BEFORE THE HEARING OFFICER  
CIVIL SERVICE COMMISSION  
CITY AND COUNTY OF DENVER, COLORADO  
Case No. 15 CSC 11

In the matter of:

Ryan C. Burke (P99069)  
Officer in the Classified Service of the Denver Police Department  
Petitioner

__________________________________________________________

FINDINGS, CONCLUSIONS, DECISION AND ORDER

Pursuant to the parties' agreement to resolve this matter by briefing rather than holding a CSC hearing, the undersigned Hearing Officer has considered the Executive Director of Safety's Opening Brief to Hearing Officer, the Petitioner's Brief to Hearing Officer and the Respondent's Reply to Petitioner's Brief. The Hearing Officer was provided with the entire Internal Affairs Bureau (IAB) investigation in this matter as Exhibits 1 and 2, Exhibit 2 being the DPD Discipline Handbook.

Having reviewed the briefs filed herein and the underlying record of the Internal Affairs investigation, the undersigned makes the following findings, conclusions and decision.

FINDINGS

The basis for the complaint filed against Respondent in this matter occurred on July 2, 2015, at the Denver Police Department Administration Building. Petitioner was in the elevator with a number of other persons, most of whom are unknown. Petitioner admitted that while in the elevator he removed his regulation knife from its sheath. He stated that he showed the knife to Detective Joseph Vasquez as part of a joke. Detective Vasquez recalled being in the elevator but did not recall Petitioner displaying his knife, however, he stated that "...myself and Officer Burke have joked in the past with each other in that manner."

Also present in the elevator was the Complainant in the underlying IAB investigation, a technician referred to in the investigation as J.A. Following the display by Petitioner of his knife on July 2nd, J.A., on July 6, 2015, confronted Petitioner, telling Petitioner that he "...did not appreciate being intimidated or incited by the way he drew his weapon in a confined space." Petitioner replied to J.A. that he was just joking around and that it would not happen again. J.A. recorded this confrontation on his phone. Not being satisfied with this response, J.A. on July 8th filed an IAB complaint against Petitioner.
In conducting its investigation herein, the IAB attempted to identify the witnesses to the elevator incident, but was able only to establish the presence of Petitioner, of J.A., and of Detective Joseph Vasquez. It also investigated contentions made by Petitioner, who raised questions regarding the possible motivation of J.A. in filing a complaint against Petitioner. The basis for Petitioner's raising questions regarding motivation for the complaint was the relationship between Petitioner and R.R., his then girlfriend and subsequent fiancé. The investigation revealed that J.A. also had a romantic interest in R.R., which interest was not reciprocated by her toward J.A. The IAB investigation reveals that Petitioner denied that at the time of the incident on July 2, 2015, he was aware that J.A. had a romantic interest in R.R.

The conduct of J.A. toward R.R., while questionable, was never reported to authorities, and therefore did not become the subject of any civil or criminal investigation.\(^1\) Further, Petitioner contends that J.A. was seeking to retaliate against Petitioner by filing an IAB complaint, and that J.A. was observed "smirking" at Petitioner when passing through the lobby of the DPD Administration Building. Two officers were interviewed, and stated that they observed J.A. in the lobby looking toward Petitioner with a "wry smile of disdain", or a "smirk". Their recollections of when they made these observations were uncertain. Using key card access records, the investigation determined the dates and times after July 2, 2015, when J.A. could be observed in the lobby of the administration building. Ex's. 1(ss), (tt), (uu), (vv), (ww) and (xx) are all video surveillance of the lobby showing J.A. entering the building. None of these exhibits show evidence of "smirking", nor is the presence of Petitioner identified. I find that Petitioner's assertions of possible retaliatory motivations by J.A. in the filing of the underlying complaint amount to nothing more than unproven speculation.

The Deputy Director of Safety, (DDOS), issued his Departmental Order of Disciplinary Action on November 2, 2015, Ex. 1(gg) pp. 1-4. In that Order he sustained the Chief of Police's Written Command that Petitioner violated RR-102.1, Duty to Obey Departmental Rules and Mayoral Executive Orders, as it pertains to OMS 111.03, Other Required Items, and RR-105, Conduct Prejudicial, of the Denver Police Department Operations Manual, when he inappropriately displayed his pocket knife in an elevator in the Police Administration Building. These alleged violations are as follows:

**RR-102.1 – Duty to Obey Departmental Rules and Mayoral Executive Orders**, of the Denver police Department Operations Manual, provides that,

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\(^1\) Apparently as a result of the IAB investigation regarding Petitioner's assertions about the motivations of J.A., the Career Service Authority was informed of J.A.'s interactions with R.R. The IAB file contains no other information of any action by the Career Service Authority.
Officers shall obey all Departmental rules, duties, procedures, instructions, directives, and orders; the provisions of the Operations Manual; and Mayoral Executive Orders.

As it pertains to:

OMS 111.03, Other Required Items

…

(18) Pocket Knife – A pocket knife shall be carried and will be of a non-mechanical nature. The maximum blade length permitted is three and one half (3 1/2 ) inches.

a. Knives shall only be carried in trouser or jacket pockets or in a leather snap pouch made specifically for the knife and worn on the Department belt. The knife must be completely concealed when not in use.

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.

In approving the Written Command finding a violation of RR-102.1, the DDOS stated:

…By inappropriately displaying his pocket knife in an elevator, Officer Burke’s misconduct “[had] more than a minimal negative impact on the operations [and] professional image of the Department [and] negatively impact[ed] relationships with other officers, agencies or the public. As such, this was a Conduct Category B rule violation.

In approving the Written Command finding a violation of RR-105, the DDOS stated:

Officer Burke violated this departmental rule when he inappropriately displayed his knife in the elevator. In doing so, he “engaged in conduct prejudicial to the good order and police discipline of the Department [and] conduct unbecoming an officer … [which] [m]ay or may not specifically be set forth in Department rules and regulations or the Operations Manual…”
Petitioner’s Appeal

Petitioner makes three contentions on appeal: 1) that the DDOS incorrectly determined that Petitioner’s removal of his knife from its sheath in violation of RR-102.1 was a Conduct Category B violation; 2) that the imposition of a ten-day suspension for the violation of RR-102.1 is excessive and clearly erroneous; and 3) that the finding that Petitioner violated RR-105 constituted stacking, that it was clearly erroneous, and that the imposition of a 10-day suspension for the violation of RR-105 was also clearly erroneous.

In support of his appeal Petitioner refers to CSC Rule 12, Sec. 9.B.1.b., which states that a Hearing Officer may reverse or modify ... a sustained Rule violation ... only when it is shown to be clearly erroneous. Rule 12, Sec. 9.B.1.c. states:

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;

ii. If the Manager fails to follow the applicable Departmental guidelines, rules or regulations, an applicable matrix or its associated guidelines, and absent such failure the discipline imposed would not have resulted; or

iii. If the Manager otherwise exceeds his authority.

CONCLUSIONS

Petitioner contends that the Deputy Director of Safety’s determination, that Petitioner’s conduct in displaying his knife in the elevator was a Category B violation, was clearly erroneous. Petitioner refers to Ex. 2, pp. 2-21 and 22, of the DPD Handbook, at Section 15, Determining Appropriate Conduct Categories – Analysis, where it sets forth a series of questions to be considered in assigning the appropriate Conduct Category.

The definition of conduct Category A is:
Conduct that has a minimal negative impact on the operations or professional image of the Department.

The definition of Conduct Category B is:
Conduct that has more than a minimal negative impact on the operations or professional image of the Department; or that negatively impacts relationships with other officers, agencies or the public.

In support of the first contention, Petitioner argues that the “display” of his knife was done only in the presence of other DPD employees, and done in
humor. I first note that the record, including the statement by Petitioner to IAB, fails to explain the nature of the “joke” Petitioner was making to his friend, Detective Joseph Vasquez. As noted, Detective Vasquez recalled being in the elevator but did not recall Petitioner displaying his knife, however, he stated that “...myself and Officer Burke have joked in the past with each other in that manner.” Petitioner's statement to IAB, Ex. 1(hh) 3-5, when asked “What was the intent of displaying your knife?”, replied that: “It was as a visual aid to the joke.” Petitioner made no further explanation of the “joke”. I therefore find insufficient evidence in this record to explain the Petitioner’s contention that the display of his knife was done in humor. The balance of Petitioner’s statement to IAB relates to Petitioner’s relationship with R.R., and to attempts by J.A. to have a relationship with R.R. Contrary to the assertions of Petitioner, that the display of his knife was part of a joke, I find, based on the record before me, it is equally possible that Petitioner was attempting to intimidate J.A., rather than engaging in joking banter with Detective Vasquez. In making his findings, the DDOS stated:

Officer Burke admits removing his knife from its sheath and openly displaying it in an elevator occupied by other individuals. ...In doing so, he violated this departmental rule because the “knife [was not] completely concealed when not in use.” Officer Burke was not using the knife for a legitimate business purpose when he removed it from the sheath and displayed it in the elevator. Thus, it was inappropriate to take it from its sheath. Ex. 1 (gg)-2.

The DDOS then refers to the provisions of the Matrix which provides that violations of RR-102.1 appear in Conduct Categories A through F, and states that:

By inappropriately displaying his pocket knife in an elevator Officer Burke’s misconduct “[had] more than a minimal negative impact on the operations [and] professional image of the Department [and] negatively impact[ed] relationships with other officers, agencies or the public.” As such, this was a Conduct Category B rule violation.

Petitioner contends that this violation should have been categorized as Category A, conduct that had a minimal impact on the operations or professional image of the Department. The apparent basis for this contention is Petitioner’s assertion that the display of the knife was merely a visual aid to a “joke”, and was done only in the presence of DPD personnel. While the DDOS did not state specifically the basis for his finding that the misconduct “...had more than a minimal negative impact ...”, I do not find that this categorization was clearly erroneous. The record before me contains the Petitioner’s admission that he violated RR-102.1 by displaying his knife. The record further provides alternative possible reasons for the display of the knife, including the possibility that Petitioner was acting to intimidate J.A. I therefore find that there was a sufficient basis for the DDOS to find that Petitioner’s actions had “...more than a minimal
negative impact ...". I find that this conclusion is not "...contrary to what a reasonable person would conclude from [this] record as a whole."

Petitioner's second contention is that the imposition of a ten-day suspension for the violation of RR-102.1 is excessive and clearly erroneous, based on the categorizing of the violation as Category B, which made the presumptive penalty a 10-day suspension. Since I have found that the finding of a Category B violation by the DDOS was not clearly erroneous, I find this contention without merit. The DDOS reviewed Petitioner's disciplinary history, noting that:

"[Petitioner] has significant prior disciplinary history that, in accordance with the matrix's principles of progressive discipline, raises the penalty level for what would otherwise be deemed a minor rule violation punishable by a presumptive penalty of a Written Reprimand."

Pursuant to the Matrix the DDOS found that the three (3) Conduct Category B violations within four (4) years mandatorily increased the penalty from a level 2 to a level 5 penalty, for which the presumptive penalty is a ten day suspension without pay. After considering mitigating and aggravating factors, the DDOS found the presumptive penalty was warranted. These findings by the DDOS were not clearly erroneous.

Petitioner's third contention is that the finding of a violation of RR-105, Conduct Prejudicial, constituted a stacking of charges. Petitioner contends that this Rule violation is not within the spirit or intent of the Disciplinary rules and matrix, in that there is nothing in Petitioner's violation of RR-102.1 that would warrant a finding of Conduct Prejudicial under Rule-105.

The Civil Service Commission addressed the concept of the "stacking" of charges in the case of Marika Putnam, 15 CSC 01A, Nov. 24, 2015, stating, "...because the penalties that the DDOS imposed for the multiple rules violations were assessed to run concurrently and not consecutively, there is no stacking." The Commission also noted that Sec. 31.8 of the DPD Handbook Avoiding the Impact of "Stacking", "...allow(s) the DDOS to impose discipline on 'the most specific violation; and then impose discipline to run concurrently 'with the most serious violation.'"

I find that the record before me provides a sufficient basis for the inclusion of a finding of conduct prejudicial by Petitioner's improper display of his knife, since, as noted, the basis for Petitioner's actions were subject to varying interpretations. Since the DDOS stated: "The periods of suspension shall run concurrently...", the addition of the violation of RR-105 does not constitute stacking. Further, the penalty of a 10-day suspension for the violation of RR-105 is also not clearly erroneous, since the DDOS reviewed the Petitioner's prior disciplinary history, and based thereon, in accordance with the principles of
progressive discipline provided in the Matrix, found that the presumptive penalty was a level 5, calling for a 10-day suspension without pay, to run concurrently with the violation of RR-102.1.

DECISION

The finding of a violation of RR-102.1 – Duty to Obey Departmental Rules and Mayoral Executive Orders, as it pertains to OMS 111.03, Other Required Items...Pocket Knife, is sustained, as is the penalty of a suspension of 10-days without pay.

The finding of a violation of RR-105 – Conduct Prejudicial, is sustained, as is the penalty of a suspension of 10-days without pay.

The periods of suspension shall run concurrently.

ORDER

The Departmental Order of Discipline is AFFIRMED.

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) days of the date noted on the certificate of service/mailing of the Hearing Officer's decision by the Commission. Any appeal to District Court shall be initiated in accordance with the Colorado Rules of Civil Procedure currently in effect.

Dated this 28th day of March, 2016, at Littleton, Colorado

[Signature]
Daniel C. Ferguson
Hearing Officer
CERTIFICATE OF MAILING

I hereby certify that on this 29th day of March, 2016, I have served the foregoing FINDINGS, CONCLUSIONS AND ORDER by in Case No. 15 CSC 11, In the matter of Ryan C. Burke (P99069), by arranging that a true and correct copy be electronically filed by email to:

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CIVIL SERVICE COMMISSION

\(\text{\textit{s/ Jeannette Madrid}}\)
By: Jeannette Madrid