CIVIL SERVICE COMMISSION, CITY AND COUNTY OF DENVER, COLORADO

Case No. 14 CSC 05

In the matter of:

BRADLEY RHODES (89034)
Technician in the Classified Service of the Denver Police Department
Petitioner

____________________________________________

FINDINGS, CONCLUSIONS, DECISION AND ORDER

Petitioner Bradley Rhodes and Respondent City and County of Denver submitted the above-captioned matter on August 20, 2014, by filing an Amended Joint Pre-Hearing Order in which they agreed to submit the case on briefs, and proposed a briefing schedule, which was subsequently approved by the undersigned Hearing Officer, Daniel C. Ferguson, in an Order Approving Agreement to Submit Case on Briefs and Canceling hearing Date, dated August 22, 2014.

Petitioner is represented by Sean T. Olson, Esq., and Respondent by Richard A. Stubbs, Esq. By agreement, the record consists solely of the DPD Internal Affairs file for Case Number IC2014-0030, (which includes the Disciplinary Order issued on May 23, 2014). The Agency's Exhibit Log, (Ex. 1-A through 1-Z) was submitted on August 26, 2014, and subsequently received by the undersigned Hearing Officer. Petitioner's Opening Brief was submitted on September 9, 2014. Respondent submitted its Respondent Executive Director of Safety's Answer Brief to the Hearing Officer on September 30, 2014. Petitioner submitted his Reply Brief on October 20, 2014. By Second Order the record herein was closed on October 24, 2014.

In his appeal Petitioner contends that the Order of Disciplinary Action is not supported by a preponderance of the evidence, is unlawful, contrary to the dictates of the Denver Police Department Disciplinary Handbook, constitutes an abuse of discretion by Deputy Manager Vigil, and is clearly erroneous; and requests that pursuant to Section 9.4.15 of the Charter of the City and County of Denver, Petitioner be afforded a review de novo of the subject Departmental Order of disciplinary Action. These arguments were further explicated in Petitioner's Opening and Reply briefs.

Having reviewed the record herein, the undersigned Hearing Officer makes the following findings, conclusions, decision and order.
FINDINGS

Ex. 1-W, the Departmental Order of Disciplinary Action, (DODA), dated May 23, 2014, sets forth the decision of the Deputy Director of the Department of Safety, and his basis therefor. The Decision is summarized as follows in its first paragraph:

This is before the Executive Director of the Department of Safety to approve, modify or disapprove the Chief of Police's Written Command ordering disciplinary action for Technician Bradley Rhodes. The Chief has determined that Technician Rhodes violated RR-808, Equipment and Property Restrictions on Use, and RR-105, Conduct Prejudicial, of the Denver Police Department Operations Manual, when he used a department owned K-9 police vehicle for personal reasons. The Written Command imposed a penalty of three (3) suspended days without pay for the violation of RR-808, a pre-determined Conduct Category B specification. It also concluded that RR-105 was a Conduct Category C specification under the facts of this case and imposed a penalty of ten (10) suspended days without pay for the rule violation. Finally, the Written Command determined that these penalties should run concurrently.

The Departmental Order (Ex. 1-W) then sets forth a detailed summary of the investigation herein, as revealed in the Agency's Exhibit Log, Exs. 1-A through 1-Z, as follows:

On March 17, 2014, Technician Rhodes was on vacation but was authorized to work overtime at DIA on a shift that was scheduled to start at 4:00 p.m. Technician Rhodes had an assigned department owned K-9 police vehicle which he was allowed to drive to and from work. He was working with a dog that he would transport to and from work in a vehicle that was equipped with features designed to insure the comfort and safety of the dog at all times.

The vehicle assigned to Technician Rhodes is a designated Class II vehicle. Pursuant to City and Department policies, such vehicle may be used for travel between the user's residence and work, provided that the radius of travel is not more than 25 miles. Personal use of the vehicle is prohibited under the Department's policy. The City's policy allows “de minimus” (sic) personal use only and provides that travel for lunch is an example of such use. Technician Rhodes was required to read and initial the take home vehicle policies. Moreover, the unauthorized trip was 28.56 miles from his work assignment, outside the 25 miles maximum radius allowed.

Technician Rhodes left home in the assigned vehicle with the police dog on board, hours before his scheduled overtime work assignment, to conduct work-related errands. He drove to a PetsMart at Wadsworth Blvd. and Cross Drive to buy supplies for his dog. He decided to meet a retired police officer who was a work partner for lunch and drove to Gunther Toody's on West Bowles Avenue.
He arrived at the restaurant at approximately 11:50 a.m., took the dog out of the vehicle and walked him for a brief period, and then went in to the restaurant to have lunch with his friend. After lunch, Technician Rhodes and his friend decided to see a movie. Technician Rhodes drove the police vehicle to the theater at South Kipling Street and Bowles Avenue. The theater is located in Jefferson County and the distance between the theater and DIA is 28.56 miles. Technician Rhodes did not have authorization from anyone in the Department to drive the take home vehicle to the restaurant where he had lunch or to the movie theater.

Technician Rhodes arrived at the theater at approximately 12:55 p.m. Technician Rhodes parked the police vehicle close to the theater, left the dog inside the vehicle and entered the movie theater. He indicated that he parked near the entrance so that he could check on the dog if he needed to do so. Technician Rhodes spent approximately 90 minutes in the theater and his vehicle was parked in the same spot for the same amount of time. Technician Rhodes did not come out of the movie at any time to check on the dog, as the pager, which is designed to be activated if the climate inside the police vehicle rises to a level that places the dog in danger was never activated. After the movie, Technician Rhodes visited briefly with his friend and then drove to DIA. He arrived there at approximately 3:50 p.m.

Later that evening, a private citizen who apparently, was at or near the theater where Technician Rhodes watched a movie, sent an anonymous email to Channel 9 News Tips regarding Technician Rhodes’ police dog and vehicle. The email indicated:

   Took this picture [of Technician Rhodes’ police vehicle] at around 3 p.m. on 3/17/14. It was at the Elvis Cinema on 6014 South Kipling Pkwy. There was a dog in this vehicle when the picture was taken. Was aware the taxpayers of Denver were funding field trips to the movies for Denver officers. And if this officer was off duty, why the need to use taxpayers resources for thier little excursion? AND WHY IS THE DOG IN THE CAR?? I’d also like to point out that this is a DIA officer, the vehicle clearly displays a Denver Dept. of Aviation seal. Even if this cop lives in the area and has a take home car, if anything happened at DIA it’s be over before this officer got to Pena Blvd. No chance it was responding to a call, this is Jefferson County. WASTE OF TAXPAYER DOLLARS, 9NEWS!!

On March 18, 2014, a 9News follow up request for more information was forwarded to Technician Rhodes’ supervisors and an Internal Affairs case was opened to investigate the matter. Technician Rhodes denied violating any Department rules and expressed his belief that his actions were consistent with departmental policy. He also indicated that the dog was cared for at all times, had enough water to drink and was in a climate controlled environment.

Based on the investigation by Internal Affairs, as noted above, the Deputy Manager of Safety analyzed the recommended disciplinary actions as follows:
RR-808 - Equipment and Property Restrictions on Use, of the Denver Police Department Operations Manual, provides that:

Officers are prohibited from using Police Department property or vehicles in the conduct of their own personal or private affairs without approval of a Division Chief or the Chief of Police.

As noted above, Technician Rhodes used his take home vehicle to meet a friend for lunch hours before he was scheduled to work an overtime shift and then took the vehicle with the police dog on board to a movie theater that was more than 25 miles from DIA where he was assigned to work. In doing so, he violated this departmental rule because he was using the vehicle "in the conduct of [his] own personal or private affairs without approval of a Division Chief or the Chief of Police."

... 

RR-105 - Conduct Prejudicial, of the Denver Police Department Operations Manual, provides that:

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.

As indicated above, Technician Rhodes used his Department issued K-9 police vehicle for the purpose of gathering supplies and extended the trip beyond a pet supply store to include lunch and a movie. The vehicle was parked for significant periods of time in plain view, in front of a restaurant and a movie theater in Jefferson County, a distance greater than the 25 mile radius allowed under the take home policy. The vehicle was visible to members of the public and in fact, at least one private individual saw the vehicle with the dog inside and became concerned or disturbed enough that he or she brought it to the attention of 9News. Although the dog was not in any danger, members of the public would not have necessarily known that the dog was safe. The complaint to 9News resulted in negative media attention and likely harmed the image of the Department. Given the totality of these circumstances, Technician Rhodes’ actions violated the above rule because he “engaged in conduct prejudicial to the good order and police discipline of the Department” and which “caus[ed] harm greater than would reasonably be expected to result” from his actions.

... 

As noted, the record in this case is limited to the Agency’s Exhibit Log and the briefs submitted by the parties. Ex. 1-B, the Notice of IAB Complaint to Petitioner, dated 3/24/2014, identifies a complaint violation of only RR-808. Ex. 1-C is the IAB Case Investigation Summary Report, in which it is noted that in searching databases relative
to the City of Denver's vehicle use policy, the investigator found two documents, Department Directive 02-04 (revised 9-2010) which stipulates the use of a Class II full use vehicle, and Denver Fiscal Accountability Rule 10.6 - Take Home Vehicles and Carpooling - which addresses a law enforcement officer's vehicle use, qualified non-personal use vehicles, and *de minimis* use, which allows for some personal use such as driving to lunch. These latter two documents are included in the Agency Log as Ex. 1-L and 1-T.

Ex. 1-K is the DPD Authorization for Full Use Vehicle for Petitioner Rhodes, specifying that Petitioner was authorized to drive a Class II vehicle, which is defined as follows:

**Class II**

Class II authorizes the user to drive the assigned vehicle to and from work. The employee's residence must be within a 25-mile radius of the City and County Building.

- The employee's assignment requires immediate response to emergency situations on a 24-hour basis.
- The immediate response requires the use of specialized safety or emergency equipment that must be carried in or on the vehicle (examples include bur are not limited to emergency lights or siren, police radio, riot equipment, protective equipment, weapons, technical equipment and tools that support the police mission during emergencies).
- Class II authorizes the employee to operate the vehicle between scheduled on duty overtime assignments and their residence.
- Class II authorizes the employee to operate the vehicle between work, authorized secondary employment, and their residence. The vehicle may be driven to his/her on duty work assignment or directly from his/her on duty work assignment, to the secondary employment.
- The Class II users may operate the vehicle as a full use vehicle except that **PERSONAL USE IS PROHIBITED**.

Ex. 1-U, page 2, is the City Business Vehicle Use Procedure from the Controller's Office, which defines *De Minimis*, in part, as follows:

A value so small that accounting for it would be unreasonable or administratively impractical. Examples of *de minimis* use of an employer-provided vehicle that are excludable include:

- Small personal detour while on business, such as driving to lunch while out of the office on business.

... 

Ex. 1-F is the Conduct Review Office report in this case. In the Analysis and Conclusions it lists two specifications, RR-808 and RR-105. It is not apparent who or when it was determined to add the second specification to this IAB case. At page 3 of Ex. 1-F it states that:

The authorization form does not address using the vehicle for the purpose of gathering supplies for the department owned K-9. Nevertheless, Technician
Rhodes violated RR-808 when he extended a trip beyond a pet supply store to include lunch and a movie. Also, the unauthorized trip was 28.56 miles in distance from the theater to DIA and outside the 25 mile maximum radius.

In his Opening Brief Petitioner contends that the Rules governing Classified Service Employee Appeals to the Civil Service Commission violate the dictates of Denver’s City Charter. He refers specifically to the revisions to Denver Civil Service Commission Rule 12, in March of 2013. The same contention was made in Case No. 13 CSC 04A (Brian Marshall).

Petitioner did not appeal the disciplinary action alleging a violation of RR-808, Equipment and Property - Restrictions on Use, of the Denver Police Department Rules and Regulations.

In his Opening Brief and in his Reply Brief Petitioner contends that the Director of Safety’s addition of a second charge, RR-105, Conduct Prejudicial, constituted “stacking” as defined by the Denver Police Department Disciplinary Matrix. Appendix D of the Denver Police Department Handbook provides that:

The Department/Manager of Safety may bring an action for violation of RR-105 pursuant to subpart (a) when the misconduct is not specifically set forth in Department rules or as an alternative to rule violations which are specifically set forth. When the violation of RR-105 is alleged as an alternative to other specifically charged rule violations, the penalty for Conduct Prejudicial should not be greater than the underlying alternative violations, and should run concurrently with the penalties for the alternative rule violations. A reviewing body may affirm both the RR-105 violation pursuant to subpart (a) and affirm the alternative rule violations, provided that the penalty for RR-105 runs concurrently with the penalties for the alternative rule violations. If the Department/Manager of Safety brings an action for violation of RR-105 pursuant to subpart (b) (harm greater than would reasonably be expected), the penalty for Conduct Prejudicial may run consecutively to the penalties for any other rule violations. The Department/Manager of Safety shall state whether RR-105 is being brought pursuant to subpart (a), subpart (b), or both.

Further, the Handbook also provides as follows:

31.8 Avoiding the Impact of “Stacking” – A balanced disciplinary system should impose fair and appropriate discipline based upon the nature of the misconduct and not simply upon the number of specifications that could arguably be charged and sustained. Discipline should be based upon the most specific violation(s) possible to adequately address the misconduct. In fashioning a final order of discipline in cases involving multiple specifications, the Manager of Safety must ensure that each specification addresses separate and distinct conduct or addresses a different aspect of or a different harm arising from the same conduct. Specifications which are only alternate theories of addressing the same
conduct should not operate so as to unfairly increase the penalty. If multiple violations are sustained which are merely alternative theories of addressing the same conduct, the sustained violations should run concurrently with the most serious violation. Only if separate and distinct misconduct or different aspects of, or different harm arising from, the same misconduct are found, should penalties run consecutively.

ANALYSIS AND CONCLUSIONS

In regard to Petitioner’s appeal of the revisions to Rule 12 in March of 2013, I am bound by the Decision and Final Order of the Commission in Case No 13 CSC 04A, dated August 1, 2014, and therefore reject Petitioner’s arguments here, that the revisions to Rule 12 violate the Charter of the City of Denver.

Regarding the alleged violation of RR-808, initially I find that Respondent has failed to present evidence that Petitioner violated some rule by using his Class II vehicle to obtain supplies for his K-9 dog at the PetsMart on West Crestline Avenue. Ex. 1-K, DPD Authorization for Full Use Vehicle, states only that: “The employee’s residence must be within a 25-mile radius of the City and County Building.” There is no evidence in this record regarding the location of Petitioner’s residence. Further, there is no contention that Petitioner violated a rule by using his vehicle to obtain supplies for his K-9 dog. Rather, the decision of the Conduct Review Office found in Ex. 1-F, relied upon by the Deputy Manager in the DODA, did not recommend a violation of RR-808 by the use of Petitioner’s vehicle for the purpose of gathering supplies for the department owned K-9, but did find a violation when Petitioner extended his trip beyond a pet supply store to include lunch and a movie, stating “...the unauthorized trip was 28.56 miles in distance from the theater to DIA and outside the 25 mile maximum radius.” There is no evidence in this record regarding a requirement that officers are restricted to a “25 mile maximum radius” when operating their City vehicles. While personal use of a city-owned vehicle is prohibited by Ex. 1-K, Respondent also offered in evidence Ex. 1-U, which states that: “Examples of de minimis use of an employer-provided vehicle that are excludable include: ..Small personal detour while on business, such as driving to lunch while out of the office on business.” Taking judicial notice of the fact that Gunther Toody’s Restaurant is located on South Wadsworth Blvd., approximately 1.1 miles from the PetsMart on West Crestline, I find that the use of the vehicle to go to lunch at Gunther Toody’s was allowable under the provisions of Ex. 1-U.

The allegation of a violation of RR-808 states that Petitioner “...took the vehicle with the police dog on board to a movie theater”..., which Petitioner has admitted doing. Notwithstanding having found that the use of his vehicle to go to lunch was permitted under the provisions of the City Business Vehicle Use Procedure from the Controller’s Office, Ex. 1-U, I find that the subsequent use of his vehicle to go to a move theater did constitute personal use of that vehicle in violation of RR-808.
Regarding the alleged violation of RR-105, the Director of Safety failed to specify whether the violation of RR-105 was being alleged under subpart (a) or (b), or both. Respondent Counsel argues that it is “obvious” that the charge was brought under subpart (b), because the Order of Disciplinary Action states that the use of Petitioner’s vehicle was brought to the attention of 9News by and individual, and: “The complaint to 9News resulted in negative media attention and likely harmed the image of the Department,” without stating any basis for this finding. The fact that a media representative made an information request, by itself, shows only that the request was made. There is no evidence that 9News aired this incident on its news broadcast, or that there was any other dissemination of the citizen inquiry regarding Petitioner’s vehicle being observed at the theater. Information requests to the DPD are routinely made by media representatives, and, depending on the situation, may or may not result in negative publicity, causing “harm greater than would reasonably be expected”.

In its brief Respondent contends that the RR-105(b) charge does not present an alternative theory for addressing the same conduct as RR-808 “…because his conduct ‘caused harm greater than would be reasonably be expected to result’ from his actions”. The record before me fails to state what is the expected harm from a violation of RR-808, personal use of vehicle, or how the observation of the vehicle outside a theater by a private individual who reported this to 9News constituted “harm greater than would reasonably be expected”, in violation of RR-105(b). The DODA states only that 9News made a follow up request for more information, which caused the opening of an Internal Affairs case. Petitioner cooperated in the investigation, giving an accurate statement of his actions, and stating that he thought they were consistent with departmental policy, while also indicating that his dog was cared for at all times. The record contains no further indication of how Petitioner’s conduct “[a] pronounced negative impact on the operations [and] professional image of the Department, [and] on relationships with other officers, agencies [and] the public.”, as stated in the DODA.

Rule 12, Section 9.B.1.b. states that 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”, which is defined in subsection 9.B.1.c.i. as: “The decision, although supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole;”. [emphasis added] I find that there is no evidence in this record to support the contentions in the DODA that Petitioner’s conduct had a pronounced negative impact on the operations and professional image of the Department, and on relationships with other officers, agencies and the public. This conclusion is supported by the statement in the DODA that: “The complaint to 9News resulted in negative media attention and likely harmed the image of the Department.” [emphasis added] This conclusion constitutes mere speculation without supporting evidence. I find that the decision of the Deputy Director of Safety approving the Written Command of the Department of a violation of RR-105 Conduct Prejudicial in this case is not supported by evidence in the record, and was therefore clearly erroneous.
As noted, Petitioner contends that the addition of the RR-105 charge constituted “stacking” as defined in the DPD Handbook, (Appendix D). Since RR-808 is specific in defining allowed use of police vehicles, the addition of an RR-105 charge must be shown to have caused “a pronounced negative impact on the ... image of the Department, and on relationships ... with the public.” Having found that the evidence in the record does not show a negative impact on the Department, I find that the addition of the RR-105 charge did constitute “stacking” in violation of the DPD Handbook.

DECISION

The request for a review de novo of the Departmental Order of Disciplinary Action in Case No. IC2014-0030 is denied.

The finding of a violation of RR-808 - Equipment and Property Restrictions on Use, is sustained, in that it constituted using his police vehicle to go to a theater in violation of the Manual.

The finding of a violation of RR-105 - Conduct Prejudicial is reversed, in that it was not supported by evidence in the record and constituted stacking since the record failed to show “harm greater than would reasonably be expected”.

ORDER

The decision regarding RR-808 - Equipment and Property Restrictions on Use is sustained, as is the presumptive penalty of three (3) days suspended without pay.

The decision regarding RR-105 - Conduct Prejudicial is reversed, as is the presumptive penalty of a ten (10) day suspension without pay.

Since the suspended days were to run concurrently beginning on June 15, 2014 through and inclusive of June 24, 2014, the imposition of ten suspended is modified to three suspended days.

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) calendar 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 November, 2014, at Littleton, Colorado

Daniel C. Ferguson
Daniel C. Ferguson
Hearing Officer
CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2014, I have served the foregoing FINDINGS, CONCLUSIONS, DECISION AND ORDER, dated 11 November, 2014, in Case No. 14 CSC 05, In the matter of Bradley Rhodes (89034), to the Counsel of record listed below, by arranging that a copy be placed in the U.S. Mail, certified, first class postage prepaid. A courtesy copy was also emailed this same date to the email addresses noted.

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s/ Brian S. Kellogg
CIVIL SERVICE COMMISSION
By: Brian S. Kellogg