CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO
Appeal No. 53-16A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

RYAN BOSVELD, Respondent-Appellant,

vs.

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

Tamatha Anding is a nurse employed by Denver Health assigned to work in the Denver Jail. On October 17, 2015, she was walking down a corridor and as she approached a corner, she heard someone say something, though she was not sure what she had heard. She then encountered Denver Sheriff Deputy Ryan Bosveld (Appellant) coming around the corner from a corridor which housed inmates who had been determined to be at risk for suicide. Upon seeing Nurse Anding, Appellant started giggling and said to her, "[w]ell, that wasn't very professional, was it?" When Nurse Anding inquired of Appellant what he was talking about, Appellant replied, "the inmate asked me what he should do ... I told him 'just die'."

Nurse Anding reported Appellant's statement (as well an incident where she believed she had observed Appellant sharing confidential information with an inmate) to management of the Denver Sheriff Department (Agency). The matter was investigated and the Agency's Civilian Review Administrator issued Appellant a ten-day disciplinary suspension finding that telling a suicidal inmate to "just die" violated several Career Service Rules and Agency internal rules and regulations.

Appellant appealed his suspension to a Hearing Officer. The Hearing Officer vacated the discipline. She found Nurse Anding to be credible at hearing and found that Appellant had, indeed, told her that he had told a suicidal inmate to "just die." She went on to hold, however, that Appellant's admission to Nurse Anding that he had told a suicidal inmate to "just die" was insufficient to prove that he had actually told the inmate to "just die," finding specifically that "[t]he evidence indicates that Appellant made a tasteless joke in an effort to impress or amuse Nurse Anding. It does not prove Appellant made that same comment to an inmate."

The Agency has appealed the Hearing Officer's decision to this Board. In its appeal the Agency claims that the Hearing Officer 's decision is not supported by record evidence and that it sets an improper precedent. After a thorough review of this record, we find that we agree

with the Agency that the Hearing Officer's decision is not supported by record evidence and further agree with the Agency that the Hearing Officer's decision sets an improper precedent, though not the precedent claimed by the Agency in its appeal. Consequently, we reverse the Hearing Officer's decision.

The Hearing Officer has based her reversal of the Agency's disciplinary decision on her conclusion that "[t]he evidence indicates that Appellant made a tasteless joke in an effort to impress or amuse Nurse Anding. It does not prove Appellant made that same comment to an inmate." (*See* Decision at 5; R. at 368) The record, however, contains absolutely no evidence to support this conclusion. Nurse Anding did not testify that Appellant was joking with her when he admitted to making the statement, nor did she testify that she believed he was joking.[1] Similarly, Appellant himself did not testify that he made the comment to Nurse Anding in an attempt to impress her or flirt with her. And Appellant further testified to the fact that he did not have the type of working relationship with Nurse Anding where he would be joking with her on the job (R. 533:19-20; R. 527:1-10). The Hearing Officer's findings and conclusions are not supported by record evidence and, as a result, cannot stand.

Given that the Hearing Officer determined that Nurse Anding's testimony was credible[2], and that none of her testimony was impeached and that Appellant himself indicated he had no reason to believe that Nurse Anding was being anything but truthful in her testimony, it is undeniable from this record that Appellant told Nurse Anding that he told a possibly suicidal inmate that he should "just die." Given this undisputed and undisputable fact, we find the Hearing Officer's ultimate conclusion, that the Agency failed to prove by a preponderance of the evidence that Appellant told an inmate to just die to be plain error as a matter of law which sets a bad precedent[3] for future hearings by, essentially, altering the burden of proof imposed on an Agency.

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[1] The Hearing Officer also found that, by her actions, Nurse Anding did not believe that Appellant had actually told an inmate to "just die." This finding is nothing more than improper speculation on the part of the Hearing Officer. It is not sufficiently supported by record evidence. What is supported by record evidence is that Nurse Anding was concerned enough about Appellant's statement that she felt the need to report it. There is no evidence in the record that she reported the statement because she believed that Appellant was being inappropriate with her, that is, that she believed that Appellant made this statement in an unprofessional attempt to flirt with her or to somehow impress her with his witty repartee. Rather, Nurse Andiing testified specifically that she was concerned that Appellant's comment had been made to a suicidal inmate. (R.388:8-18)

[2] At page 4 of her decision, the Hearing Officer notes that Nurse Anding's credibility is not at issue and that Nurse Anding "truthfully reported Appellant's statements to her."

[3] The improper precedent which the Agency expresses concern about in its brief is the alleged precedent set by allowing an employee to advance defenses at hearing that were not raised with management before the formal imposition of discipline. Whether this is the result of a conscious trial tactic or merely the result of how circumstances have played out, we see no reason (nor any authority) to prohibit or curtail this practice, if it can even be called a practice. In any event, we note that there is some inherent risk in engaging in such conduct. For instance, in the appeal of Robert Roybal, No. 47-15A, the deputy, who was charged with failing to notice prisoner hazings, claimed at hearing that while the video of the events showed his head pointing in one direction, his eyes were actually focused on a different direction, so that he actually was observing what was happening throughout

This record indicates that Appellant admitted to Nurse Anding that he told a suicidal inmate to "just die." We find this admission, in and of itself, is proof by a preponderance of the evidence that Appellant did, in fact, tell a suicidal inmate that he should just die. It is plain to this Board that by essentially rejecting the admission and deciding in the manner she did, the Hearing Officer imposed an improper higher burden of proof on the Agency.

The Hearing Officer's incorrect ultimate legal conclusion is based on her unsupported and improper speculation that she can conceive of a scenario, such as Appellant joking or flirting, where Appellant did actually tell Nurse Anding that he told a suicidal inmate he should just die, without actually having told the inmate that he should just die. This tells us not that the Agency failed to meet its burden of proving its case by a preponderance of the evidence, but rather, that it failed to persuade the Hearing Officer beyond a reasonable doubt that Appellant, while having made the statement to Nurse Anding, was being truthful with her concerning the substance of the statement.

This decision is unfair to the Agency and imposes a burden on it that is not in accord with this Board's practices. We find as a matter of law, based on this record, that Nurse Anding's credible and unimpeached testimony that Appellant told her, admitted to her, that he had told a potentially suicidal inmate to "just die" is proof by a preponderance of the evidence that Appellant did in fact tell that inmate to "just die." The Hearing Officer's decision is REVERSED. In addition, we remand this case back to a hearing officer for further proceedings to determine the propriety of the penalty imposed by the Agency.[4]

SO ORDERED by the Board on May 18, 2017, and documented this 16th day of November, 2017.

BY THE BOARD:

Chair (or Co-Chair)

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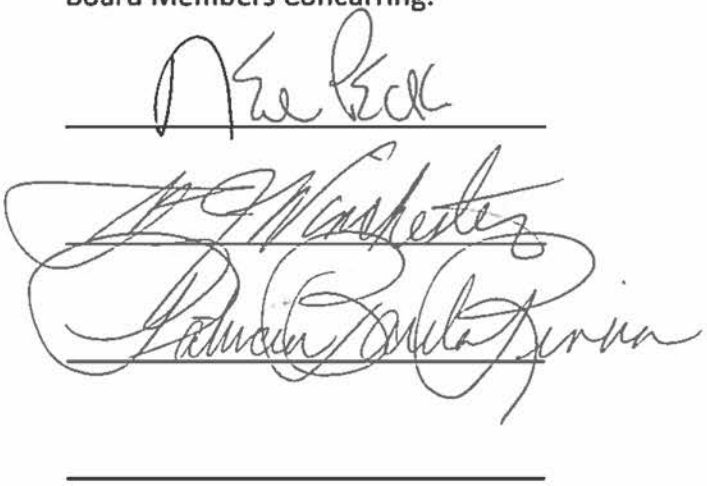
the area. The Hearing Officer in that case noted that Roybal had failed to mention this "head one way – eyes the other way" defense at any time before hearing, which resulted in a negative impression of his credibility at hearing. If an appellant wishes to risk such a finding, we suppose that would be his right.

[4] The Hearing Officer made a statement in her decision which needs correcting, even though it did not impact her decision or ours. In the Hearing Officer's footnote 1, she described a Garrity advisement; explaining it as informing employees being interviewed during an internal or administrative investigation that they need not answer questions if their answers could implicate them in a crime. It appears that the Hearing Officer confused a Garrity advisement (from the case of *Garrity v. New Jersey*, 385 U.S. 493 (1967) with a Miranda warning. A Garrity advisement tells an employee that he is ***required*** to answer questions during the internal investigation, lest he suffer the consequence of losing his job. The threat of job loss is considered sufficient compulsion so that the statement is not considered voluntary and, as a result, cannot be used against the employee in a subsequent criminal proceeding.

Board Members Concurring:



CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **DECISION AND ORDER** on November 16, 2017, in the manner indicated below, to the following:

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s/George Branchaud for the Career Service Board