order of Disciplinary Action. The evidence offered initially by the Manager of Safety shall be limited to evidence, including materials, considered as the basis of the Order (generally, the Internal Affairs investigation).

Sec. 9.B.1.b. A Hearing Officer may reverse or modify the Manager of Safety's Departmental Order of Disciplinary Action on the basis of issues raised by the Petitioner concerning policy considerations, a sustained Rule violation or an imposed penalty, only when it is shown to be clearly erroneous.
Sec. 9.B.1.c. A Departmental Order of Disciplinary Action shall be deemed to be "clearly erroneous", in whole or in part, in the following circumstances:

i. The decision, although supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole;

Section 9.4.15 of the Charter of the City and County of Denver states:

(C) At a disciplinary hearing the member in person or by counsel, may offer evidence in support of his or her written objections. The Manager of Safety, acting through the City Attorney as counsel, shall offer evidence in justification of the departmental action. The hearing shall be recorded by a reporter or by an electronic recording device and a full record made. The Commission may adopt rules regarding pre-hearing matters and the conduct of the hearing.

(D) In reviewing the disciplinary action, the Hearing Officer shall give due weight to the necessity of the maintaining by the Manager of administrative control of the department. The Hearing Officer shall review the full record before him or her and shall make written findings, affirming, reversing, or modifying the disciplinary action in whole or in part.

It appears that the newly revised language of Rule 12, Sec. 8.D.2 has a limiting effect on evidence offered by Respondent. Thus, Counsel for Respondent offered the Exhibits herein and rested his case. I am therefore left to consider whether the determination of the Manager of Safety was "clearly erroneous", i.e., "... contrary to what a reasonable person would conclude from the record as a whole;", based on the Exhibits and the testimony of Petitioner.

I find Petitioner here to be a credible witness, and I credit his testimony that he was not angered by Ms. Anaya's questioning his driving ability. Since Ms. Anaya was not called to testify, I am only able to consider her phone conversation with Internal Affairs, Ex. 1.c. Respondent presented no evidence regarding Ms. Anaya's alleged call to the Denver Police Department phone number on Petitioner's business card, wherein she was supposedly told that she could continue to drive, as said by Ms. Harris. However, Ms. Anaya told IA, in Ex. 1.c., that she had called her father, who called his lawyer, who said that Ms. Anaya could continue to drive. Nor is it possible to resolve the conflicting accounts of whether Petitioner came close to Ms. Anaya's car when he first stopped her for speeding on 14th Street, especially considering that in Ex. 1.e. Ms Packer told IA that Ms. Anaya was in the left lane on 14th Street and did not swerve or take evasive action, but only turned onto Monroe Street and stopped, thus calling into question the statements given by Ms. Anaya and Ms. Harris, that Petitioner had almost struck her vehicle. Finally, with no other witnesses, it is not possible to resolve the conflicts regarding Petitioner's admitted statement to Ms. Anaya, "You started this," as referring only to Ms. Anaya having driven considerably in excess of the speed limit on 14th Street, and without a driver's license on her person.

I find that the decision of the Manager of Safety herein was based on a record from Internal Affairs that was incomplete, for the reasons stated herein, that the exhibits
contain no information about the training of officers regarding the proper procedure to follow when a driver is unable to provide a valid license or identification during a traffic stop. Nor are the conflicting oral statements of the witnesses clarified. I therefore find that the conclusions of the Manager of Safety, that Petitioner’s “...order not to drive was unnecessary and was likely made in response to Ms. Anaya’s complaint about his driving behavior.”, and that Petitioner “...abused his discretion, if not his authority.”, in issuing the second citation, were determinations based on an incomplete record. Based on the incomplete record herein, I find the Departmental Order of Disciplinary Action “clearly erroneous”, and contrary to what a reasonable person could conclude from the record as a whole.

ORDER

The Decision of the Manager of Safety in Departmental Order of Disciplinary Action, Case No. P2013-0139, dated September 20, 2013, is reversed.

NOTICE OF APPEAL RIGHTS

Petitioner is hereby notified of his right to appeal the decision herein either to the Commission or directly to the District Court in accordance with the Colorado Rules of Civil Procedure currently in effect. An appeal to the Commission shall be initiated by filing an original and one copy of a Notice of Appeal with the Commission within fifteen (15) days of the date noted on the certificate of mailing/service of the Hearing Officer’s decision by the Commission, and promptly serving the Notice on the opposing party or counsel, including a certificate of service/mailing.

Dated this 11th day of February, 2014,
at Littleton, Colorado

Daniel C. Ferguson
Hearing Officer