This matter comes before the Commission on an appeal by the Deputy Director of Safety (DDOS). DDOS issued Denver Police Detective Jay Spitzer a ten-day disciplinary suspension for conducting a shoddy investigation. Detective Spitzer appealed that discipline to a Hearing Officer. Because the facts surrounding the misconduct of Detective Spitzer\(^1\) were not in dispute, the parties agreed to forego an evidentiary hearing and have the Hearing Officer decide the case on briefs.\(^2\)

As noted above, the facts forming the basis for the imposed discipline are not in dispute.\(^3\)

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\(^1\) As it turned out, a factual dispute arose concerning the level of discipline imposed in this case as compared to the level of discipline imposed in a different case which Detective Spitzer believed essentially set a comparability bar. See n. 10, infra.

\(^2\) We applaud the professionalism and collegiality exhibited by the parties’ respective counsel in this matter.

\(^3\) Several personal opinions expressed by the Hearing Officer, however, are in dispute. For example, the DDOS, in his appeal, takes issue with the Hearing Officer’s comment on page 2 of her opinion where she concludes (for no discernible reason) that information found in Detective Spitzer’s case file “should have been viewed with
On one of his cases, Detective Spitzer ignored information available to him in his file, failed to show a witness a photographic lineup as he should have, provided information in an affidavit used to procure an arrest warrant that was plainly inaccurate and was known or should have been known by Detective Spitzer to be inaccurate, and obtained a warrant for the arrest of an innocent man. Detective Spitzer’s blunders led to the arrest of this same innocent man, who subsequently filed a notice of intent to sue the City and County of Denver because of that wrongful arrest.

The Hearing Officer, in her opinion, held that the DDOS was clearly erroneous in determining that Detective Spitzer’s misconduct should be classified as Matrix Category D violation. The Hearing Officer believed the misconduct should have been properly classified as a Category C violation. She then remanded the case back to the DDOS for a new penalty determination using the Matrix guidelines applicable to category C violations.

We first note that the Hearing Officer erred in remanding the case to the DDOC for a new penalty determination. She does not have the authority to do this. Our Rule 12, Section 9(A) requires the Hearing Officer to issue a written decision “which includes findings of fact and conclusions of law affirming, reversing, or modifying the disciplinary action in whole or in part.” The Rule does not give her the authority to remand a matter back to the DDOS. We do not believe this authority to remand could be considered an implied power. When we look to our Rules concerning the Commission’s power, we find Rule 12 Section 11(H) which provides:

The Commissioners have the power and authority to remand the matter under appeal
to the Hearing Officer and to order an entirely new hearing, limited new hearing, entry of new or additional findings, or other further action as may be deemed proper. As appropriate, in a remand to the Hearing Officer, the Commissioners may retain jurisdiction over the matter under appeal. The Commissioners may remand the case to the Hearing Officer on their own motion or upon request of any party.

Had we intended to grant the Hearing Officer the authority to remand an appeal back to the DDOS, we would have specifically stated so in our rules. We did not do this. We conclude that the Hearing Officer erred in remanding the matter to the DDOS for a new penalty determination.

We turn then to the issue of whether the Hearing Officer was correct in her holding that the DDOS was clearly erroneous when he assigned Detective Spitzer’s misconduct as a Matrix Category D violation as opposed to a Category C violation. We conclude she was not.

The Hearing Officer believed Detective Spitzer’s penalty should be reduced based on the presence of a case she considered to be nearly identical in which the Officer’s misconduct was classified as a Matrix Category C violation. The only distinction she could find between that case and Detective Spitzer’s case was that in the instant case, the victim of the wrongful arrest has threatened a lawsuit. She plainly believed that Detective Spitzer, therefore, was entitled to a reduced penalty. We believe the Hearing Officer’s ruling is premised upon a misunderstanding of relevant laws and regulations.

The concept of comparability of discipline has its origins in one section of the Denver City Charter. Specifically, Charter Section 9.4.15 F. provides:

… Review of a Hearing Officer decision by the Commission shall be limited to the following grounds: … (d) the discipline affirmed or imposed by the Hearing Officer is inconsistent with discipline received by other members of the department under similar circumstances….  

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5 This Charter language would appear to make the comparability issue one which can be considered only by the Commission and not the Hearing Officer. We must admit, however, that even our own Rule 12, Section 9(B)(2) contemplates the Hearing Officer making an initial comparability determination. (“The Hearing Officer shall not consider any other case offered for purposes of assessing consistency of discipline if the final penalty imposed in that case was based on a documented negotiated settlement between the parties.”)
In attempting to give guidance to litigants appearing before the Commission concerning this provision of the Charter, the Commission promulgated the following rule:

Section 11(D)(4). The Discipline Affirmed or Imposed is Inconsistent: The discipline affirmed or imposed by the Hearing Officer is inconsistent with discipline received by other Members of the Department under similar circumstances:

a. A finding of similar circumstances by the Commissioners shall be based on an assessment of the relative degree to which any other disciplinary case offered for purpose of assessing consistency in discipline contains the following factors:

i. Similar factual situations;

ii. Similar disciplinary histories;

iii. The same or similar facts in aggravation and/or mitigation;

iv. The same or similar Rule violations;

v. The application of the same or similar disciplinary policies, principles, disciplinary matrix, and/or guidelines; and

vi. Notice to Members of the Classified Service of any change in the Departmental disciplinary policies, principles, discipline matrix, and/or guidelines.

b. For discipline to be determined inconsistent, it must be outside of a reasonable range for discipline imposed in similar circumstances. (emphasis supplied)

It is critical to note that neither the Charter nor our Rules require an identity of punishments in cases deemed to be similar. The Charter states that the Commission can reverse or modify an imposed discipline if it is inconsistent with what has been issued in similar cases. The Charter does not require that similar cases carry identical punishments.

In addition, our Rule 12, Section 9 (B)(2) further clarifies that for punishment to be inconsistent, it must be outside of a reasonable range of discipline. This is in accord with our holding today that for an amount of discipline to be consistent, it need not be identical to the amount of discipline issued in a different case found to be similar. Assuming, therefore, that the Hearing Officer was correct in determining that the case Detective Spitzer offered as a
comparable was indeed comparable for purposes of the above referenced Charter provision and Rules, it does not necessarily follow that Detective Spitzer’s punishment was inappropriate.

We do not perceive the ten-day suspension received by Detective Spitzer to be “dramatically”\(^6\) different from the six-day suspension received by his alleged comparable\(^7\). We conclude the issuance of a ten-day suspension was not outside of a reasonable range of discipline imposed under similar circumstances. As such, we conclude that the issuance of a ten-day suspension to Detective Spitzer did not violate the Charter or our Rules; the two punishments are consistent, even though plainly not identical.

In holding to the contrary, the Hearing Officer referenced the Handbook issued by the DPD which explains and gives guidance for the use of the Matrix. The Hearing Officer reasoned that the Handbook provides that “a finding of a violation must not be based on or be influenced by the anticipated or perceived effect which the finding may have upon any witness or other involved person…”\(^8\) The Hearing Officer went on to conclude that the fear of lawsuits, a factor found in this case but not in Detective Spitzer’s comparable case, is an inappropriate consideration upon which the DDOS could base a finding of a rules violation\(^9\). For reasons not stated in the decision, however, the Hearing Officer conflates DDOS’s decision-making as to the existence of a rules violation with his decision-making as to the appropriate punishment for that rules violation. DDOS did not use the “fear of lawsuits” to determine that Detective Spitzer violated Departmental Rules. The record reflects that DDOS used the evidence of Spitzer’s incompetent investigation as justification for concluding that the Detective had violated

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\(^6\) Hearing Officer Decision, p. 4.

\(^7\) We do not mean to suggest that the standard of “dramatic difference,” per the Hearing Officer’s decision, is the standard for determining non-comparability; only that in this case, we do not see an appreciable difference between a ten-day suspension and a six-day suspension so as to make the former improper under the terms of the Charter or our Rules.

\(^8\) Hearing Officer Decision, p. 3. Though the Hearing Officer did not provide a citation in her opinion, we find this language at Section 10.11.7 of the Handbook.

\(^9\) Id.
Departmental rules.

The Handbook specifically cautions that:

In determining whether a violation of any Departmental rule, regulation, policy, procedure or directive has been proven, the reviewer must act as a finder of fact. This process is separate and distinct from any consideration of what disciplinary sanction, if any, is appropriate if it is decided that a violation has been proven. (emphasis supplied)\textsuperscript{10}

The Hearing Officer, in deciding that the DDOS was clearly erroneous in utilizing the fear of a lawsuit in determining the existence of a rules violation, was clearly in error. Her conclusion is simply not supported by the record. What she claimed the DDOS did, never actually happened.

The only matter remaining for our consideration\textsuperscript{11}, then, is whether the Hearing Officer erred when she concluded that DDOS could not, as matter of policy, use the fact that the wrongfully arrested citizen was threatening legal action, as justification for finding that Detective Spitzer’s misconduct merited Matrix Category D consideration as opposed to only category C consideration. We conclude she did, indeed, err.

Ironically, the Hearing Officer herself admitted that factors that could not be considered when deciding whether conduct amounted to a rules violation (such as the threat if a lawsuit) could be used for determining which category of rules violation that misconduct should be characterized as. (\textit{Cf.} Hearing Officer Decision, p. 3 bottom paragraph with p. 4, first full paragraph.) She is correct in this respect. (\textit{See, e.g.,} Handbook Section 15.1.3.)

\textsuperscript{10} Handbook Section 10.1.

\textsuperscript{11} DDOS also argued in his brief that the Hearing Officer erred in even considering Detective Spitzer’s offered comparable case because, he claimed, the discipline issued in that case was the result of a negotiated settlement. If that was the case, the Hearing Officer would have been precluded from considering that discipline as a comparable per our Rule 12, section 9(B)(2), \textit{supra}, at n. 4. But Detective Spitzer, in his brief, claimed that the comparable discipline was not the result of a negotiated settlement, but rather merely an acceptance of the Chief’s recommended discipline. While technically, an officer cannot accept discipline issued by the Chief because the Chief does not issue discipline, we are not convinced, without further development of this issue, that the meeting of the minds where the chief, the officer and the DDOS all agree that a particular discipline is acceptable amounts to a negotiated settlement. The Hearing Officer, in her decision, ignored this issue altogether. And because the parties submitted this appeal to the Hearing Officer on briefs without offering testimony or other evidence on the question of the applicability to Section 9(B)(2) to the discipline in question, we find that the record is insufficiently developed for the Commission to rule on this issue.
Nevertheless, the Hearing Officer concluded that as a policy consideration, it would be inappropriate to aggravate Category C misconduct to Category D misconduct based on the genuine threat of a lawsuit arising out of that misconduct. We disagree. Sound public policy allows for the DDOS to take into consideration the threat of litigation when assigning misconduct to a Matrix category. We believe lawsuits and even the threat of lawsuits can have a negative impact on the Department. The understandable but constant media barrage that comes with officers not performing at their best when doing their critically important jobs foreseeably has a negative impact on how all officers are perceived and has the very real possibility of affecting how officers interact with the public and how the public interacts with our officers. In addition, the time and expense that may be incurred in investigating threatened lawsuits and defending actual lawsuits eats up valuable time and resources, impairing the optimal functioning of the Department. While we do not ask our officers to do their jobs while constantly considering whether their actions will result in a lawsuit, we do not think it unreasonable for management to take into account, when issuing discipline, the threat or existence of lawsuits stemming from the act of misconduct under consideration, and the damage, or potential damage legal action might inflict.

For all of the above reasons, the Hearing Officer’s Decision is REVERSED and the DDOS’s imposition of a ten-day suspension to Detective Spitzer is re-instated.

Filed the 7th day of October, 2015.

For the Civil Service Commission,

[Signature]

By: Earl E. Peterson, Executive Director
CERTIFICATE OF SERVICE

I hereby certify that this 7th day of October, 2015, I have electronically served the foregoing DECISION AND FINAL ORDER, in Case No. 14 CSC 07A, Jess Vigil v. Jay Spitzer (P00055), by arranging that a true and correct copy of the same be sent by email to the following attorneys of record at the email addresses listed:

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