HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 40-15

DECISION REVERSING TWO-DAY SUSPENSION

IN THE MATTER OF THE APPEAL OF:

GARY ROLANDO, Appellant,

vs.

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

I. INTRODUCTION

Sergeant Gary Rolando appeals his suspension from employment with the Denver Sheriff's Department (Agency), for alleged violations of specified Career Service Rules. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on December 29, 2015. The Agency was represented by Natalia Ballinger, Assistant City Attorney, while the Appellant was represented by Doug Jewell, Esq. Agency exhibits 1-13 and 15 were admitted. Appellant' exhibits A-6, A-7, B-1 through B-5, and C-H were admitted. The following witnesses testified for the Agency: Sgt. Gabriella Velez; Deputy Donald Travis; and Civilian Review Administrator Shannon Elwell. The Appellant testified on his own behalf, and presented the testimony of Deputy Carla Lopez.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant violated any of the following Career Service Rules: 16-60 A.; 16-60 L.; or 16-60 Z.

B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to suspend him for two days conformed to and was reasonable under the purposes of discipline under CSR 16-20.

III. FINDINGS

The Appellant, Gary Rolando, is a sergeant in the Denver Sheriff's Department (Agency). He also serves as head Chaplain.

On June 15, 2014, an Agency captain, AC, was arrested and transported to the city jail, the Downtown Detention Center, or DDC.[1] Internal Affairs Sergeant Velez accompanied AC. When Sheriff Wilson found out about the arrest, he instructed Chief Gale, who has overall authority for the DDC, to ensure AC was not given any preferential treatment, specifying "this must be played by the book." Gale relayed Wilson's order to the DDC watch commander, Major Brown. Brown relayed the directive to an unknown number of subordinates, stating AC was to be "dressed out" in inmate attire.

AC was placed in a cell on the third floor of the DDC where Rolando was in charge as third floor sergeant. AC asked Velez, who had accompanied her to her cell, if she could change back to civilian clothes. Velez called Chief Gale who denied the request, and ordered Velez to treat AC as any other inmate. [Velez testimony].

The next morning, June 16, 2015, AC was scheduled for her arraignment. Someone asked Rolando, who had not heard of Wilson's directive, if AC could change into civilian clothes for her arraignment. Remembering that he had seen inmates change to civilian clothes for their court appearances, Rolando ordered AC's clothes to be brought up in case AC was permitted to change, because her arraignment was imminent; however he wasn't sure if he had the authority to allow AC to change. After an exchange between Velez and Rolando, Rolando handed AC's clothes to Velez. Velez then stood by while AC changed into her civilian clothes in the nearby sergeants' office.

Following her arraignment, AC was allowed to leave directly out the front door of the courthouse, instead of being processed out in the normal fashion for an inmate. An investigation ensued during which 15-20 officers, including Rolando, were investigated.

The Agency served a letter in contemplation of discipline on Rolando on July 2, 2015, and convened a pre-disciplinary meeting eight days later, June 6, 2015. Rolando attended with his attorney-at-law. On July 27, 2015, the Agency notified Rolando he would be suspended for two days - August 14 and 15, 2015. This appeal followed timely on August 5, 2015.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19- 10 A.1.b., as a direct appeal of a suspension. I am required to conduct a de novo review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

[1] For additional context and facts surrounding this case, see In re Gale, CSA 02-15 (11/23/15).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend him for two days was reasonable under CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 A. Neglect of duty.

To sustain a violation under CSR 16-60 A, the Agency must establish Rolando failed to perform a known duty. In re Gomez, CSA 02-12 (5/14/12) *citing* In re Abbey, CSA 99-09, 6 (8/9/10). The Agency claimed Rolando violated this rule "when he neglected to **use sound judgment and discretion in the performance of his duties**" under RR 200.19. [Exhibit 1-9; Elwell testimony] [emphasis added]. This Agency claim depends entirely on finding a neglect of a duty under another rule, in this case, CSR 16-60 L., via Department Rule and Regulation (RR) 200.19, which states "[d]eputy sheriffs and employees shall use sound judgment and discretion in the performance of duties."

A violation of CSR 16-60 A. may not be established simply by proving another rule violation. [In re Robinson, CSA 03-13, 4 (6/18/13)]. Said another way, in this case, the failure to use sound judgment and discretion does not automatically establish a violation of the duty to use sound judgment and discretion; nor does a finding of carelessness establish the failure of the duty not to be careless; dishonesty does not establish a failure of the duty not to be dishonest, and so on. To allow this practice would automatically and impermissibly double every CSR violation – a practice the Career Service Board has deemed to be improper stacking of charges. In re Mitchell, CSB 57-13A, 3 (11/7/14); *See also* In re Mack, CSA 43-12, 8 (3/18/13). In order to establish a violation under this rule, agencies must prove some duty other than those stated or necessarily inferred by the other Career Service Rules. The Agency failed to prove a violation of CSR 16-60 A. on the basis of Rolando's failure to use sound judgment and discretion.

The Agency also alleged Rolando neglected his duty not to afford preferential treatment to AC. [Elwell response to Hearing Officer question]. However, in the Agency's notice of discipline, Elwell stated the preferential treatment that Rolando afforded AC was a neglect of his duty to **use sound judgment and discretion in the performance of his duties** as a sergeant at the facility." [Exhibit 1-9] [emphasis added]. The claim here fails for the same reasons as stated immediately above, thus no violation of CSR 16-60 A. is established by Rolando's alleged preferential treatment of AC. Additionally, for reasons stated below, the Agency failed to establish, by a preponderance of the evidence, that Rolando neglected a duty to avoid preferential treatment to AC.

The Agency's third basis to allege a violation under this rule was that Rolando engaged in conduct prejudicial under the Agency's RR 300.11.6. [Elwell response to Hearing Officer]. For the same reasons as stated above, I decline to find the Agency's allegations under CSR 16-60 L., via RR 300.11.6, establish a separate violation under this rule CSR 16-60 A.

Even if a violation of this rule could be proven through the failure to abide by another rule, the Agency failed to prove Rolando knew about his alleged obligation not to allow AC to dress into her civilian clothes.

2. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

The Agency claimed the Appellant violated the following written Agency rules and regulations.

Denver Sheriff Department Rules and Regulations

a. RR. 200.19 —Performance of Duties

Deputy sheriffs and employees shall use sound judgment and discretion in the performance of duties.

In the absence of any other basis for wrongdoing or poor performance, it is uncertain this rule provides sufficient notice what conduct or performance would constitute a violation. [*See* In re Norman-Curry, CSA 28-07 and 50-08, 7 (2/27/09); In re Mestas et al., CSA 64-07, 46 (5/30/08), citing In re Encinias, CSB 02-07 (10/18/07)].[2] The phrase "sound judgment and discretion," while employed since biblical times,[3] does not lend itself to a "plain and ordinary meaning" necessary for enforceable rules. In re Kemp, CSB 19-13A, 5 (7/28/14) ("In interpreting Sheriff Dept. rules, the plain and ordinary meaning of words shall apply"). Even assuming this rule contains adequate notice and some enforceable standard, the Agency failed to establish a violation for the following reasons.

1. The Sheriff's directive. The Agency concluded Rolando "was subject to the orders of the Sheriff, Chief, and Watch Commander that [AC] was not to be treated any differently than any other inmate." [Exhibit 1-5; 1-9; Agency opening statement]. Throughout this case, the Agency seemed intentionally vague regarding whether Rolando had notice of the Sheriff's directive. The Agency's notice of discipline attributed Rolando's knowledge of Wilson's directive through a Telephone-style communication[4] from Sheriff Wilson to Chief Gale, then from Gale to Watch

[2] Regarding vagueness, in Norman-Curry I stated that orders couched in aspirational terms such as "should adhere," "strive for excellence," and to be "accountable for everything we do" are too vague to enforce as rules. Regarding lack of notice, in Mestas I stated that essential duties must be communicated in a sufficiently meaningful manner to apprise employees affected by them of the nature and importance of the duty and means to accomplish it, so that the employee has fair notice and a reasonable opportunity to comply.

[3] "My son, do not let wisdom and understanding out of your sight; preserve sound judgment and discretion." [Proverbs 3-21, New International Version].

[4] "Telephone" is the elementary school active listening game in which the first student whispers a message to his or her

Commander Brown, Rolando's supervisor. [Exhibit 1-5]. The Agency's notice of discipline ambiguously stated Brown then "passed these instructions on to his subordinates," [Exhibit 1-5; Agency opening statement], without mentioning whether Rolando was even likely to have been one of the subordinates so instructed. After the Agency made oblique references to the same directive at hearing, Elwell, the decision-maker, acknowledged she could not determine, by the preponderance of the evidence, that Rolando was informed of Wilson's directive. [Elwell response to Hearing Officer]. No other basis appeared in the evidence to infer Rolando became aware of Wilson's directive. Without notice, Rolando was not subject to Wilson's directive, and the Agency failed to establish a violation of this rule on the basis of Rolando's failure to comply with Wilson's directive.

2. Rolando should have known. While the Agency failed to prove Rolando was aware of Sheriff Wilson's directive, it claimed, in the alternative, that Rolando should have known better than to direct and allow AC to change into civilian clothes. In that regard, Elwell declared "I believe it could be reasonably inferred that [AC] was to be treated like any other inmate based on her treatment on June 15th and 16th, prior to Sergeant Rolando permitting her to dress out."

Elwell based her assessment on: Rolando's presence in AC's cell when she was in inmate attire; Rolando's knowledge that AC was taken to her court appearance in the same manner as any other inmate; Rolando's familiarity with DDC procedures including his experience with transporting inmates to arraignment (inferably in inmate attire); and Rolando's acknowledgment that he had never seen or heard of an inmate dressing out for an arraignment.[5] [Elwell testimony].

In summarizing these particulars, Elwell testified Rolando failed to use sound judgment and discretion by affording AC preferential treatment, specifically by calling to the Intake Office to have AC's civilian clothing brought to where AC was awaiting her arraignment; by handing AC's clothes to Velez and telling her to stand by while AC dressed out; and by allowing AC to dress out for her arraignment.

In essence, the Agency argued Rolando's use of sound judgment and discretion necessarily includes the "obvious" [Exhibit 1-9] knowledge that inmates always attend their arraignments in inmate attire, and that deputies must not stray from that practice. The evidence revealed problems with both assumptions.

Elwell acknowledged Rolando was credible generally, and credible in stating he asked Velez whether AC could dress out, and did not direct Velez to allow AC to dress out. [*See* Elwell cross-exam]. Rolando acknowledged he sent for AC's clothing, but explained he did so because arraignment was imminent, so that, in case Velez

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neighbor who, in turn, whispers the same message to the next neighbor, continuing through the entire class. The exercise almost invariably ends with a different message altogether.

[5] However, Elwell also acknowledged Rolando stated at his pre-disciplinary meeting, that he sometimes saw inmates in civilian attire at their arraignments. Elwell also stated another basis for finding Rolando in violation of RR 200.19 was that Rolando "failed to take responsibility for authorizing [AC] to change out and instead he attributed that decision to Sergeant Velez…" The failure to take responsibility for wrongful actions or performance may apply to the degree of discipline, but not to a rule violation.

approved AC's dressing out, her clothes would be available in time for arraignment. Rolando's explanation was as plausible as the Agency's accusation that he ordered or directed AC to dress out despite not knowing whether he could.

Elwell stated one of the bases for her conclusion was that Rolando acknowledged he had never seen or heard of an inmate dressing out for arraignment. However, she also stated Rolando told her and others at his pre-disciplinary meeting that that he has seen inmates dressed in civilian clothes at arraignment. [Elwell testimony]. Lopez later corroborated Rolando's perception. [Lopez testimony].

The Agency further claimed Velez had no authority to order AC to dress out, and the preponderance of the evidence indicates this is true.[6] However, it is equally apparent there is a widespread misunderstanding, at the level of officers below command staff, that an IA sergeant controls all other officers for all purposes, regardless of rank, except the Sheriff. Thus, it was not apparent, by preponderant evidence, that Rolando was, or should have been, aware that Velez was not empowered to order AC to dress out. Elwell acknowledged as much in the following exchange.

> Q: Is it your testimony that Sergeant Rolando and everyone else should have known what her [Velez'] role was?
>
> Elwell: I don't believe I said that.
>
> Q: Well, is that your position?
>
> Elwell: My position is that the policy is that Internal Affairs is to observe only in these particular situations. There is nothing saying Internal Affairs is directing anything along those lines. Whether Sergeant Rolando should have known that…you know, it's speculation, I'm not sure. I don't know if he's ever had any time in Internal Affairs, I don't know if he's ever reviewed the policy, [or] if it's been explained to him. I don't know any of those things.

[Elwell cross-exam].

Unlike Rolando, Velez was subject to Gale's direct order not to treat AC any differently than any other inmate. Nonetheless, Velez was present for and participated in AC's change into civilian clothes. She assumed Rolando had sought and obtained permission for AC to change out, [Velez cross-exam], just as Rolando assumed Velez was authorized to approve AC to change out, yet Velez was neither investigated nor disciplined.[7]

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[6] While the Agency did not state so, the evident inference is Rolando should have known Velez was not empowered to order AC to dress out.

[7] I make this observation not as a matter of comparative discipline, but to point out the unfair subjective nature of the rule. Almost all the evidence Elwell attributed to Rolando's violation of this rule also applied to Velez: she was present at AC's cell while AC was in inmate clothing; was familiar with the arraignment process; was unaware of any rule regarding inmate attire at arraignment; carried the same rank – sergeant – as Rolando; never saw an inmate appear in civilian clothing at arraignment;

Next, in support of its alternate claim, that Rolando should have known not to allow AC to dress out, the Agency presented the testimony of Deputy Travis who stated "I know [dressing in civilian attire] is not the proper protocol for going to court. Nobody else gets to be dressed in their civilian clothes; that's just how it is." Travis acknowledged his statement applied to the County Jail and to the former Police Administration and Detention Facility (PADF). Travis acknowledged he was not familiar with dress protocol for the DDC, [Travis cross-exam], and Travis did not address special management inmates such as AC. The Agency presented no evidence whether the policies are similar.

Other witnesses were uncertain whether inmates were required to appear in court in inmate clothing. Captain Brown, the watch commander of the jail which housed AC, was unsure whether it was preferential treatment for someone (in the absence of a directive to the contrary) to allow AC to dress into civilian clothes for her arraignment. [Elwell cross-exam]. Rolando was uncertain whether AC could be dressed out for her arraignment into her civilian clothes. [Rolando testimony]. Deputy Carla Lopez, who was present during AC's arraignment, testified in particularly candid fashion that inmates appear at arraignment in civilian clothes "all the time," and even those who have been booked in and assigned a cell, are sometimes dressed into their civilian clothes for arraignment. [Lopez testimony]. Sgt. Velez stated she knew of no rule regarding courtroom attire for inmates, but just assumed it was the norm. [Velez cross-exam].

Most of the evidence indicated that inmates typically remain in inmate clothing for arraignment. However, the current practice of the Agency permits substantial discretion in handling special management inmates in the absence of a directive to the contrary. Some of those deviations derive from security concerns, but others do not. For example, Chief Gale, Sgt. Rolando, Deputy Travis, Sgt. Velez, and other officers all visited with AC in her cell to console her even though only Rolando, as Chaplain, had an official reason to do so; AC was permitted, for her privacy, to change clothes in a sergeant's office; after AC's erroneous release, her release documents were simply brought outside to her in the car, rather than have her return into custody as is usual; AC's credit card was brought to her to enable her to post bond; AC's credit card was retrieved from her property as a favor to enable her to post bond; and AC was transported to her home in a Sheriff's Department vehicle.

In the end, the evidence simply did not prove one way or the other whether an officer breaches sound judgment and discretion by allowing a special management inmate to dress in civilian clothes for arraignment when the officer is a sergeant in charge of the floor housing the inmate, is a chaplain imbued with authority to provide comfort and support, and there is no communicated directive to the contrary. The Agency also did not establish Rolando was subject to an inherent duty for which he failed to use his sound judgment and discretion, in violation of RR 200.19.[8]

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and did not believe AC received any preferential treatment by dressing out. [Velez cross-exam]. In addition, unlike Rolando, Velez was under a direct order not to allow preferential treatment to AC.

[8] The uneven result of the current system is that those who were aware of Wilson's directive –Gale, Brown, and Velez - were bound to insure AC remained in inmate attire for her arraignment, while those who were unaware of Wilson's directive had the discretion to permit AC, as a special management inmate, to appear in her civilian attire. Consequently, even assuming the enforceability of this Sheriff's Department Rule, and also assuming Rolando directed AC's change to civilian clothes, he acted

b. RR 300.11.6 —Conduct Prejudicial

Deputy sheriffs and employees shall not engage in conduct prejudicial to the good order and effectiveness of the department or conduct that brings disrepute on or compromises the integrity of the City or the Department or conduct unbecoming 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.

3. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

The Agency found Rolando violated these rules based on its findings that he "facilitated, authorized, and directed [AC]'s changing out into civilian attire prior to her arraignment. In doing so, Sergeant Rolando afforded [AC] preferential treatment and caused confusion among the other members of the Department whose responsibility it was to release [AC] in the normal fashion, which included changing her into her civilian clothing after her arraignment."

As found above, the Agency failed to prove Rolando authorized or directed AC to change out into civilian clothes. His request to have her clothes sent up could be seen as facilitating that outcome. However, also as found above, such action was not shown to be outside his discretion in handling a special management inmate such as AC.

Moreover, under RR 300.11.6, Rolando engaged in no conduct "that might otherwise appear to be minor yet result in serious consequences or potential consequences." In re Khelik, CSB 31-12A, 3 (10/3/13). Since the Agency failed to prove Rolando acted outside his discretion to have AC's clothes brought up, he did not "afford [AC] preferential treatment." [Exhibit 1-10].

The Agency also alleged "Release staff" were confused by Rolando's request to send AC's personal effects, including her civilian clothing, but it was unclear who was confused or to what end. Blair and Brown did not become aware of AC's change of clothes until after her erroneous release. No other release staff were specified. It was also not clear whether the alleged confusion caused by Rolando in any way contributed to AC's alleged preferential treatment, erroneous release, or any other reasonably foreseeable harm, including serious consequences or potential consequences.

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within his sound judgement and discretion to do so. No violation, therefore, was established under RR 200.19.

Finally, Elwell concluded media coverage concerning AC's alleged preferential treatment "brought disrepute on and compromised the integrity of the Department," in violation of RR 300.11.6 and CSR 16-60 Z. [Exhibit 1-10; Elwell testimony]. The Agency provided no exhibit or example of such media coverage. No actual harm was shown as is required under CSR 16-60 Z., and the hypothetical negative image attributed to the Agency by unspecified media coverage is too tenuous both in terms of theoretical harm and its nexus to Rolando's actions to constitute "serious consequences or potential consequences" under RR 300.11.6. In re Khelik, CSB 31-12A, 3 (10/3/13). For these reasons, the Agency did not prove Rolando violated either RR 300.11.6 or CSR 16-60 Z.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

A. Seriousness of the proven offenses

As no violation was established, no discipline may be assessed. Even if the Agency had established the violations it alleged, the Agency's level of discipline would not be affirmed. Without formally doing so, the Agency seemed to withdraw its first allegedly aggravating factor. At first, the Agency announced:

> However, there are also present aggravating factors. Sergeant Rolando was a sergeant, and as such, he should exercise better judgment and a greater awareness of circumstances than a subordinate deputy. The Department expects supervisors to lead by example; they are responsible for holding others accountable and should likewise be accountable and held to a higher standard of conduct than subordinate deputies.

[Notice of Discipline, Exhibit 1-10].

However, at hearing, in response to the question "do you find it [Rolando's rank] to be an aggravator, Elwell answered "no," then specified his rank was an aggravating factor, but one to which she gave little or no weight. Either way, in the end, Rolando's rank did not affect the degree of discipline assessed.

Next, in aggravation, Elwell stated Brown, Blair and "other" Intake Office personnel were confused by Rolando allowing AC to dress out [Elwell testimony; Exhibit 1-10]. However, Elwell acknowledged Brown and Blair did not become aware of the dress-out issue until after AC's arraignment and her release. [Elwell cross-exam], and it remained unstated who, if anyone, was confused in the Intake Office.

Moreover, "confusion" is not inherently aggravating. Elwell acknowledged AC's erroneous release was unrelated to any confusion caused by Rolando's actions, and no other evidence established why release officers' confusion, even if caused by Rolando, became an aggravating factor.

Finally, Elwell deemed Rolando's failure to accept responsibility was a factor in aggravation of his penalty. However, since the Agency failed to prove he engaged in any wrongdoing, Rolando's refusal to accept responsibility was proper.

B. Prior Record

Sergeant Rolando has no prior discipline. Elwell acknowledged the following additional mitigating factors: Rolando's past and ongoing service as Chaplain to the Denver Sheriff's Department; and his lack of malicious mental culpability in this case, ("his mental culpability at the time of the offense was not malicious"), [Exhibit 1-10], which I read as meaning he was trying to do the right thing.

C. Likelihood of Reform

An agency's decision with respect to the degree of discipline should be upheld if it is supported by record evidence, unless it was clearly excessive. In re Khelik, CSB 31-13A, 1-2 (8/8/14). Where the evidence fails to establish any rule violation, any discipline is clearly excessive.

VI. ORDER

The Agency's two-day suspension of the Appellant's employment from August 14, 2015 through August 15, 2015, is REVERSED.

DONE January 26, 2016.

Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You 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 decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

Career Service Board
c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.

CERTIFICATION OF DELIVERY

I certify that on January 26, 2016, I delivered a correct copy of this DECISION to the following via email:

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