HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 14-16

DECISION AND ORDER

FRANK ESPINOZA, Appellant,

v.

DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on June 22, 2016 before Hearing Officer Valerie McNaughton. Appellant was represented by Reid Elkus and Steven T. Mandelaris of Elkus & Sisson, P.C. Assistant City Attorney Charles Mitchell represented the Agency in the appeal. The Agency called Sara Hefty, Major Jodi Blair and Shannon Elwell. Appellant testified on his own behalf.

I. STATEMENT OF THE APPEAL

Deputy Sheriff Frank Espinoza appealed his seven-day suspension dated Mar. 17, 2016, which was based on a Sept. 29, 2014 erroneous release of an ineligible inmate. Agency Exhibits 1 – 26 and 28 – 30 were admitted in evidence, as were Appellant Exhibits B, I, K, and M. The parties agree that Agency's Exh. 5 is the same as the last 15 pages of Appellant's Exh. C, and therefore Appellant withdrew those pages from its offered exhibits. The Denver Sheriff Department Discipline Handbook effective July 8, 2013, is admitted into evidence under the doctrine of administrative notice. C.R.E. Rule 201.

II. FINDINGS OF FACT

Appellant has been employed as a Deputy Sheriff with the Agency for the past 23 years. He had been assigned as a Release Officer for nine years prior to this incident, first at the County Jail and for two years at the Downtown Detention Center (DDC). While serving as a Release Officer at the DDC on Sept. 29, 2014, he authorized the release of an ineligible inmate. Appellant challenges the resulting seven-day suspension as too severe under the Agency's Discipline Handbook.

After a prisoner becomes eligible for release by court order or posting a bond, actual release is a two-step process. First, trained personnel from the jail's Central Records Office (CRO) reviews the Jail Maintenance System (JMS) database to determine whether an inmate is entitled to release. Paper documents including the

court mittimus[1] and bonds must also be examined to ensure release is proper and that any conditions to release are observed. After that analysis, the Records Officer makes any necessary changes in status to the JMS, prepares the paper release file, and confirms the tasks performed by notes on the release form, sometimes referred to as the hang sheet because it hangs from a hook. The release file is then in the tray for delivery to the release desk. The next officer headed to that desk brings the accumulated files to the Release Officer. [Hefty, 6/22/16, 9:38 am.]

The second part of the process takes place at the release desk located next to the jail exit. The Release Officer Post Order outlines the necessary tasks, starting with accessing JMS to ensure all court cases are in inactive status. The documents must show that the inmate has been ordered release, and that there are no conditions for release shown in the records. The officer then calls the housing unit to prepare the prisoner for release and have him or her sent to the release desk. Once there, the inmate confirms his identity with the Release Officer and signs the discharge documents. The officer then informs the inmate of any court return dates, and provides copies of the release documents. [Exh. 5-5.] The Post Order requires the Release Officer to add his checks to the relevant boxes on the release form already begun by the Records Officer in order to document the performance of each task. [Exhs. 5-5; 8.]

The Agency periodically reviews its release procedures in order to enhance its ability to prevent erroneous releases. For a time in early 2014, a third review by a sergeant was required to supplement the reviews by the Records and Release Officers. That process led to significant delays because sergeants with time to do it could not always be found. After consultation with the Sheriff, Major Anthony Gettler issued a revised release procedure on Aug. 28, 2014. The new procedure substituted a third independent review by a Release Officer of any rank, instead of requiring that a sergeant conduct one of the three reviews. [Exh. 7.] The release form was not revised to reflect that change until November, 2014, two months after this event. [Exh. 23; Maj. Blair, 2:10 pm.]

On Sept. 29, 2014, CRO civilian employee Sara Hefty received a mittimus on inmate WK for a park curfew violation. The mittimus indicated that the judge had ordered WK's release "on this case only." [Exhs. 15, 16.] At the time, WK was in jail on a pending domestic violence case on a $5,000 bond. [Exh. 9.] That day, WK had been brought to court for the curfew violation, had pled guilty and paid a fine, and was ordered released only on the park curfew case. [Exh. 15.] The court records showed that WK was not eligible for release on the domestic violence charge. [Exhs. 9 – 13.] Hefty later told Internal Affairs that she did not observe until after the fact that the curfew mittimus was a different case number than the domestic violence case on which he was being held. [Exh. 21-27.] Under the impression that there was just one case, Hefty changed the case status in JMS to inactive, which had the effect of starting the jail's release process. [Appellant, 9:14 am.] Hefty prepared the release file, verified her actions on the release form, and had the file delivered to the release desk, where Appellant was on duty. [Exh. 8.]

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[1] A mittimus is a writ directing a jailer to take custody of a person, and includes any terms of confinement. See Black's Law Dictionary (10th ed. 2014.)

Appellant reviewed the release file and called WK's housing unit to send him down. When he arrived, Appellant verified his identity, glanced through the release file, completed the release form, and permitted WK to leave the facility. [Appellant, 2:41 pm.] About five hours later, after Appellant's shift had ended, WK turned himself back in. [Exh. 1-5]. Appellant was told the next day that he had had another erroneous release.[2]

Six months after the incident, Appellant was interviewed by an Internal Affairs investigator. [Exh. 20.] He stated that his duties included reviewing the same paperwork previously reviewed by the Records Officer prior to authorizing a release. [Exh. 20-4.] Appellant admitted he missed seeing that WK had two criminal cases, and that the prisoner had only been released as to one. Appellant explained that the release desk is short-staffed, the files can be very large, and the courts sometimes list the wrong case numbers on the pleadings. [Exh. 20-15.] Appellant did not recall the incident, but believed he checked WK's identity and authorized his release, since his name was on the release form. [Exh. 20-18.] Appellant said his practice was to assume an inmate was eligible for release if the Records Officer delivered a release file. He would then check the inmate's name and case numbers with JMS, verify the inmate's identity, and authorize the release. He added that after this incident, he started circling the case numbers to remind himself to check for multiple criminal charges. [Exh. 20-22.]

Appellant confirmed that he was aware of policy changes that required three reviews before an inmate could walk out the door, and described those changes to the investigator. Prior to this incident, he related, a sergeant needed to be the third reviewer. Major Gettler eliminated the need for a sergeant's review when that requirement was proven to cause long delays in prisoner releases. Just before this incident, Gettler ordered that any release officer could perform the third review. Appellant was not disciplined for his failure to obtain a third signature on the release form because the form had not yet been changed in response to the new procedure. [Elwell, 12:18 pm.]

Eighteen months after the incident, Appellant told the pre-disciplinary panel that he looked through the paperwork in addition to checking WK's identity, and "determined [WK] was good to go." [Exh. 3-11.] He repeated the work issues he raised as mitigation during the Internal Affairs interview, but added, "I'm not denying the fact that I played a part in letting the guy go." [Exh. 3-2.] His representative argued that the offense merited only a Category B under the Discipline Handbook because the Records Officer made the same mistake, and Appellant's main job was to validate that the person before him was the person entitled to release. [Exh. 3-7.] Appellant told the Sheriff that he has since "tried to be a little more meticulous and understanding what we were – what we were facing. There was a lot of problems that we were working with back there." [Exh. 3-9.] He did not claim that any of the work issues contributed to the mistaken release.

[2] Appellant had released another inmate by mistake on Dec. 9, 2013. [Exh. 25.]

At hearing, Appellant stated that he had worked as a Release Officer at the Denver County Jail (DCJ) for several years before transferring to the DDC. He worked at the DDC from about 2012 to late 2014. After this event, he was transferred at his own request to a housing unit at the DDC.

Appellant testified that his job as Release Officer was to "make sure [inmates] were eligible for release." He added however that "[w]e had an expectation that when they came from Records to us that they were ready to be released." [Appellant, 2:37 pm.] "I glanced through the file and verified what was on the JMS system. The JMS system had both those cases inactivated at the time I looked at it. JMS is the jail management system. That's what we look at to determine whether someone is eligible to walk out the door." [Appellant, 2:43 pm.] Appellant then signed the release form and allowed WK to depart. WK left the facility, but turned himself back in about five hours later that same day.

In Dec. 2013, ten months prior to this event, Appellant had permitted an erroneous release of an inmate based on his review of a mittimus unrelated to the inmate's incarceration, while overlooking the relevant mittimus. Appellant was interviewed by Internal Affairs about that issue on Aug. 19, 2014, six weeks before this occurrence. [Exh. 30.] A year later, in August 2015, he was given a four-day suspension for the 2013 incident. [Exh. 25.]

Records Officer Sara Hefty stated during her Internal Affairs interview that she had been doing this job for six months at the time of the incident, and felt "mostly well-versed and comfortable with its duties." [Exh. 21-7.] Hefty admitted she failed to match up the case numbers, and had mistakenly inactivated the jail hold on JMS for the domestic violence charges. [Exh. 21-27.] She testified at hearing that she made a mistake, but that she was not responsible for the physical release of the inmate because her role is to perform solely a record review of the database and official documents. [Hefty, 9:43 am.]

Major Jodi Blair was the commander over Intake and Release when the incident took place. She testified that the Post Order makes it clear it is the Release Officer's job to check the release file to determine the right to release, as well as checking the JMS computer database. [Exh. 5-4.] She reviewed the documents in JMS and the release file for purposes of determining the cause of the improper release. [Exhs. 9 – 16.] Blair concluded that Appellant's was "a very basic mistake", as it was "not possible to look at the file carefully and not catch it." [Blair, 2:10 pm.] Blair worked with Appellant at both the County Jail and the DDC, and believed Appellant knew how to do his job. [Blair, 2:17 pm.] She noted that Appellant had only two erroneous releases during the nine years he performed the duties of Release Officer. In response to Appellant's claim that the unit was understaffed, Blair testified without contradiction that while staffing issues are common in the Department, the Release Unit must always be covered. [Blair, 2:291 pm.]

After reviewing the entire file and presiding over the pre-disciplinary meeting in this matter, Civilian Review Administrator Shannon Elwell determined that Appellant had been careless in the performance of his duties and had violated departmental rule RR-

400.4.4 prohibiting the erroneous release of a prisoner. Based on Appellant's recent commission of the same type of misconduct in 2013 and other aggravating factors, she imposed a seven-day suspension. [Exh. 1.] Appellant challenges that penalty as too severe given all of the circumstances.

III. ANALYSIS

The Agency bears the burden of proving both of the asserted rule violations, and that the suspension imposed was within the range of discipline that could be meted out by a reasonable decision-maker under the applicable Career Service Rules. In re Economakos, 28-13A (CSB 3/24/14).

1. Carelessness in the performance of duties, CSR § 16-60 B.[3]

An employee is careless in performing duties when he fails to complete them in an acceptable manner. In re Espinoza, CSA 42-15, 2 (12/31/15); *aff'd* (CSB 7/21/16). Here, the Agency claims that Appellant failed to adequately perform his duty to verify the prisoner's right to release, and as a result freed an ineligible inmate for five hours. Based on Elwell's testimony that the absence of a third reviewer was not considered in the disciplinary action, Appellant's failure to obtain a third signature prior to releasing WK is not at issue here.

Appellant has admitted he failed to adequately review the second mittimus, which clearly shows that WK was not entitled to release on the domestic violence charge. Records Major Blair characterized Appellant's error as "a very basic mistake", especially in light of his excellent performance during his previous nine years of experience in the same assignment.

Appellant claimed at both the pre-disciplinary meeting and hearing that he saw his job as merely verifying the inmate's identity, because he assumed that the Records Officer had already confirmed the right to release. However, that assumption ignores the Post Order, which states that a Release Officer must also review the release documents. [Exh. 5-4.] Appellant stated that he received no training on the DDC Post Order, but conceded that it was on the computer with all the other policies and procedures, and he could see it at any time. [Appellant, 2:48 pm.] Appellant's claim is also contrary to the language of the release form, which specifically requires Release Officers to perform the same tasks as the Records Officer, and document that performance by check marks, a signature, and the date and time of performance. Appellant entered the appropriate check marks and added his signature to the release form, indicating that he had performed all of those tasks. [Exh. 8.] Hefty testified that "the common lore is that [the release form is called a "hang sheet" because] that's what can hang you as far as your work eligibility." [Hefty, 9:00 am.] Hefty had performed the job for only six months at the time of this incident. In contrast, Appellant was in his ninth year as a Release Officer, and had performed it well with only a single

[3] CSR Rule 16 was amended on Feb. 12, 2016. The former version of Rule 16 is applicable in this appeal, since the conduct on which it is based occurred on Sept. 29, 2014, prior to that amendment. Am. Comp. Ins. Co. v. McBride, 107 P.3d 973, 977 (Colo.App.2004.)

improper release, while catching mistakes "on a daily basis". [Exh. 20-8.] Major Blair noted that out of the thousands of releases Appellant completed each year, he had only two erroneous releases over nine years. It is highly improbable that he could have achieved that performance record without reviewing the release files, which contain the documents that control the right to release. Appellant's consistent admissions that he "missed it" makes it clear that he understood his job was to verify each release based on the computer and paper documents before he could authorize an inmate to leave the facility.

Most persuasively, Appellant had faced the identical accusation only six weeks before this incident at an IAB interview over the very same type of oversight. It cannot reasonably be argued that Appellant was unaware of his duty as a Release Officer to review the release documents furnished to him in order prevent any unauthorized releases. In fact, RR-400.4.4 explicitly states that releasing an ineligible prisoner subjects any employee to discipline. [Discipline Handbook, Appx. E., p. 3.] I find the Agency proved Appellant was careless in his performance of the duty to confirm the inmate's eligibility to be discharged from incarceration, in violation of this rule.

2. Failure to observe departmental regulation RR-400.4.4 – Erroneous Release

RR-400.4.4 states that "Deputy Sheriffs and employees shall not release a prisoner who is not eligible for release." As found above, Appellant failed to adequately review the release file on Sept. 29, 2014. That file contained the mittimus clearly showing that WK was being held on a $5,000 bond on a domestic violence charge, and was therefore not entitled to release. As pointed out in the discipline letter, Appellant was not free to rely on the Record Officer's release directive in JMS where it was directly contradicted by the court mittimus, the controlling document. The Agency therefore established that Appellant violated this departmental rule, and thereby also violated CSR § 16-60 L.

3. Penalty determination

Civilian Review Administrator Shannon Elwell determined that Appellant had violated both CSR § 16-60 B and L by virtue of his erroneous release of a prisoner. Elwell then isolated the factors she considered relevant to the question of the appropriate penalty. First, she found that the error was a basic one, in that Appellant "simply would have had to compare the case number on the park case mittimus and the case number on the domestic violence mittimus to each other." He could also have avoided the error by observing "that the case numbers and release directives were different." His carelessness permitted an inmate charged with domestic violence to be free for five hours, potentially endangering the safety of the victim who "expected him to remain incarcerated." This act "jeopardized the Mission of the DSD" to hold persons in custody in compliance with court orders. [Exh. 1-6.]

In addition, Appellant admitted only that he "played a part" in the improper release, but also blamed the court system, two other employees, lack of adequate staffing, long hours, and various procedural issues. Elwell found this response demonstrated a continued failure to understand the requirements of his position,

especially in light of his very recent commission of the same act of carelessness in late 2013.

After reviewing the entire file, including Appellant's excellent performance evaluations and positive employment history, Elwell concluded that those mitigating factors did not outweigh the significance of the aggravating factors. Elwell noted that she had imposed a four-day suspension for the 2013 erroneous release because she believed it may have been caused by Appellant's genuine misunderstanding of his responsibilities, and gave him the benefit of the doubt by imposing the short suspension. [Elwell, 10:48 am.] The second incident in Elwell's view revealed that Appellant's carelessness was a more serious matter, and only a longer suspension would convey the right message and help achieve the purposes of discipline.

Elwell also analyzed the same penalty factors under the lens of the DSD's disciplinary matrix based on Appellant's violation of RR-400.4.4. A violation of that departmental rule can be categorized as anything from a Category B to a D, depending on the underlying circumstances. Elwell found the conduct met the criteria for Category C based on her determination that it violated the basic mission of the Agency to keep prisoners incarcerated, resulting in an inmate charged with domestic violence to be at large for five hours. She concluded the facts demonstrated a pronounced negative impact on Agency operations and professional image. Elwell rejected the higher Category D level because the prisoner's voluntary return on the same day did not cause a serious risk to the public, or even official efforts to re-arrest him. In fact, WK's absence was not noticed until his voluntary return. On the other hand, she found that the impact of the prisoner's release could not be characterized as anything less than significantly negative given the nature of the inmate's pending charge and his hours of unsupervised freedom. The decision-maker properly considered and weighed the factors set forth in Discipline Handbook §15 for determining the conduct category, including the nature of the misconduct, impact on the Agency, and the degree of harm caused.

A second Category C violation within five years carries a Level 4 degree of discipline. Here, Elwell considered this conduct as a second violation and applied Level 4 because the Dec. 2013 erroneous release was caused by an identical mistake: failing to read the mittimus ordering an inmate's incarceration. It took over 1 ½ years to conclude the investigation of the 2013 incident, and the resulting four-day suspension was not issued until Aug. 19, 2015. Appellant argues that, since the punishment in the prior case had not been imposed at the time of this discipline, it cannot be used to increase the level of this disciplinary matter from a 3 to a 4.

The Discipline Handbook §18.2 states that "the date of prior violations being considered is the date of imposition of discipline by the Manager of Safety … The date of the current violation is considered to be the date on which the violation occurred." Here, the Dec. 2013 erroneous release was the first to occur, and the first on which discipline was imposed. Under the handbook definition, however, the "current violation" occurred for purposes of this section on Sept. 29, 2014. On that date, discipline for the 2013 incident had not yet been imposed.

it is unnecessary to decide whether the Agency properly found this incident was a second offense under the matrix. The same facts support both the Career Service violation and the departmental rule. The Career Service Rules do not require that formal discipline must be imposed before a previous event can be considered as relevant to the appropriate penalty, and a seven-day suspension was amply supported by the evidence and the Agency's analysis of factors applicable to the purpose of discipline under former Rule § 16-20. That rule required the decision-maker to "take into consideration the employee's past record [and] impose the type and amount of discipline" needed to correct the situation. It cannot be argued that a recent and admitted erroneous release is not such a factor under the Rules.

The high degree of similarity in penalties under both the matrix and the Career Service Rules further validates the Agency's exercise of judgment in imposing the seven-day suspension. At an IAB investigation little more than a month before the second erroneous release, Appellant was confronted with his failure to review the correct mittimus, and admitted he was at fault. He cannot therefore claim he lacked notice of the prior misconduct.

Finally, Appellant argued that the lengthy investigation should be used in mitigation of the penalty, but presented no evidence that he was prejudiced by that delay. I find that the suspension was well within the range of punishment that could be imposed by a reasonable administrator under the totality of the evidence.

Order

Based on the above findings of fact and law, it is hereby determined that the Agency's disciplinary action dated March 17, 2016 is affirmed.

DONE this 27th day of July, 2016.

Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 et seq. within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at www.denvergov.org/csa/career service rules.

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX: (720) 913-5720) Fax transmissions of more than ten pages will not be accepted.