

DECISION AFFIRMING FOUR-DAY SUSPENSION

ABBHEY ELLIS, Appellant,

v.

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

I. INTRODUCTION

Appellant Abbey Ellis appeals her four-day suspension imposed by her employer, the Department of Safety, Denver Sheriff Department (Agency), assessed on June 6, 2018, for acknowledged violations of specified Career Service Rules (CSR). Pursuant to CSR 20-54, the parties waived hearing and submitted briefs regarding the degree of discipline. Appellant acknowledged she was in breach of all rules specified below and waived her right to contest any fact establishing those violations as provided in the Agency's notice of discipline, except as related to the degree of discipline. [Order dated July 17, 2018]. The parties stipulated to the admission of Agency exhibits 1.a. through 1.jj., Agency exhibit 2, and Appellant's exhibits 1-6. Mallory A. Revel, Esq. and Steve Wienczkowski, Esq. of the law firm Foster Graham Milstein & Calisher, LLP, filed briefs on behalf of the Appellant. Assistant City Attorney Richard Stubbs filed a responsive brief for the Agency.

II. ISSUES

The only issues presented for this appeal were whether the Agency's assessment of a four-day suspension was clearly erroneous under CSR 20-56 A., and whether the application of the Agency's disciplinary matrix in assessing discipline was clearly erroneous.

III. FINDINGS

I adopt the following findings as derived from the Agency's notice of discipline. [App. Exh. 1]. Appellant graduated from the Denver Sheriff's Department Academy in April 2017. She assumed her first duties as a Denver Deputy Sheriff on May 23, 2017.

On August 14, 2017, Ellis was assigned as a Housing Unit Officer in an inmate residential pod in the Downtown Detention Center. Security cameras captured the following incidents. [Agy. Exhs. 1-aa - ee].

1. While Ellis went upstairs to conduct a round, inmates took a table from the pod to the adjoining recreation yard. They made a running start behind the table and pushed it into a window, cracking it.

2. Later the same date, during Ellis's roll call beginning at 20:28:29, one inmate remained on the common area phone, few inmates were on their bunks, most were walking around the pod, even after 1:05 a.m., and one inmate was hanging off a staircase railing. Inmates were not fully dressed.

3. At 21:08:53, Ellis opened the cleaning closet door to allow an inmate to take two brooms. The brooms were not returned when the inmate finished using them.

4. At 22:43:24 during nightly lockdown, inmates continued to walk about, visiting with other inmates. Housing lights remained on.

The above incidents constituted violations of CSR 16-29 O., (failure to observe safety regulations), CSR 16-29 R., (conduct which violates written agency rules) via Agency rule RR 200.9 Full attention to duties, and the Agency's Housing Post Order regarding Chemical and Equipment Inventory. [Agy. Exh. 1-f].

An investigation ensued which resulted in the issuance of a letter in contemplation of discipline. A pre-disciplinary meeting was held on May 16, 2018, and Ellis attended with her attorney. During the meeting, Ellis acknowledged her security shortcomings, accepted full responsibility, and committed to improving her control of the pods.

The decision maker, Civilian Review Administrator Alfredo Hernandez, issued Ellis a notice of discipline on June 6, 2018, imposing a four-day suspension. This appeal followed timely on June 20, 2018.

IV. ANALYSIS – DEGREE OF DISCIPLINE

A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction of this direct appeal of a 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

Appellant bears the burden to prove her discipline was clearly erroneous. CSR 20-56 A.¹ 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.1.i.-iii].

In view of Ellis's acknowledgement that she violated all rules alleged by the Agency in its notice of discipline, there remains no dispute regarding (1), whether the finding of the above-cited rule violations was contrary to what a reasonable person would conclude from the record as a whole; nor does the Appellant dispute the authority of the decision-maker under (3). What remains is the question raised under (2), whether the Hernandez followed the Agency's disciplinary matrix and, if so, whether a lesser discipline would have followed pursuant to the matrix.

Hernandez based his election of the discipline level on the assignment of each violation pursuant to the matrix. Under the matrix, the decision-maker may assign a category between A and F for violations of RR 200.9, Full attention to Duties, and RR 200.16, Failure to Perform Duties. Hernandez determined Ellis's actions aligned with the description of misconduct under Category D., which states:

¹ Normally, Appellant would be obligated to prove the Agency's determination of rule violations was clearly erroneous. Since Appellant confessed to all alleged violations, the only remaining issue (thus the only remaining burden of proof) concerns the degree of discipline.

Conduct that is substantially contrary to the guiding principles of the Department or that substantially interferes with its mission, operations or professional image, or that involves a demonstrable serious risk to deputy sheriff, employee or public safety.

Hernandez specified Ellis's failure to pay attention to her duty to account for two brooms taken from the supply closet "could pose a demonstrable serious risk to deputy sheriffs or the inmates in the pod." Ellis protested the risk was speculative and therefore did not constitute substantial interference with DSD's mission or cause a demonstrable serious risk. [Appellant Opening Brief]

I agree Ellis's failure to account for two brooms did not substantially interfere with the Agency's mission, operations or professional image. However, that is not the only basis for ranking conduct in the "D" category, which also includes conduct that involves "a demonstrable serious risk to deputy sheriff, employee or public safety." The risk of inmates' possession of brooms was a demonstrable, serious risk. "Demonstrable" means "apparent," or "evident." ["demonstrable," Merriam-Webster Online Dictionary. 2018. <http://www.merriam-webster.com> (25 Sept. 2018)]. The evident risk to inmates' possession of brooms derives from the specific requirement to account for all items taken from the pod closet, and from well-known risks of converting such items into shanks. [*In re Norman-Curry*, CSA 28-07, 50-08 (2/27/09), *aff'd* CSB 9/3/09); see also *In re Economakos*, CSB 28-13A (3/24/14)]. As such, Ellis failed to meet her burden to prove Hernandez's election of Category D was clearly erroneous, as it pertained to the Housing Post Order.

The Notice of Discipline also specified Ellis failed to pay attention to her duties as it related to two inmates removing a table from the pod, and using the table to break a window in the exercise yard. [App. Exh. 1-12; Agy. Exh. 1-cc at 20:38:41]. Although that incident occurred while Ellis began her rounds, she passed nearby, and in clear view, of the location where a group of inmates tipped a table on its side and slid it out the pod door to the yard. [*id.* at 20:38:39]. The conduct here – Ellis's inattention, resulting in inmates' taking a table into the yard and cracking a window – does not fit within the definition of conduct D category. First, it is not evident what guiding principles were implicated. Second, the agency presented no evidence demonstrating how the inattention to that conduct "substantially interfere[d] with [the Agency's] mission, operations or professional image. Third, the agency presented no evidence, nor was it apparent, that Ellis's inattention resulting in a cracked window "involved a demonstrable serious risk to deputy sheriff, employee or public safety." At most, Ellis's inattention, which permitted inmates to remove a table and crack a window had a minimal negative impact on operations or professional image of the Agency, a category "A" violation. As such, the determination to place this inattention to duties in the "D" category was not supported by the evidence, and was, therefore, clearly erroneous.

After the decision-maker elects the conduct category, the next step is to determine the level of discipline. [Agy. Exh. 2-43 at §32.6]. As Ellis had no prior discipline, a first violation under Conduct Category D falls under level 5. [Agy. Exh. 2-86 at Appendix E]. The range of discipline for that level includes: suspension between 4-6 days in the mitigated range; suspension of 10 days in the presumptive range; and suspension between 14-16 days in the aggravated range.

The decision-maker then determines if mitigating and aggravating circumstances should decrease or increase the presumptive penalty. [See Agy. Exh. 2-29 at §19.0; 2-43 at §32.6]. Hernandez considered the following mitigating circumstances: Ellis's short time with the Agency; her lack of prior discipline; her willingness to take responsibility; and her willingness to reform. Hernandez also found aggravating factors including "the janitor closet being left open containing chemicals, not keeping track of cleaning equipment which was not seen returned, broom left out for anyone to access as a weapon..." [*Id.*]. While the potential for harm, as described above, was

present, little actual harm occurred and the "aggravation" described was no more than a description of the Ellis's wrongdoing. [See Agy. Exh. 1-15]. More is required to achieve aggravated status than reiterating the wrongdoing.

Additional "aggravating factors" cited by the Agency also were merely descriptive and therefore were insufficient to prove aggravation. Those additional factors included descriptions of wrongdoing under 16 -29 O. via RR 200.9, regarding Ellis's failure to maintain inmates' distance from her desk, and allowing inmates to roam freely after curfew. While Hernandez failed to establish aggravating factors, no further-mitigated penalty is due for reasons that follow.

Ellis first argues the purpose of discipline under the matrix was accomplished by her contrition and corrective actions. [Appellant's Opening Brief].² While the sincerity of Ellis's commitment to change is not in dispute, this argument fails to establish how the Agency's election, which followed the dictates of its disciplinary matrix, was clearly erroneous.

Next, Ellis argued the assignment of category D was erroneous. She argues the result of her neglect was a broken window. I agree, as noted above that, for this particular misconduct, the category selection was clearly erroneous. However, Ellis's argument ignores separate misconduct - inattention to her duties as it related to two missing brooms - that posed an immediate danger of being weaponized, thus was a "demonstrable serious risk," and merited placement under category D. That violation alone was sufficient to merit placement under Category D.

Having weighed the mitigating and alleged aggravating factors in this case, Hernandez elected the lowest end of the mitigated range, 4 days. Any further reduction would require the decision-maker to find extraordinary circumstances ("special circumstances"). [See Agy. Exh. 2-34 at §25.0]. Ellis stated she had no prior discipline. Prior disciplinary history represents one potential factor for assessing extraordinary mitigation, [Agy. Exh. 2-35 at §25.3.2], but the very few months of her employment at the time of her misconduct is not an extraordinary period of no discipline. She also cited her commitment to change. While commendable, Ellis's commitment to change is not so extraordinary that the mitigated penalty assessed was unjust. [*Id.*].

Consequently, Ellis failed to demonstrate Hernandez's election of the lowest mitigated penalty available under the Agency's disciplinary matrix was clearly erroneous, i.e. the penalty was not contrary to what a reasonable person would conclude from the record, and was within the range of penalties available to a reasonable and prudent administrator. [[Economakos](#), *supra* at 2]. Moreover, Hernandez followed the Agency's matrix in assessing discipline for her violations. For these reasons, Appellant failed to meet her burden to prove the Agency's election of the level of discipline was clearly erroneous, and failed to prove the Agency's application of its disciplinary matrix was clearly erroneous.

V. ORDER

The Agency's four-day suspension of Appellant is AFFIRMED.

DONE September 26, 2018.



Bruce Plotkin
Career Service Hearing Officer

² Appellant's reply brief contained no additional persuasive argument concerning mitigation.