HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 45 -15

DECISION MODIFYING 10-DAY SUSPENSION TO WRITTEN REPRIMAND

DESIREE ARCHULETA, Appellant,

v.

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

I. INTRODUCTION

The Appellant appeals her 10-day suspension, assessed on September 4, 2015 by her employer, for alleged violations of specified Career Service Rules (CSRs). Unlike most appeals to the Hearing Office, no hearing was held to resolve factual disputes. Instead, the parties agreed to the admission of specified exhibits, agreed to the facts underlying this case, and submitted briefs which argued only (1) why those undisputed facts do or do not result in the Career Service Rule violations alleged by the Agency and (2) if any rule violation is proven, whether a 10-day suspension was within the range of alternatives available to a reasonable administrator pursuant to CSR 16-20.

II. ISSUES

The following questions were presented for appeal:

A. Did the Appellant violate Career Service Rule: 16-60 A. or 16-60 J., CSR 16-60 Z., or 16-60 L., via Denver Sheriff Departmental Rules and Regulations (RR) 200.9, 300.11.6, or 300.19.1?

B. If the Appellant violated any of the specified Career Service Rules, did the Agency's decision to suspend her for 10 days conformed to the purposes of discipline under CSR 16-20?

III. FINDINGS

The following facts were agreed by the parties. [Amended Order Vacating Hearing, Stipulations, and Briefing Schedule].

1. Deputy Archuleta has been employed as a Deputy Sheriff with the Denver Sheriff Department (DSD) for approximately 7 years. On July 31, 2014, Deputy Archuleta's assignment was with Court Services at the Downtown Division. Her main duties, as reflected in the DSD Mission, are to "provide safety and security for the

community by ensuring care, custody, transportation, and re-entry services for detainees by operating safe, secure, efficient, and humane facilities that adhere to federal, state and local laws."

2. On July 31, 2014, Deputy Archuleta was assigned to the Lindsey-Flanigan Courthouse (LFC) courtroom 4H, where an in-custody murder trial was being conducted. Inmate ML was on trial for murder and was restrained by a leg brace. During the trial, Deputy Archuleta was observed by her sergeant using her personal cell phone as well as another electronic device. Deputy Archuleta's conduct in this matter was subsequently investigated by DSD IAB for potential rule violations. The entire investigative file has been reviewed, including but not limited to surveillance video footage, audio interviews, and relevant paperwork.

3. On July 31, 2014, when Sergeant Phil Swift was doing his rounds, he looked through a window into courtroom 4H from the vestibule area and he could not see Deputy Archuleta in the courtroom. Sergeant Swift entered courtroom 4H to check on Deputy Archuleta. He was unable to immediately locate Deputy Archuleta upon entering the courtroom, but eventually observed Deputy Archuleta sitting to the left of the main entrance in the public seating area, approximately two rows from the back. Sergeant Swift observed Deputy Archuleta with a cell phone on one leg and another electronic device on the other leg. Sergeant Swift stood at the door to the courtroom waiting for Deputy Archuleta to notice him, and observing Deputy Archuleta's behavior. While doing so, Sergeant Swift observed Deputy Archuleta with one phone and scrolling through what appeared to be photographs on the other electronic device. Sergeant Swift also received a look from the presiding judge, which he interpreted to mean that the judge was aware of Deputy Archuleta's behavior. Sergeant Swift also observed both the defendant's and the victim's families in the courtroom, and characterized the security situation as "this is as bad as it gets." Approximately four minutes passed before Sergeant Swift approached Deputy Archuleta and spoke to her. When he did so, Deputy Archuleta dropped one of the electronic devices. Sergeant Swift told Deputy Archuleta to put the devices away and then he walked out of the courtroom. After leaving the courtroom Sergeant Swift had Deputy Archuleta relieved from her assignment, as he needed to ensure that the person assigned to the courtroom was able to pay attention to their surroundings and to the trial. Sergeant Swift subsequently assigned another deputy sheriff to Deputy Archuleta's post.

4. Surveillance video footage from courtroom 4H on the date of the incident shows Deputy Archuleta seated in the rear of the courtroom, in public seating, two rows from the back. During this time, the murder trial is going on, the jury is seated in the jury box, the judge is on the bench, and a witness is on the stand. Also, inmate ML is seated in the courtroom. For most of the time shown on the video footage, Deputy Archuleta remains seated in the back with her head down.

5. Deputy Archuleta was interviewed by DSD IAB and admitted that, during the incident, she had one cell phone that worked and another that she was using as a day planner, and that she was looking at her calendar. Deputy Archuleta further admitted to using her phone to visit various websites on the internet.

These exhibits were stipulated by the parties: Agency exhibits 1-10, exhibit IAB I., the entire IAB file in this case, and Appellant exhibits B-M.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR 19-10 A.1.b., as the 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).

B. Burden and Standard of Proof

The Agency bears the burden of persuasion to prove Archuleta violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend her 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]

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

To sustain a violation under CSR 16-60 A, the Agency must establish that Archuleta 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 Archuleta violated this rule when she failed to pay attention to the proceedings in her assigned courtroom. Appellant responded she was: seated in an appropriate place in the courtroom, she regularly looked up, surveyed the courtroom and otherwise performed her duty to observe and provide overall security for her assigned courtroom as required by post order. Appellant argued even if she performed those duties poorly by being occasionally distracted, she would have violated CSR 16-60 B., for performing her duties carelessly, not for failing entirely to perform her courtroom duties, under this rule.

Both sides persuasively argued over the sometimes fine-line distinction between a neglect of duty, under CSR 16-60 A., and a careless performance of a duty under CSR 16-60 B.[2] A neglect of duty focuses on the failure to perform a duty, while careless performance focuses on a duty that was performed, but poorly. The Agency addressed what Archuleta failed to do – pay undivided attention to her courtroom, while Appellant focused on what she did – looked up from her personal devices 13 times in 15 minutes.

Appellant's inference and conclusion that those disparate assessments are mutually exclusive and require finding no neglect of duty is inaccurate. Both Agency and Appellant statements are reconcilable. As noted by the Agency, a prior decision

[1] Since this appeal was filed, the Career Service Rules have been revised and renumbered. Because the previous version of the rules were in effect at the time discipline was assessed, the earlier version controls here.

[2] The need to make that distinction is obviated by new CSR 16-29A. which combined both rules.

by the Career Service Board stated CSR 16-60 A. "does not include a requirement that the employee utterly neglected to perform a duty." In other words, the Board rejected the notion that an employee's inattention must be absolute before finding she neglected a duty. In re Serna, CSB 39-12, 4 (10/17/13). When a duty, such as Archuleta's post order, requires undivided attention, and circumstances indicate an important need to comply, as they did here, then all but common-sense and momentary lapses in attention, such as glimpsing at a watch, or casting a momentary glance out a window, violate 16-60 A. That Archuleta paid attention to her duties at most 13 times in 15 minutes,[3] proves she substantially neglected her duties during that time. This violation is established by a preponderance of the evidence.

2. CSR 16-60 J. Failure to comply with lawful orders/Failure to do assigned work.

This rule contains two distinct prohibitions: failure to comply with a lawful order of an authorized supervisor, and the failure to do assigned work which the employee is capable of performing. The Agency's allegations fall under the latter category. For that reason, I disregard as irrelevant the portion of the Appellant's response that the Agency failed to prove any specific order.

Regarding the Agency's claim that Archuleta failed to do assigned work, Archuleta agreed that on July 31, 2014, she was a deputy assigned to Courtroom 4H, where a murder trial was being conducted. She also stipulated that an important part of that assignment was to provide safety and security. [Stipulated paragraphs 1 and 2 above].

The Agency alleged Archuleta violated this rule by her pre-occupation with her personal electronic devices, resulting in her failure to monitor and ensure courtroom security. Appellant protested that, even though she was inattentive at times, a violation under the second portion of this rule, as for finding a neglect of duty, requires proof that she failed perform her assignment at all, so that her periodic inattention was not a violation.

The Agency's assertions state a *prima facie* violation. As a seven-year veteran, it can be readily inferred Archuleta was aware and capable of performing her duty to provide safety and security. She stipulated that during "most of the time" in the stipulated video recording of the courtroom, she had her head down.

Archuleta claimed the Agency improperly shifted the burden of persuasion to her under this rule. The burden of persuasion to prove a disciplinary allegation always begins and remains with the agency asserting the violation. Even if Appellant were correct in asserting the Agency improperly attempted to shift the burden of persuasion, that effort would prove inconsequential, as the agency has no authority to cause the burden to shift to the appellant.

[3] Even accepting that Archuleta looked up 13 times in 15 minutes does not establish that she focused on her duties every time she looked up.

Archuleta also asserted this rule requires the Agency to prove she failed to do any assigned work. In support of her assertion, Archuleta cited In re Perry-Wilborne, CSA 62-13 (5/22/14).

Archuleta's argument fails on two counts. First, Perry-Wilborne is distinguished on its facts. This rule did not apply in Perry-Wilborne because other, more specific rules covered the conduct. Second, in the present case, this rule squarely addresses the conduct at issue. In view of Archuleta's acknowledgment of her courtroom duties, acknowledgment of her failure to pay full attention to those duties, and the established inference that she was capable of performing them, the Agency established this violation by a preponderance of the evidence.

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

The Agency found Archuleta violated this rule via three department directives.

DSD RR 200.9 – Full attention to duties.

Archuleta admitted she violated this rule. [Appellant Response Brief at p. 4].

DSD RR 300.11.6 – Conduct Prejudicial

This rule sets a lower bar to establish a violation by deputies than similarly-titled CSR 16-60 Z. This rule encompasses "conduct that might otherwise appear to be minor, yet results in serious consequences or potential consequences." In contrast, conduct resulting in a violation of CSR 16-60 Z. must have caused actual harm to the Agency's mission or to the City's reputation or integrity. In re Khelik, CSB 31-12A, 3 (10/3/13); In re Jones, CSB 88-09A, 3 (9/29/10), *citing* In re Strasser, CSB 44-07A (2/29/08). While DSD RR 300.11.6 extends the scope of proscribed conduct to include potential harm, that extension is not unlimited. Establishing "potential consequences" requires more than the Agency's imagination, In re Strauch, CSA 31-13, 9 (3/14/14), *affirmed on other grounds,* In re Strauch, CSB 40-13A (7/17/14), and must be buttressed by indicia of reasonable expectation.

The circumstances in this case include that Archuleta was assigned to provide safety and security at a murder trial where families of both the victim and the accused were present; Archuleta was inattentive to that duty by her preoccupation with her electronic devices; the judge presiding over the trial noticed Archuleta's inattention; Archuleta's supervisor stood in the courtroom for four minutes without Archuleta ever noticing; she was so startled when he addressed her that she dropped one of her devices; Archuleta's supervisor described the courtroom security as "this is as bad as it gets." Under those circumstances, there was a reasonable expectation that a security issue could have escalated unduly because of Archuleta's inattention. Archuleta's inattention caused her supervisor to reassign a different deputy to the courtroom. Finally, it is reasonable to infer the presiding judge was concerned about Archuleta's inattention to security.

The circumstances, above, establish a reasonable expectation that serious consequences could have arisen from Archuleta's inattention to her courtroom duties in violation of RR 300.11.6. The Agency therefore established this violation of CSR 16-60L.

DSD RR 300.19.1 – Disobedience of rules.

The Agency specified the following Agency order.

> **D.O. 2710.1E.**
>
> **Denver Sheriff employees shall not use a personal cell phone while on duty, nor use or have in their possession a cell phone inside any secure area of DSD jail facilities or in any secure area where a prisoner is or may be detained under the direct control of the Department without prior authorization and express permission of the Sheriff or designee.**
>
> **It is the responsibility of each employee to know and follow the guidelines in this order and his/her divisional procedures regarding the use of personal cell phones on Department time. Abuse of this privilege may result in corrective action, up to and including dismissal.**

Archuleta acknowledged in her response brief that she violated this D.O. 2710.1E.[4] No more is required of the Agency to find she violated that order, in violation of CSR 16-60 L. I did not considered any allegations of fact which were not stipulated.

CSR 16-60 Z. Conduct Prejudicial.

This violation requires proof that an employee's actions or inaction caused actual harm to the agency's mission or to the City's reputation or integrity. In re Jones, CSB 88-09A (9/29/10), *citing* In re Strasser, CSB 44-07 (2/29/08). The Agency claimed the judge's "disapproval" caused the Agency's reputation to suffer. First, neither of the Agency's references to Swift's perception of the judge's "look," even if it was disproving, establish a harm to the Agency or to the City. Second, the Agency's allegation that Archuleta's conduct "created the potential to cause harm…" fails to establish any harm. Third, the Agency's allegation that Archuleta "caused a high security risk of the people present in the courtroom" also fails to establish any harm. The Agency failed to establish this violation by a preponderance of the evidence.

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.

[4] While Appellant repeated referred to D.O. 4710.13, it appears she intended 4710.1E, based upon the Agency's notice of discipline, and her own appeal in which she cited 4710.1E and not 4710.13. [p. 2 of appeal attachment titled "Appeal of disciplinary Action"].

A. Severity of the Proven Offenses.

Archuleta's neglect of duty carried a substantial risk of harm. Both the accused murderer's family and that of the victim were in the same room, and the accused was relatively unrestrained. Archuleta admitted "I put the safety of the inmates – the inmate and the people, and allowed myself to be distracted by the cell phone" caused "unsafety to my courtroom," and made "a very bad, poor choice." That she was the only person armed in that environment, and not paying attention, increased the risk of harm. [See IAB I @ 41:25, 42:7-13].

Archuleta argued the Agency exaggerated the seriousness of her conduct as it related to the nature of the trial. She cited her supervisor's statements that murder trials are treated just as any other felony. Archuleta added that being the only deputy assigned to that trial underscored her belief that no heightened concern was justified.

Regardless of the nature of the trial, the proximity of the accused's and victim's families was inherently concerning and posed an increased risk not likely in a trial for a lesser charge. Her conduct unnecessarily placed public safety in jeopardy.

B. Prior Record.

Archuleta's work performance was evaluated as exceeding expectations every year including 2015, the year of the incident underlying this case. [Exhibits B-H]. Appellant had two previous disciplinary incidents which the Agency did not view as significant.

C. Likelihood of Reform.

Archuleta accepted responsibility and expressed remorse for her conduct. [Exhibits 1-10]. Her statement that she has corrected her behavior was corroborated by her supervisor who stated Archuleta never had a similar issue before or since this incident, adding "she seemed to find religion over this. You know, she got very by-the-book about it." [Exhibit IAB (I) @ 44:10-22].

D. Additional Factors

The Agency stated aggravating factors included: Archuleta's conduct jeopardized the Agency's relationship with other agencies; endangered the public; and created a legal or financial risk to the Department and City.

The Agency's first allegation seems based on the supervisor's interpretation of a judge's look. The judge was not interviewed, no other indication arose that the judge viewed the Agency less favorably, and no other evidence established any diminished view of the Agency by another agency. Despite Appellant's protest to the contrary, I find her conduct created a heightened risk to the public in the courtroom.

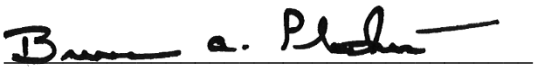
The record, as stated by the Appellant, was devoid of any evidence Archuleta's conduct created a legal or financial risk to the Agency or to the City. In short, there was little aggravation compared with substantial mitigation.

Under the Career Service Rules, the principal purpose of the disciplinary rules, to correct inappropriate behavior or performance when possible, was fully achieved even before hearing. Archuleta acknowledged her momentary wrongdoing, fully accepted responsibility, and implemented immediate and lasting change. Her prior record was commendable, and the Agency did not view two prior disciplinary incidents as significant in the present case. [Exhibit 1 at pg. 10]. She was returned to duty in the same courtroom and even the same trial, indicating her supervisor's faith in her ability and desire to carry out her duties. That fact also indicated the courtroom judge did not view her conduct as egregious, since the judge could have evicted or even banned Archuleta from the courtroom. Under these circumstances, a reasonable administrator would necessarily find mitigating factors sufficiently significant to assess a minimal penalty. Thus, the penalty assessed by the Agency did not conform to the purposes of discipline under the Career Service disciplinary rules, was clearly excessive, and was based substantially upon considerations unsupported by the record evidence.

VI. ORDER

The Agency's 10-day suspension of Deputy Archuleta, assessed on March 19, 2015, is amended to a written reprimand. .

DONE March 23, 2016.



Bruce A. Plotkin
Career Service Board 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.