CIVIL SERVICE COMMISSION, CITY AND COUNTY OF DENVER, COLORADO
Case No. 20 CSC 05

In the matter of:

Nicholas Mauro (P15062)
Technician in the Classified Service of the Denver Police Department

Petitioner

DECISION AND ORDER

A virtual Hearing was held in the above-captioned matter on October 7, 2020, using Teams. The Petitioner participated in the hearing throughout, and was represented by Donald C. Sisson, Esq., and Kathryn Sheely, Esq., of the firm Elkus & Sisson, P.C. The Respondent was represented by Kristen George, Esq. Respondent called the Petitioner, Nicholas Mauro, and the Deputy Director of Safety, Mary J. Dulacki, to testify in this matter. Both Counsel for Petitioner and for Respondent argued on the record in support of their respective positions.

Based on the record before me, I make the following Findings, Conclusions, Decision and Order.

FINDINGS

In her opening statement, Counsel for Petitioner Kathryn Sheely stipulated to the facts as set forth in the Notice of Discipline. She stated that Petitioner had made a mistake and admitted to his mistakes. She argued that the discipline of termination was inappropriate, and that the Deputy Manager of Safety had inappropriately construed the language of the Matrix in the Denver police Department Discipline Handbook in finding termination to be the only appropriate discipline.

The parties stipulated to the admission of the Internal Affairs investigative file as Exhibits 1 and 1 A. through 1. OC, and Ex. 2, the Denver Police Discipline Handbook, which were admitted into evidence.

Based on the Exhibits and the testimony of Petitioner and of the Deputy Director of Safety, I find the following facts. On November 19, 2019, at some time after 12:30 a.m., Petitioner Mauro, while on patrol, observed an SUV with a tail light that was not working, and proceeded to follow the vehicle, without activating his lights or siren, and without requesting authorization from Dispatch for a pursuit. During his pursuit of the
SUV he attained speeds in excess of 85-90 mph. While in pursuit of the SUV he called a fellow officer, Aldo Salayandia, on a personal cellphone, to notify him of the pursuit. Officer Salayandia spotted the SUV, estimated its speed in excess of 100 mph, and joined in the pursuit, but both officers briefly lost contact with the SUV, before Petitioner Mauro observed it on Laredo Street, and both officers followed it to 5532 Laredo Street, where the SUV crashed into the garage door. Petitioner Mauro observed that the air bags had deployed on the SUV, and after determining that no one was in the SUV. Petitioner proceeded to turn off the ignition on the SUV, which resulted in the SUV rolling backward down the driveway, striking Petitioner’s police cruiser. The officers then contacted the Homeowner, who informed them that the vehicle was unknown to her. Petitioner Mauro then advised the Homeowner to file an accident report online, and gave her his business card. Petitioner identified Ex. 1.C. as the Incident Report which he had generated, which he admitted was inaccurate, in that it did not set forth the fact of the SUV being pursued to and found at the 5532 Laredo Street address. Rather, Ex. 1.C. was generated for the sole purpose of having the SUV towed to the impound lot. Ex. 1.D. Petitioner’s Activity Log, shows only that at the time of the incident herein involving the chase of the SUV, Petitioner was at N. Laredo Street/E. Maxwell Pl., from 01:18 to 02:10AM. Thereafter Petitioner completed Ex. 1.U., Theft of Motor Vehicle, in which he stated that “On 11/19/2019 at approximately 0118 hours while assigned to car 551A I observed a damaged vehicle on the side of the road at N. Laredo St./E. Maxwell Pl. The vehicle was bearing CO plate OUH986.”

After completing the tow/removal of the SUV, Petitioner completed his shift, as indicated on Ex. 1.D. He then proceeded to the District 5 parking lot, where he parked his vehicle in a remote area, and proceeded to the office, where he obtained a bottle of white-out, which he attempted to use to cover the damage to his patrol vehicle caused by the SUV striking it when it rolled backward on the driveway at 5532 Laredo Street. After leaving the scene at 5532 Laredo, Petitioner texted the Homeowner at 2:24 a.m., checking to make sure he had her phone number, and also saying he would check back with her on her insurance claim for the damage caused by the SUV. Upon awakening later in the day, he texted the Homeowner at 2:39 p.m. regarding whether she had been able to file an accident report online regarding the SUV damage to her property. At this point Petitioner realized that his actions had been discovered. He testified that prior to being discovered, he had not admitted to any mistakes. During cross-examination Petitioner attempted to explain his actions by stating that in October of 2019 his wife had had a miscarriage, causing stress in his marriage.

Mary J. Dulacki, Deputy Director of Safety, was called by Respondent to testify regarding her Departmental Order of Disciplinary Action. She stated that the Department learned of the incident when the Homeowner called District 5 to report the accident. Ms. Dulacki testified regarding all of the details of the subsequent
investigation, which are set forth in the Departmental Order of Disciplinary Action, Ex. A. Cpl. A. B. Allen was dispatched to contact the Homeowner, after which he followed up his initial contact by searching the records management system for an accident report, but found no report of an accident at that location, and then by checking with the Communication Center for activity in the area, where he learned of a "self-initiated action" requesting a tow from 5522 North Laredo. Cpl. Allen then reported to Sgt. Michael Reifsteck, and to Sgt. Jacqueline Anderson, who instructed him to complete two motor vehicle accident reports, one for the SUV striking the garage door and one for the SUV striking Petitioner's patrol car.

Ms. Dulacki testified that she reviewed the entire Internal Affairs file, including videos, interviews, and statements, in approving the Chief of Police's Written Command terminating Petitioner. She agreed with the findings of the Internal Affairs investigation, which showed that Petitioner by his own admission had committed the violations alleged, including violating RR-102.1, Duty to Obey Departmental Rules as they pertain to OS 204.01, Police pursuits, and RR-607, Failure to Make, File or Complete Official Required Reports, for Petitioner's failure to report his pursuit of the SUV or the accidents which occurred. She further testified that she found that the circumstances in the conduct of Petitioner constituted "extraordinary circumstances”, as explained in the DPD Handbook, Sec. 25-Special Circumstances, which justified the imposition of discipline over and above what is anticipated by the matrix, and justified the penalty of termination for the violations of RR-105, Conduct Prejudicial, and RR-112.1, Misleading and Inaccurate Statements. She based this determination on the fact that more than one incident should have been reported, both of the pursuit, of the damage to the property of the Homeowner, of the damage to his patrol vehicle, and of the recovery of the SUV. In addition, Petitioner told the Homeowner that the license plates on the SUV were fake, which was untrue, furthering his attempts to cover his conduct. She also testified regarding the importance of the image of the department with the public, stating that open records requests were made routinely by the media, and that this disciplinary action was reported on by the Denver Post, as well as by other media outlets.

In concluding that termination was the only appropriate remedy, Ms. Dulacki stated that Petitioner created a stacked wall of fabrications in his attempt to cover up his conduct, that his actions were unbecoming of an officer, and that his actions violated the core mission and values of the Denver Police Department. She stated that she recognized the effect of termination on an officer, but that it was her responsibility to find termination was the only appropriate remedy.
Respondent’s Contentions

On cross-examination, Ms. Dulacki testified that she was not aware of who made the determination to amend the original charges in this matter, to add a charge of a violation of RR-112.2, Commission of Deceptive acts, on January 14, 2020. Ex. 1.A. reflects notice to Petitioner of the original Internal Affairs Complaint on November 20, 2019, as well as the amendments to that Notice on January 14, 2020, and again on January 29, 2020, wherein the allegation of a violation of RR-112.2 was deleted, and the violation of RR-112.1, Misleading or Inaccurate Statement, was charged.

As noted, Petitioner does not deny his conduct which forms the basis for the charges against him in the Internal Affairs investigation. Rather, Counsel argues that the penalties of termination for the violation of RR-112.1, and RR-105, are not found in accordance with the requirements set forth in the DPD Disciplinary Handbook, generally Sections 14 and 15. RR-112.1 Misleading or Inaccurate Statements, states: “Officers shall not knowingly make a misleading or inaccurate statement relating to their official duties.” A violation of RR-112.1 appears in Conduct Categories D and E of the disciplinary matrix, with a Discipline Level of 6 through 8. The Penalty Table reflects that the range of penalty is from 18 days to termination.

RR-105, Conduct Prejudicial, states: “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 specifically set forth in Department rules and regulations or the Operations Manual.
A violation of RR-105 appears in Conduct Categories A through F of the Discipline Matrix, ranging from an oral reprimand to termination.

Section 14.1.1 states in part:

...However, the unique and extraordinary factual circumstances of a given case may justify the application of a different conduct category than that previously assigned to the particular violation in the matrix. As such, command officers, any reviewing board, the Chief of Police, the Manager of Safety, the Hearing Officers, and the Civil Service commission can and may determine that a previously assigned conduct category is not appropriate under the unique and extraordinary factual circumstances of the case. In this situation, a deviation from the Matrix is allowed. Any such deviation must be documented, be
reasonable under the circumstances and be justified by the facts of the case. Such deviation shall be guided by the analysis contained in Section 15.0 below.

15.0 Determining Appropriate Conduct Categories – Analysis

15.1 Situations will arise where personnel charged with the responsibility of recommending or ordering disciplinary sanctions will have to determine the appropriate Conduct Category into which the misconduct falls and whether the alleged misconduct satisfies the definition of a particular category. This is a necessary first step in determining the appropriate sanction. In analyzing the misconduct, the following questions, among others, should be considered: (Secs. 15.1.1 through 15.1.11 set forth some of the questions to consider)

And 15.2, states:

In determining the conduct category, the reviewer must continually bear in mind that this analysis focuses on the nature of the misconduct and how it conforms to the specific definitions of conduct categories already established. It is not the analysis of mitigating and aggravating factors which determines penalties within a given conduct category.

And 15.3, states:
In determining the conduct category, the definition of the category and the analysis described in this section should control the determination of what category applies to the violation in question. No attempt should be made to unjustifiably or unreasonably “fit” a violation into a particular conduct category based upon the desire to reach or avoid a certain discipline level or a certain penalty.

Sec. 25.0 Special Circumstances
Sec. 25.1 states: It should be recognized that any matrix system can only be designed for the large majority of cases and that on limited occasions there will be extraordinary circumstances which would justify a penalty less than or greater than that allowed under the matrix. The authority to do so is within the sound discretion of the Chief of Police and the Manager of Safety and is reasonable and necessary to avoid injustice. A properly functioning matrix system cannot be so rigidly applied as to mandate a certain sanction or limit a certain sanction where doing so would lead to an unjust result or fail to reflect the totality of the particular circumstances.
Sec. 25.4 Extraordinary Aggravation

Sec. 25.4.2 states:
In order to recommend or impose a penalty greater than the maximum penalty called for in the matrix, it must be concluded that the matrix fails to appropriately address the conduct or the officer specific to the case. ...

Sec. 25.4.3 states:
The reasons for departing upward from the maximum penalty called for in the matrix as well as the basis for determining the particular penalty must be documented and explained.

Sec. 25.4.4 states:
Listed below are factors to consider in determining whether extraordinary aggravation exists...

Sec. 25.4.4.3. states:
Commission of an act or acts which call into serious question the officer’s trustworthiness and/or integrity so as to interfere with the continued performance of his or her assigned duties and responsibilities, or which demonstrate a serious lack of the ethics, character or judgment necessary to hold the position of police officer;

Sec. 25.4.4.4 states:
Commission of an act or acts which have had or may be reasonably demonstrated to have, an appreciable negative effect on the general public's confidence and/or trust in the operations of the Department; or

Sec. 25.4.4.5.
Creation of a serious legal or financial risk for the Department or the City arising from the misconduct of an officer or the retention of that officer.

There can be no dispute that the “Appropriate Conduct Categories” were found in this investigation. Petitioner admitted to engaging in a police pursuit in violation of RR-102.1. He also admitted to violating RR-607 by failing to file numerous reports regarding his pursuit of the SUV and the accidents resulting from that pursuit.

Counsel for Petitioner questioned Ms. Dulacki regarding the statement given by the Homeowner Ex. 1.G., wherein the Homeowner “...thought it was fishy that they hadn’t done something more investigating last night.” In addition to this
statement, the Homeowner also recorded an audio interview. Counsel contends that the Homeowner’s statements are not a sufficient basis for a finding of extraordinary aggravation. He also questioned Ms. Dulacki regarding whether she had performed an “analysis” of all of the eleven questions listed in Sec. 15.1. I note that the stated intent of this section is to determine the appropriate conduct category. Having determined the appropriate category violations in this case, the matrix sets forth the penalty for each violation, depending upon whether there are mitigating or aggravating factors involved, or, as in this case, whether special circumstances exist which would prompt a greater or lesser penalty than provided for in the matrix.

Counsel for Petitioner argues that there is no basis for the determination that Petitioner should be charged with making misleading or inaccurate statements so egregious as to warrant termination. He further asserts that under the matrix the same factors cannot be used for finding a violation and also for finding aggravation in determining the penalty. I find no basis in the Disciplinary Handbook which would forbid using conduct for finding a violation, and then concluding that such conduct was of such a nature as to constitute an aggravating factor in deciding the appropriate penalty.

Counsel also contends that Respondent did not consider Petitioner’s work history and performance awards in making her determination that termination was the only appropriate remedy for Petitioner’s misconduct. Initially, I note that Ex. 1.H., the Chief’s Written Command, lists Petitioner’s work history showing no commendations, and showing three disciplinary actions for rough and careless handling, and a four-day suspension for arrest procedures. In addition, the Chief’s Written Command sets forth the basis for his recommendation that Extraordinary Aggravation exists in this case based on Petitioner’s conduct in violating department rules and attempting to hide and avoid responsibility for his actions.

Further, Ms. Dulacki detailed the effect of Petitioner’s failure to properly report the accident caused by his pursuit, which resulted in damage to the Homeowner. She explained the process by which the City responds to damage to citizens caused by Police activity. Here, because of Petitioner’s failure to file a report of the accident, the Homeowner was initially unable to file a claim for the damages to the home. Ms. Dulacki also testified to the damage to the reputation of the department caused by media coverage of this incident. She also noted the fact that Petitioner attempted to conceal his conduct by failing to turn on his body-worn camera (BWC), by falsely stating that he had found the SUV abandoned by the side of the road, by telling the Homeowner that the license plates were “fake”, by not reporting the damage to his patrol vehicle, and by attempting to conceal the damage to his patrol vehicle with “white-out”.

Ms. Dulacki considered all of the above factors in concluding that special circumstances existed which warranted a finding that Petitioner’s actions were so
egregious as to warrant an aggravated penalty of termination for the violations of RR-105 and RR-112.1.

CONCLUSIONS

Petitioner admitted the commission of the acts for which he was found to have violated RR-102.1, Duty to Obey Departmental Rules and Mayoral Executive Orders, as it pertains to Operations Manuel Section 204.01, Police Pursuits, and was assessed the presumptive penalty of three days suspension. Counsel for Petitioner did not dispute the finding of this violation or the penalty found appropriate.

Petitioner admitted the commission of the acts for which he was found to have violated RR-607, Failure to Make, File or Complete Official Required Reports, and was assessed a penalty in the aggravated range of seven days suspension for this violation. Counsel for Petitioner did not dispute the finding of this violation or the penalty found appropriate.

Civil Service Commission Rule 12, Sec. 9.B.1.a., states:

Hearing Officer shall not substitute their judgment for that of the Manager of Safety concerning any policy considerations underlying the discipline, to include the interpretation of Departmental Rules and Regulations, and may only reverse or modify the Manager’s decision concerning policy considerations when it is shown to be clearly erroneous. Hearing Officers shall not substitute their judgment for that of the Manager of Safety in determining the appropriate level of penalty to be imposed for a sustained violation, and may only modify the disciplinary penalty imposed when it is shown to be clearly erroneous.

The Deputy Manager of Safety, Ms. Dulacki, found in agreement with the Chief of Police’s Written Command, that special circumstances existed here, necessitating a penalty greater than that provided for in the matrix, for violations of RR-105 and RR-112.1.

Having reviewed the testimony and evidence in this case I do not find the ruling of the Deputy Manager of Safety, that Petitioner should be terminated for violation of RR-105, Conduct Prejudicial, and RR-112.1, Misleading or Inaccurate Statements, is clearly erroneous.

DECISION

Petitioner is assessed a penalty of suspension for three days for the violation of RR-102.1, Duty to Obey Departmental Rules as they pertain to OMS 204.01.

Petitioner is assessed a penalty of suspension for seven days for the violation of RR-607, Failure to Make, File or Complete Official Required Reports.
Petitioner is assessed a penalty of termination for the violation of RR-112.1, Misleading or Inaccurate Statements.

Petitioner is assessed a penalty of termination for the violation of RR-105, Conduct Prejudicial.

ORDER

The Departmental Order of Discipline is AFFIRMED, and Petitioner is terminated from the Denver Police Department.

Daniel C. Ferguson
Hearing Officer

Dated this 2nd day of November, 2020, at Littleton, Colorado