BEFORE THE HEARING OFFICER
CIVIL SERVICE COMMISSION
CITY AND COUNTY OF DENVER, COLORADO
CASE No. 16 CSC 04

In the matter of:

Shawn Saunders (P95042)
Detective in the Classified Service of the Denver Police Department,
Petitioner-Appellee.

__________________________________________________________
FINDINGS, CONCLUSIONS, DECISION AND ORDER

I. INTRODUCTION

The Deputy Directory of Safety (DDOS), Jess Vigil, found that Petitioner violated RR-117, Disobedience of an Order, and sustained the violation. He fined the Petitioner four days. The Petitioner appeals that decision.

II. PROCEDURAL HISTORY

A pre-trial telephone conference was held on November 7, 2016, in anticipation of the hearing date scheduled for November 15, 2016. At the pre-trial conference, the parties in this case agreed to proceed by brief rather than to proceed to the hearing. This agreement was made after the Department of Public Safety (Agency) stipulated that the “orders” in question came from two emails written by Lieutenant Edward Leger, one written on January 26, 2016 and the other written on February 2, 2016. This left no factual dispute between the parties.

The parties’ stipulation regarding the emails was accepted. This Hearing Officer granted the parties’ request to proceed by brief finding that it was in the parties’ best interest, and that any delay in the proceedings did not prejudice either party or unduly delay the resolution of the case. The Petitioner’s Motion for Evidentiary Hearing was denied in that the parties had decided to proceed by brief. A written briefing schedule was issued on November 7, 2016.

In addition, there was an outstanding issue about the causes of action raised by the Petitioner in his initial pleading. This prompted an Order to Show Cause to issue on October 25, 2016. After hearing no objection from the Agency, this Hearing Officer found that the parties would proceed on the following three issues as requested by the Plaintiff:

1) That the penalty imposed was erroneous because the Petitioner had not been given an “order”.
2) That the Penalty imposed was disproportionate to the offense alleged and/or was excessive to be unduly punitive.
3) That the penalty imposed failed to properly consider and evaluate the mitigating circumstances.
The Order to Show Cause was vacated

On November 10, 2016, the Plaintiff filed his First Set of Discovery Requests to Respondents. After hearing no objection from the Agency, this Hearing Officer granted the Plaintiff’s request with limitations on November 19, 2017.

On January 10, 2017, the Petitioner filed an Unopposed Motion for Extension of Time to File Petitioner’s Answer Brief. The attorney for the Petitioner represented that he had suffered an injury to his left foot on January 3, 2017, requiring him to spend several days out of the office. The Petitioner requested seven additional days to complete his brief. The Petitioner’s motion was granted on January 12, 2017, and the briefing schedule was adjusted accordingly in writing.

All briefs and exhibits were received in a timely manner. This Hearing Officer has reviewed and considered the briefs and exhibits submitted in this case, and makes the following findings, conclusions and decision.

II. FINDINGS OF FACT

The facts of this case are not in dispute. They are as follows:

On October 19, 2015, Petitioner was working in the Sex Crimes Division, and assigned himself sex assault case #2015-610434. As part of his duties in that case, the Petitioner interviewed the victim and a suspect, ordered a Sexual Assault Nurse Examiner report (SANE) and submitted a brief report stating that he was working the case and would follow up. The Petitioner did not contemporaneously prepare or complete a supplemental report. The Petitioner’s commanding officer in the Sex Crimes Division at that time was Lieutenant Edward Leger.

On January 16, 2016, the Petitioner was transferred out of the Sex Crimes Division, and into Patrol in District 6. His direct supervisor in Patrol was Lieutenant Kevin Edling. Based on the Petitioner’s transfer, Lieutenant Leger directed Sargent Phillip Hernandez to reassign Case #2015-610434. Case #2015-610434 was reassigned to Detective Brian Slay on January 7, 2016.

On January 26, 2016, Lt. Leger learned from Sargent Hernandez that the file in Case #2015-610434 had not been updated since October 16, 2015. On January 26, 2016, Lieutenant Leger sent an email to the Petitioner (Exhibit. #3; SAUNDERS 0009-0010). Lieutenant Leger copied Kimberly Bowser, Phillip Hernandez, Brian Slay and Mark Drajem on the email. The email read as follows:

_Shawn,_

_As of January 07, 2016, the Sex Assault Case DPD #15-610434 that you had assigned to yourself back in October 2015, while working in MCD has been reassigned to Detective Bryan Slay. Detective Slay is needing a statement from you regarding what you had done in relation to this case, since you were the primary investigator._
Can you please get this done in a couple of days.

Petitioner did not reply to the email or take any action.

On January 28, 2016, Detective Slay and the Petitioner spoke by telephone. Detective Slay asked the Petitioner to complete a supplementary report. Petitioner told Detective Slay that the report had “slipped his mind.”

The Petitioner was on vacation from January 26, 2016 to February 2, 2016. He returned to work on February 3, 2016.

On February 2, 2016, Lieutenant Leger again emailed the Petitioner (Exhibit. #3; SAUNDERS 0009-0010). Lt. Leger copied Mark Drajem, Philip Hernandez, Kimberly Bowser and Brian Slay on the email. This email read as follows:

Shawn,
Can you get with Det. Slay ASAP and let him now when this will be done.

On February 2, 2016, Petitioner responded to Lt. Leger’s email (Exhibit. #3; SAUNDERS 0009-0010). Petitioner did not copy anyone else on his email. The email to Lieutenant Leger reads as follows:

Everything is pretty much done and I’ll put it in the Vesadex when I go back to work. We are waiting on labs to come back.

Petitioner did not take any action, or follow up with Detective Slay.

Lieutenant Leger had a conversation with Lieutenant Drajem about the Petitioner during an off-duty event at the Pepsi Center shortly after the February 2, 2016 email was sent (Exhibit 2; SAUNDERS0128-0133, 0131). Lieutenant Drajem subsequently had a conversation with the Petitioner. (Exhibit 2; SAUNDERS0128-0133, 0131).

On June 7, 2016, Commander Ron Saunier initiated a complaint with Internal Affairs (IA) based on the Petitioner’s failure to complete a report in Case #2015-610434.

On June 8, 2016, the Petitioner filed his report in Case #2015-610434.

On August 23, 2106, the IA review was completed. Commander Michael Battista issued his recommended Review and Findings to Petitioner (Exhibit 4; SAUNDERS 0148-0149). A Contemplation of Discipline was held on August 25, 2016. On August 26, 2016, the Chief of Police issued his Written Command, adopting the recommendations of Commander Battista (Exhibit 1; SAUNDERS 0159-0162). On August 31, 2016, the DDOS issued a Departmental Order of Disciplinary Action (Exhibit 5; Saunders0168-0172). The DDOS’s Order was consistent with the recommendations of Commander Battista and the Chief of Police.
III. CONCLUSIONS OF LAW

A. ORDERS

The Petitioner first argues that the DDOS’ finding that he violated an order was “clearly erroneous” because he was not given an “order”. He raises three issues: 1) that the emails from Lieutenant Leger constituted a “request” and not an “order”; 2) that Lieutenant Leger was not in his “chain of command” and could not give him an order absent one of the circumstances described in Operations Manual Denver Police Department, 115.01 (3); and 3) that Lieutenant Leger did not copy his supervising officer within the Petitioner’s chain of command as required by the Denver Police Department of Operations Manual, 115.01 (3)(b).

What Constitutes an Order

An “order” is defined as “A command or instruction given by a superior to a subordinate. It may be oral or written.” Rules and Regulations for the Police Department of the City and County of Denver, Definition Section, Exhibit C; SAUNDERS0067; Operations Manual Denver Police Department, G.9.

Lieutenant Leger’s email of January 26, 2016 was sent in a chain with his email of February 2, 2016 (Exhibit 3 infra.). It would be difficult to understand the meaning of the February 2nd email without reading the email of January 26th. Aside from the fact that Lieutenant Leger stated he sent the emails as an order (Exhibit 8; SAUNDERS0150), the nature and wording of Lieutenant Leger’s emails clearly indicate he gave the Plaintiff an order. Lieutenant Leger, a “superior”, gave the Plaintiff, a “subordinate”, written “instructions.” The tone of the Lieutenant’s emails is irrelevant. Lieutenant Leger clearly states that he wants the report done.

The Plaintiff also argues that Lieutenant Leger’s emails did not constitute an order because the Lieutenant did not put a time limit on the assignment. There is no requirement in the definition of “order” that requires that a commanding officer include a time limit. However, Lieutenant Leger’s emails did include a time limit. He wanted the report completed “in the next couple of days” or “ASAP”. While there may be disagreement over how many days constitutes a “couple of days” or “ASAP”, common sense would dictate that these descriptions of time do not mean 153 days (five months). Commander Ron Saunier waited over five months before he initiated an Internal Affairs investigation by filing a complaint, and the report still had not been completed.

Who May Give an Order

The Plaintiff had been transferred out of the Sex Crimes Division and into Patrol on January 16, 2016. Lieutenant Leger was not his direct supervisor, nor was he in his chain of command at the time the emails were written.
Plaintiff argues that Lieutenant Leger’s emails did not constitute an order because he was outside the Lieutenant’s direct chain of command. The Plaintiff relies on Operations Manual Denver Police Department, 115.1(3) for his argument. Operations Manual 115.01 (3) provides, in part, that:

MEMBERS OF THE POLICE DEPARTMENT SHALL BE REQUIRED TO TAKE DIRECT ORDERS FROM AND BE DIRECTLY RESPONSIBLE TO, ONE SUPERVISORY OFFICER, EXCEPT AS OTHERWISE PROVIDED HEREIN:

A. A COMMAND OFFICER OR A SUPERVISORY OFFICER SHALL RETAIN COMMAND POWERS OVER ALL SUBORDINATES WITHIN THE DEPARTMENT, BUT SHALL EXERCISE SUCH COMMAND POWERS OVER SUBORDINATES OUTSIDE THEIR USUAL COMMAND ONLY IN SITUATIONS WHERE THE POLICE PURPOSE OR THE REPUTATION OF THE DEPARTMENT IS JEOPARDIZED.

Lieutenant Leger was both a supervising officer and a command officer (see Petitioner’s Brief, Rules and Procedures for the Police Department of the City and County of Denver; SAUNDERS0067; Operations Manual Denver Police Department, G.9). He was a command officer in the Sex Assault unit, and had been the Plaintiff’s supervising officer during the time Plaintiff had been in the Sex Assault Unit. Pursuant to 115.01(3), Lieutenant Leger was still allowed, under certain circumstances, to give the Plaintiff an order after he transferred out of the unit.

While the Plaintiff may have transferred out of the Sex Assault Unit, Case #2016-610434 did not follow him. The case was reassigned within the Sex Assault Unit. The investigation and progression of the case continued to be Lieutenant Leger’s responsibility as a supervising officer.

Case #2016-610434 was transferred to Detective Brian Slay in January 2016. Detective Slay reviewed the case and noticed there was very little information in the case file. The contents of the file revealed that some NCIC searches had been done, as well as a videotaped interview of the victim. However, the actual videotape was not in the file. This was reported to Lieutenant Leger by Sargent Philip Hernandez. Detective Slay searched for the videotape, and asked that it be transcribed. He found out from Transcriptionist Patricia Vigil that the transcript had already been done and given to the Plaintiff. The transcript was not in the case file. He also spoke to the Plaintiff by phone on January 28, 2016, and was told that the Plaintiff had contacted a possible suspect. No mention of this was in the case file.

Detective Slay was new to the case. He knew nothing about the case or what had been done. In addition, Detective Slay was unable to complete his investigation until he knew what the Plaintiff had done during his preliminary investigation (Exhibit 8, SAUNDERS0150). To get up to speed, Detective Slay had to spend valuable time searching for the videotape recording of the victim’s interview. He also had to speak to the Plaintiff to obtain the missing transcript and information. One can also surmise that Detective Slay would need to review the Plaintiff’s supplemental report to help determine what, if any, follow up investigation needed to be done. He certainly would need the Plaintiff’s supplemental report to submit the case to the Denver District Attorney’s Office. The time spent by Detective Slay trying to get information and figure out where items were located was time wasted. This was counterproductive, delayed the case submission to the District Attorney’s Office and was certainly contrary to the purpose of the police department.
What is equally troubling to this Hearing Officer is the resulting discrepancy in the suspect’s statement. Detective Slay recalls that the Plaintiff told him that the suspect said he “…had a female at his apartment during this time and they had sex but he didn’t want to talk about this matter any further.” (Exhibit 2, infra.). When Detective Slay was finally able to review the Plaintiff’s report, he found that the Plaintiff had reported that the suspect denied that he had a female in his apartment. Detective Slay observed that Plaintiff’s version of the suspect’s statement was materially different than what he had been told by the Plaintiff during their telephone conversation.

While the Plaintiff has a different recollection of what he told Detective Slay on January 28, 2016, it is not necessary to resolve that issue here. The important fact is Detective Slay recalls that he heard a rendition of a suspect’s statement, given to him by the interviewing officer, that was materially different than what was finally relayed in the interviewing officer’s report. It is reasonable to conclude that Detective Slay documented the telephone conversation in his police report. At the very least, Detective Slay would have to testify to his memory of the conversation if he were to be asked about it under oath. Had the Plaintiff done a contemporaneous report, this might never have occurred. This not only affects the credibility of both the Plaintiff and Detective Slay, but it also affects the integrity of the case and puts the Department’s reputation in jeopardy.

Plaintiff argues that the completion of his report was not urgent as the SANE report had not been completed on February 2, 2016, and that the police purpose or reputation of the department was not in jeopardy. All evidence to the contrary. Lieutenant Leger had every right to issue the order for the completion of the report pursuant to 115(3)(a). The order was not unreasonable. It promoted the police purpose and, if it would have been followed, could have prevented the situation where the reputation of the department was placed in jeopardy. The argument also disregards the fact that the SANE report was completed on March 11, 2016 (Reply Brief, Exhibit 1), while the supplemental report was not completed until June 8, 2016; three months after the SANE report was received.

Who Must Be Copied on an Order Issued Outside a Division

Plaintiff argues that Lieutenant Leger’s emails were not orders because he failed to notify his direct supervisor, Lieutenant Edling as required by 115.1(3)(b). This argument also fails.

Operations Manual Denver Police Department, 115.1(3)(b) reads that:

Command or supervisory officers finding it necessary to exercise their command powers with subordinates outside their unusual command…shall at their earliest convenience report such action to the command or supervisory officer in charge of the member involved.
Lieutenant Leger copied Lieutenant Drajem on both the email on January 26, 2016 and the email on February 2, 2016 (Exhibit 3 infra.). Lieutenant Leger even spoke to Lieutenant Drajem about the situation at an off-duty event at the Pepsi Center. At that time, Lieutenant Drajem was not in the Petitioner’s direct chain of command, but the Administrative Lieutenant in District 6. Thus, Lieutenant Drajem was clearly a command officer within District 6 with supervisory powers over the Petitioner. While the better practice would have been to include Lieutenant Edling in the communications, the failure to do so certainly does not make Lieutenant Leger’s emails any less an order.

Even if Lieutenant Leger did not inform the correct officer in District 6, the result was a procedural defect. Any failure to copy the correct officer on the emails did not affect the communication that occurred between the Lieutenant and the Plaintiff, or alter the Lieutenant’s authority to give the order. The Department’s remedy would have been to correct the behavior of Lieutenant Leger. This would not invalidate the Lieutenant’s Order to the Plaintiff.

B. WILLFUL DISOBEDIENCE

The DDOS found that the Plaintiff was in violation of RR-117, Disobedience of an Order. Petitioner argues is that his failure to provide the report was not the result of “willful” disobedience, but that he simply “forgot”. Consequently, his behavior does not fall under RR-117.

RR-117 reads as follows:

> Officers shall obey any order lawfully issued by a supervisory or command officer.

A plain reading of the rule would suggest that a “willful act” is immaterial to a finding that an order had been disobeyed. All that is required is that the officer not follow a lawful order. It is mandatory. This is exactly what occurred in this case. The truth is that whether the failure to follow an order stems from a willful act or a lack of memory, the result is the same. Simply put, it is essential to the operation of the department that officers follow lawful orders.

C. PUNISHMENT

The DDOS imposed four fined days for the violation of RR-117. The Plaintiff raises two issues with respect to the punishment: 1) that the punishment constituted “stacking”; and 2) that because the DDOS did not properly consider his mitigation, the Respondent’s punishment was disproportional to other punishments in like situations.

Stacking

In addition to a finding that the Plaintiff violated RR-117, Commander Battista found that the Plaintiff violated RR-102.01, Duty to Obey and Mayoral Executive, as it pertains to Operations Manual Denver Police Department, Duties and Responsibilities of Detectives, 9.0. The Commander found that violation fell under Category B OF the disciplinary matrix. He recommended a written reprimand. The violation of RR-102.1 is not part of this appeal as disciplinary reprimands cannot be appealed. C.S.R.12(3)(A).
31.8 of the Denver Police Department Discipline Handbook: Conduct Principles and Disciplinary Guidelines states as follows:

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 specifications that could arguably be charged or 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 alternative 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 aspect of, or different harm arising from, the same misconduct are found, should the penalties run consecutively.

3.18 only instructs when to run a sanction concurrently or consecutively. The Civil Service Commission addressed this in the case of Marika Putnam, 15CSC01A, November 24, 2015. It found that “because the penalties that the DDOS imposed for the multiple rules violations were assessed to run concurrently and not consecutively, there is no stacking.”

In addition to the fact that the RR-102.1 violation and its sanction are not the subject of this appeal, a written reprimand is not, by its nature, a sanction to which four fined days could be run concurrently or consecutively. Therefore, the DDOS was not in error.

The Plaintiff also suggests that to satisfy the requirements of 3.18, the RR-117 violation should not have been filed. 3.18 simply does not address this issue. As long as there was evidence to support it, the filing of RR-117 was appropriate.

Mitigation and Disproportional Punishment

The Plaintiff argues that the DDOS did not appropriately consider his mitigation. Consequently, the penalty of four fined days was disproportional to the penalty imposed on other similarly situated officers.

While this is not a criminal case, this Hearing Officer looks to the concept of disproportionate sentences or “proportionality” in the criminal law for guidance in her analysis. “...as a matter of principal ...a criminal sentence must be proportionate to the crime for which the defendant has been convicted...Reviewing courts, of course, should grant substantial deference to the broad authority that the legislature necessarily possesses in determining the types and limits of punishments for crimes, as well as discretion that trial courts possess in sentencing.” Close v. People, 48P.3d528, 534 (Colo.2002) citing Solem v. Helm, 463 U.S. 277,
103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983). Under this analysis, the gravity of the offense in comparison to the harshness of the penalty should be considered. The comparison of sentences imposed on others who committed the same offense may also be considered.

A violation of RR-117 appears in Conduct Categories C-F of the disciplinary matrix. Because the Plaintiff had no prior Conduct Category C or higher violations within five years, there was no increase in the conduct category. The DDOS then weighed both aggravating and mitigating factors. In weighing all the factors in mitigation and aggravation in this case, the DDOS found that the Plaintiff’s behavior warranted a penalty in the aggravated range for a Conduct Category C violation. Four fined days is within the aggravated range.

The DDOS found that the Plaintiff “…has served the Department well.” (Exhibit 5 at 4). However, he also found that the Plaintiff’s role as a supervising officer, along with several other factors, should be considered in aggravation (see Exhibit 5 at 4-5). The fact that the Plaintiff was a supervising officer alone was enough to “…warrant a penalty higher than the presumptive penalty…” Denver Police Department Discipline Handbook: Conduct Principles and Disciplinary Guidelines, 20.2 The aggravated penalty range for a Class C violation is four to six fined days. Imposing a sanction contained in the lowest conduct classification for the violation, and at the lowest end of the aggravated range was not unduly harsh.

This Hearing Officer was given Chief of Police’s Written Command reports of other officers with sustained petitions, along with a record pertaining to officers who had been charged with a violation of RR-117 (Petitioner’s Brief, SANUDERS0037-0043; 0032-0036; 0029-0031; 0044-0062; 0028; 0063-64). Between 2014 and 2016, there were fourteen cases that included an alleged violation of RR-117. Of the fourteen cases, there were six cases with a sustained violation of RR-114. Of the other seven cases, one case was unfounded, one case was resolved informally, one case was still pending, one case was exonerated and three resigned. Of the seven cases sanctioned, one officer was resolved informally, one officer received a penalty of two fined days, four officers received a ten-day suspension and the last officer was terminated (the officers who resigned were excluded because the reason for their resignation is unknown). Five out of those seven officers received a penalty greater than that of the Petitioner. In fact, the Petitioner received much less of a penalty than imposed in these other five cases. Four fined days for a violation of RR-114 was not a disproportionate sanction.

The Respondent focuses on Case No. IC2014-0111, the case in which the officer received two fined days. The Respondent argues that this case is the most like his. The Respondent points out that the difference between the two cases is that the officer in Case No. IC2014-0111 willfully violated an order. Therefore, the Plaintiff’s penalty is disproportionate to the penalty of the officer in Case No. IC2014-0111 because he did not act in a “willful” manner.

One major difference between the officer in IC2014-0111 and the Plaintiff is that there is no indication that the officer in Case #IC2014-0111 was a supervisor. In addition, the officer did not have to be reminded several times to follow two orders over a period of five months. The point is that the disciplinary matrix allows the DDOS to consider the specific facts of each case and impose an appropriate penalty within a specified range.
The difference in penalty between these two cases is not extreme. The Plaintiff’s sentence was higher because the DDOS felt the facts in his case warranted a penalty in the aggravated range. This finding was further supported by Denver Police Department Discipline Handbook: Conduct Principles and Disciplinary Guidelines, 20.2. Four fined days in this case was not unreasonable, nor was it so excessive in comparison to the penalty in Case #C2014-0111 as to be disproportionate.

D. THE FINDINGS OF THE DEPUTY DIRECTOR OF PUBLIC SAFETY

To reverse or modify the Deputy Director’s decision regarding a sustained rule violation or an imposed penalty, his decision must be found to be “clearly erroneous” C.S.R.12 (9)(b)(I)(a) and (b). The DDOS’s finding, sustaining a violation of RR-117 in this case, is not clearly erroneous. Nor his decision to impose a penalty of four fined days. The decisions of the DDOS are AFFIRMED.

Notice of Appeal Rights

Petitioner and Respondent are hereby notified that their 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 15 calendar days of the date noted on the certificate of service/mailing of the Hearing Officer’s decision by the Commission, and properly serving the notice on opposing party or counsel, including a certificate of service/mailing.

DATED this 5th day of March 2017

/s/Carrie H. Clein
Carrie H. Clein
HEARING OFFICER
CIVIL SERVICE COMMISSION
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of March 2017, a true and correct copy of the foregoing FINDINGS, CONCLUSIONS, DECISION AND ORDER BRIEF was sent via e-mail to the following:

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CIVIL SERVICE COMMISSION

/s/Jeannette Giron
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