

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. A010-19

DECISION AFFIRMING SUSPENSION

ABBHEY ELLIS, Appellant,

v.

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

I. INTRODUCTION

Appellant appeals her fourteen-day suspension assessed on February 6, 2019, by her employer, the Department of Safety, Denver Sheriff Department (Agency), for alleged violations of specified Career Service Rules (CSR). A hearing was conducted on May 1, 2019 by Hearing Officer Bruce A. Plotkin. Agency Exhibits 1 and 2 were admitted, as were Appellant Exhibits C - J. Mallory Revel, Esq. and Erin O'Neil, Esq. from Foster Graham Milstein & Calisher, LLP, represented the Appellant. Assistant City Attorneys Richard Stubbs and Katherine Brown represented the Agency. Appellant testified on her own behalf, and also called Sergeant Kyle Kilman and Deputy Martin Varela. The Agency called Civilian Review Administrator Alfredo Hernandez.

II. ISSUES

The issues presented for this appeal were whether Appellant established:

- (1) the Agency's finding she violated Career Service Rule 16-29 R. as it pertains to DSD RRs 200.16 and 400.8.1, was clearly erroneous;
- (2) the Agency's assessment of a fourteen-day suspension was clearly erroneous under CSR 20-56 A.; or
- (3) the application of the Agency's disciplinary matrix in assessing discipline was clearly erroneous.

III. FINDINGS

The Appellant, Abbey Ellis, has been a Denver Deputy Sheriff since 2016. She is responsible for the safety and security of inmates in the Agency's custody including, pertinent to this appeal, the obligation to be alert at all times to protect inmates from harming themselves.

On January 6, 2018 Ellis was the lone housing unit officer assigned to inmate housing unit 2B in the Downtown Detention Center (DDC). Inmates are allowed out of their cells to take their dinner trays and sit at communal dining tables. While Ellis was tending to the meal service, Inmate TC exited her cell along with other inmates, waited until no one was looking, and slipped into the adjacent shower area. She closed the shower curtain, and tied one end of a bed sheet to the shower cage and the other end around her neck to hang herself. She lost consciousness and her feet protruded from under the closed shower curtain. The shower stall was out of direct view from the officer's desk.

Six minutes later, Ellis conducted a partial round¹ in which she passed by the shower area but did not notice TC. After mealtime, inmates returned to their cells and Ellis began securing cells when she noticed

¹ Officers are required to conduct a certain number of rounds to check each cell. Ellis complied with that requirement. This was a partial round she conducted in addition to the required rounds.

cell 107 had only one inmate. Without demanding the identity of the remaining inmate, she left that cell unsecured and returned to her desk to check whether there should have been two inmates in cell 107. Ellis suspected the missing inmate was inmate BH who threatened her earlier so, pursuant to her training, she phoned for backup. Deputy Varela answered, and Ellis shared her concern about the missing inmate. Varela said he was not immediately available but would go to 2B as soon as he was able.

Ellis went to the door to watch for Varela's arrival, with her back to the pod, for 17 seconds. Deputy Varela entered 2B and took the lead in searching for the missing inmate. Ellis slowly followed behind him with her right hand in her pocket. Following the same route Ellis had taken in her partial round, Varela saw a foot in one of the shower stalls, pulled back the curtain, and saw TC with a sheet around her neck. This was 27 minutes after TC entered the shower. He ran to the officer's desk to retrieve a 911 cutting tool and freed TC from the sheet while Ellis remained in the shower area. Less than one minute later, medical aid arrived and were able to revive TC who was stable and answering questions when she was taken to the hospital.

An investigation ensued which resulted in the issuance of a Contemplation of Discipline letter on September 7, 2018. [Exh. 1-II]. A pre-disciplinary meeting was held on September 19, 2018. Appellant attended with her union representative, Ed Bagwell. A second Contemplation of Discipline letter was issued to Appellant on January 8, 2019 [Exh. J], and a second Contemplation of Discipline meeting was held on January 16, 2019. Appellant attended the second meeting with her attorney-at-law.

The Agency issued a notice of discipline on February 6, 2019, imposing a fourteen-day suspension. [Exh. 1-rr]. This appeal followed timely on February 12, 2019.

IV. ANALYSIS

A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction over the appeal of a Career Service deputy sheriff suspension pursuant to CSR 20-20 A.2. The Hearing Officer is required to affirm the discipline assessed by the Agency if the Appellant fails her burden of proof.

B. Burden and Standard of Proof

The Appellant retains the burden of persuasion, throughout the case, to prove the Agency's finding that she violated CSR 16-29 R. was clearly erroneous or that the Agency's application of its disciplinary matrix in assessing the level of discipline was clearly erroneous. See CSR 20-56 A. Discipline is clearly erroneous: (1) when the decision maker's assessment, even while supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole; or (2) when the decision-maker failed to follow its disciplinary matrix and, absent such failure, a lesser discipline or no discipline would have resulted; or (3) if the decision-maker exceeded his authority. [CSR 20-56 B.1c.i.-iii].

C. Career Service Rule Violations

The Agency alleged Appellant violated **CSR 16-29 R.** "Conduct which violates...written departmental or agency regulations, policies or rules..." as it pertains to the following Denver Sheriff Department Rules and Regulations:

1. RR 200.16 – Failure to Perform Duties

Deputy sheriffs and employees shall not fail to perform the required duties of their assignments.

The Agency claims Ellis violated this rule by failing to provide safe and secure custody of an inmate when she failed to: (1) check the shower area during a round, (2) identify a missing inmate, (3) secure a cell door, (4) remain situationally aware as she waited for backup, and (5) act more promptly in searching for a missing inmate.

(1) Check the shower area during a round.

Ellis challenged the assumption underlying this allegation. The Agency stated “Deputy Ellis proceeded past the showers without looking inside that area...” Ellis responded that when she passed by the shower area she was not conducting one of her required rounds, but only a partial look around the residential pod while securing doors in addition to her required rounds. In Ellis’s favor, the Agency did not charge that she failed to conduct all required rounds and did not charge that she conducted any round carelessly. In addition, deputies are required to scan selectively placed scanners with a device called a “pipe” when they conduct required rounds. The scanner provides an independent check of rounds conducted. Appellant did not bring the pipe during this “supplementary round,” further indicating it was not a required round.

Notwithstanding Ellis’s explanation, when Deputy Varela arrived, he followed the same route toward the shower area that Ellis took moments before, but he immediately noticed BH’s feet extending from under the shower curtain. Ellis’s inattention established the Agency’s allegation that she failed her duty to remain alert to possible inmate harm. Consequently, Ellis failed to establish the Agency’s finding – that she violated her duty to provide safe and secure custody by failing to see evident potential harm - was clearly erroneous.

(2) Identify missing inmate / (3) Fail to secure cell door.

When Ellis stopped at cell 107 and perceived one inmate was missing, she could have, according to the Agency, simply have demanded that the remaining inmate identify herself to determine who was missing. Ellis replied she did not enter the cell because she assumed the missing inmate was BH who had threatened her earlier in the shift, and she was taught to call for backup instead of entering into a potential ambush.

While Ellis’s explanation was credible, it failed to explain why she failed even to ask the remaining roommate to identify herself in order to identify who was missing, and failed to explain why she then left the cell unlocked while turning her back to the cell (from where she feared an ambush) and to most of the pod while she returned to her desk. [See Exh. 1uu at 17:23:07-17:23:25]. Ellis acknowledged she did not secure the door to cell 107. By her own testimony Ellis acknowledged inmates are to be secured in their cells unless called out for a nurse, an official visit, or designated out time. [Ellis testimony]. The first two exceptions did not apply and the third exception, designated out time - in this instance, for dinner - was finished, so, by her own admission, Ellis should have secured cell 107 when she left it to check the identity of the missing inmate. She did not. Therefore, Ellis failed to demonstrate the Agency’s conclusion that her actions violated this rule, was clearly erroneous.

(4) Remain situationally aware while waiting for backup.

This allegation derives from Ellis’s actions after she called for backup. A video recording, [Exh. 1uu from 17:26:00 to 17:26:21], shows Ellis in a corner, facing away from the pod, while she watched outside the pod for her backup, inattentive to the very ambush which was the proffered reason for not searching the pod.

In her own exhibit, Appellant presented a training document which, in each scenario, specified performance is graded, in part, on a deputy remaining “aware of their environment, and the situation,” and “keeping appropriate control over the situation.” [Exh. D-4, D-7, D-12]. By turning her back on her pod while waiting for backup, Ellis did not remain aware of her environment, particularly as she believed the still-missing inmate intended her harm. These facts fail to establish the Agency’s finding – that Ellis violated her duty to provide safe and secure custody - was clearly erroneous. Ellis claimed she believed the inmate who threatened her was missing, and therefore could ambush her. This mindset, according to Ellis, justified her return to her desk and justified waiting for backup instead of searching for the missing inmate. Even assuming this to be true, Ellis’s actions, as recorded on the Agency’s security cameras, establish she turned her back to that potential threat and remained situationally unaware as she waited for backup with her back to her pod. Ellis failed to establish this Agency finding was clearly erroneous.

(5) Act more promptly in searching for a missing inmate.

This allegation appeared to have two parts: first that Ellis failed to walk around 2B after discovering an inmate was missing; and second, Appellant failed to move quickly even after her backup, Deputy Varela, arrived. Ellis claimed she did nothing wrong, and merely waited for backup as she was taught when she legitimately feared an inmate who had threatened her was missing.

Even granting that Ellis had a legitimate fear that BH might ambush her, such a circumstance qualifies as an emergency. It was apparent from viewing the video evidence that Ellis did not treat it as such. She left the door unlocked to the cell where she feared to enter, turned her back to that cell, turned her back to the pod while she walked away, and turned away from the pod while in a highly vulnerable position – standing in a corner facing away from the pod – while she waited for backup. Her casual actions, while she thought an inmate may attack her, placed her in danger of the very risk she feared. Moreover, it is evident that a missing inmate, even one out of view momentarily, is cause for grave concern, [see In re Swarr, CSA 56-15 (6/12/17)], and prompt action. Neither was shown, thus Ellis failed to prove the Agency's finding here was clearly erroneous.

**2. RR 400.8.1 – Failure to Protect Prisoners from Harming Themselves or other Prisoners
Deputy sheriffs and employees shall be alert at all times to protect prisoners from harming themselves including attempting suicide or harming other prisoners.**

The Agency assessed this rule violation when Ellis failed to observe TC's feet protruding from the shower as she passed by the shower area. Most of the facts analyzed above apply here as well. Ellis's actions demonstrated a lack of alertness to the risk she perceived, and delayed the discovery of an attempted suicide. Her argument that TC suffered no harm is incorrect and the risk of TC's death from Ellis's lack of urgency was evident. The harm described in the rule applies to the risk of harm as well as actual harm. Moreover, TC lost consciousness from her attempted hanging which is evident harm. While it was unknown whether earlier intervention by Ellis could have prevented TC's attempted suicide, it is apparent that, in the absence of such knowledge, earlier intervention would reduce that risk. For these reasons, Ellis failed to meet her burden to prove her violation of RR 400.8.1 was clearly erroneous.

V. DEGREE OF DISCIPLINE

The decision maker, Civilian Review Administrator Alfredo Hernandez, determined both Agency rule violations above fell into conduct category D of the Agency's disciplinary matrix.² As is pertinent to this appeal, conduct falls under category D when it is (1) contrary to the Agency's guiding principles or interferes with its mission to provide care and custody to inmates, or (2) involves a demonstrable risk to the safety of a detainee or to law enforcement personnel. [Exh. 2-120]. The guiding principle cited by Hernandez was the obligation to protect detainees from harm. [Exh 2-49]. As noted above, Ellis failed to address a missing inmate with all due haste, increasing the risk of harm to TC, and risked her own harm by her inattention to her pod while searching for an inmate she believed was intent on harming her. Both failures aptly described conduct in violation of Category D.

Next, as each violation was a first violation in the D category, the level of discipline, pursuant the matrix is "5." [Id]. The range of penalties for level 5 is a suspension of 4-6 days if mitigated, a presumptive 10-day suspension, and 14-16 days if aggravated. [Exh. 2-127].

In balancing mitigating and aggravating factors, Hernandez determined an aggravated penalty was required based on the following. (1) In mitigation, Ellis had no prior violations counting against her, and her work reviews were favorable. In aggravation, an inmate sustained injury, Ellis's actions endangered an inmate, and Ellis refused to accept any responsibility for her actions. The evidence did not establish that Ellis's actions directly resulted in actual harm to TC. However, it was clear her actions increased the risk of harm. Ellis also insisted, throughout hearing, that she committed no wrongdoing. While Hernandez could have weighed the competing factors differently, the measure here is whether his final assessment

² A violation of RR 200.16 may fall under categories A-F; a violation of 400.8.1 may fall under categories D-F. [Exh. 2-120, 2-121].

was clearly erroneous. Ellis's rejection of responsibility, coupled with the increased risk of harm by her inattention to duty, constituted aggravating factors to be weighed by the decision maker, [Exh. 2-33, 2-34], and were, therefore, not clearly erroneous, even when balanced against Ellis's positive work record.

VI. ORDER

The Agency's assessment of a 14-day suspension against Appellant on February 6, 2019, is AFFIRMED.

DONE June 12, 2019.



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 final order, in accordance with the requirements and limitations of CSR § 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery, below. See Career Service Rules 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

Career Service Hearing Office

201 W. Colfax, Dept. 412, 1st Floor Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.

I certify that, on June 12, 2019, I emailed a correct copy of this Decision to:

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