CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER,
STATE OF COLORADO
Appeal No. 42-15A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:
FRANK ESPINOZA,
Petitioner-Appellant,
vs.
DEPARTMENT OF SAFETY, DENVER SHERIFF DEPARTMENT,
and the City and County of Denver, a municipal corporation,
Respondent-Agency.

On December 9, 2013, Denver Deputy Sheriff Frank Espinoza (Appellant) was serving as a Release Officer, tasked with verifying inmates' identities and whether the paperwork accompanying those inmates appearing before him actually permitted their release from the jail. Inmate JA presented his paperwork for his release which included two *mittimus* forms (from two different cases pending against JA)[1]. Appellant glanced at the papers and released JA back into the public.

There was, however, a problem. One of the mittimus forms actually ordered that JA be held in jail – not released from jail; and had Appellant conducted even a cursory review of the document, this fact would have been evident. At the time of this unauthorized, erroneous release, JA was a felon with an active no-contact order entered against him in a domestic violence case. It took a joint operation between the Denver Police and the Westminster Police and twenty-three days to bring JA back to jail.

The Denver Sheriff Department (Agency) investigated Appellant's erroneous release of JA. During the course of the investigation, Appellant admitted that he had made a mistake[2] in authorizing and permitting the release of JA.

The Safety Department's Civilian Review Administrator (CRA), finding that that Appellant's malfeasance violated Departmental and Career Service Rules, issued him a four-day disciplinary suspension. While the presumptive penalty under the Department's disciplinary matrix is a ten-day suspension for this misconduct, the CRA believed there to be sufficient

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[1] The Hearing Officer described a *mittimus* form as an order from the court directing the jailer to keep or to move an inmate to or from court.

[2] One of Appellant's admissions went like this: "I admit it now, ... I see that we did wrong, that we released him when we weren't supposed to. I own up to that." (Exhibit H)

mitigating circumstances – which included Appellant's admission of error and acceptance of responsibility – to warrant the imposition of a matrix mitigated penalty of a four day suspension.

Appellant appealed his suspension to a hearing officer. At hearing, while never explaining away his prior admission of guilt and responsibility, Appellant attempted to blame his erroneous release on another co-worker, a new software system, confusing documents, a confusing system, and that preventing erroneous releases was not his job.[3] The Hearing Officer was not persuaded and upheld the four-day suspension. Appellant now appeals the Hearing Officer's decision.

Appellant first argues that the CRA's assignment of Appellant's offenses to a Matrix Category D violation is arbitrary and that the offense should have been classified in a matrix category which would dictate the imposition of a lighter punishment. We disagree. Under the Agency's matrix, a Category D violation is:

> 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.

The rule is written in the disjunctive. Misconduct is Category D misconduct if it is contrary to the guiding principles of the department OR if it interferes with the department's image, operation or mission OR if it involves a demonstrable risk of serious harm. In this case, Appellant's misconduct achieves the hat trick. Appellant's erroneous release of a felon with an active no-contact order in a domestic violence case, and the resulting twenty-three days of unearned freedom which required a joint police agency operation to remedy met *all* of the conditions for a category D violation. The release was contrary to guiding principles involving care and custody of inmates, substantially interfered with the department's mission of keeping people behind bars who were supposed to be behind bars, made the department look bad, and posed a serious risk of harm to the person who was supposed to benefit from the no-contact order and to the public as a whole. Not only does the CRA's classification of Appellant's misconduct not have the appearance of being arbitrary, we can say with certainty that, based on this record, said classification is, in fact, NOT arbitrary.

Appellant attempts to make an issue out of the fact that the CRA's assessment that Appellant's conduct amounted to a Matrix Category D violation was at odds with the recommendation made by the Conduct Review Office (CRO) which believed the misconduct

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[3] The Hearing Officer took special note of the absurdity of Appellant's claim that things were too confusing or too unclear for him to have been able to do his job properly, finding that over a period of time, out of the 30,777 releases performed by the jail, only five were erroneous and out of those five, only three were caused by Deputy error, for an error rate of 0.006%.

amounted to a Category C violation. This disagreement does not concern us.[4] The CRA, that is, the discipline decision-maker, is free to accept or reject any recommendation he or she might receive. The fact that in this case she disagreed with the CRO's recommendation is not evidence that the CRA's decision is arbitrary. As we have noted, the CRA's determination that Appellant's misconduct amounted to a Matrix Category D violation is fully supported by the evidence in the record and the plain language of the Matrix.

Appellant also accuses the CRA of abandoning the principle of consistent discipline[5] espoused in the Matrix's Disciplinary Handbook. The record does not support this conclusion. The record reflects that another deputy involved in this incident, who also missed the fact that JA should not have been released, also received a four-day suspension. In addition, Appellant cites to our *In re Mitchel* decision (No. 57-13A)[6]. The facts in *Mitchell* differ in material respects from this case. For example, in *Mitchell*, the inmate released was not a dangerous felon, it took less than twenty-four hours to return the inmate to custody and it did not take two police agencies to do it. Further, Mitchell received a suspension of sixteen days for his erroneous release.[7] The imposition of a Category D mitigated discipline is entirely consistent with the goals and principles of the Matrix, as well as Career Service goals of progressive discipline.

Appellant next argues that the Hearing Officer erred in finding Appellant responsible for the erroneous release of JA because this duty was allegedly ambiguously stated. Appellant argues, essentially, that he was not sufficiently informed that it was his duty and responsibility to review paperwork to insure that people in jail, who he would be releasing back into the general public, were entitled to be released into the general public. We cannot take this argument seriously. We note that Appellant had been performing this duty for eight years prior to this incident, without an erroneous release. We wonder what Appellant thought he was actually doing for these eight years and we marvel at the fact that there were no prior erroneous releases, given his claim that he had no idea that he needed to be concerned about proper authorization for inmates' releases. In any event, as the Agency correctly argued in its brief, the record is replete with both documentary evidence and testimonial evidence supporting the Hearing Officer's conclusions. The Hearing Officer did not err when he ruled that Appellant violated Career Service Rule 16-60 L when he improperly allowed the release of JA in violation of Agency Rule RR 400.4.4.

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[4] If the imposition of discipline by the CRA was arbitrary by virtue of the fact that it did not agree with a recommended discipline made by someone not authorized to actually impose discipline, the recommender would essentially become the decision-maker, stripping the actual decision-maker of the authority to exercise discretion and impose discipline in accordance with that discretion.

[5] While discipline should be consistent, we have never held, and certainly do not hold today, that "consistent" discipline means "identical" discipline.

[6] Mitchell's erroneous release was classified as a Matrix Category B violation, which Appellant now claims makes his Category D discipline inconsistent.

[7] Would Appellant claim that his discipline should be quadrupled for the sake of upholding the Matrix's goal of consistent discipline?

Appellant also urges this Board to reduce his punishment because of the delay in issuing the discipline. While we do not condone the excessive amount of time it took the Agency to process this discipline, we do not believe this record justifies any further reduction of the penalty imposed.

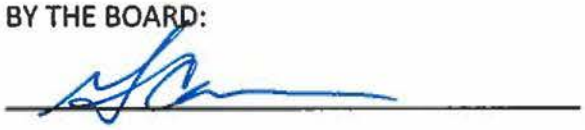
Finally, we believe we must comment on the fact that during the investigation of the erroneous release, Appellant admitted that he had made an error and took responsibility for his error. In part, as a result of this admission, Appellant received a matrix mitigated penalty as opposed to a matrix presumptive penalty. At hearing, Appellant denied any responsibility whatsoever for the erroneous release. To some it would appear as if Appellant has successfully gamed the system; making an admission of liability in an attempt to receive a mitigated punishment and being successful in that attempt. This calls into question whether Appellant was ever entitled to mitigation and if he was not, what this Board should do about it.

In the past, we have expressed uncertainty as to whether we possess the authority to increase a penalty administered by an Agency or imposed or upheld by a hearing officer. *See, e.g. In Re Lovingier*, No. 48-13A, n. 16. After considering this case, we have resolved our doubts. Should this Board, in the future, be faced with a case where it appears as if an appellant has falsely pled contrition to his appointing authority for the purpose of obtaining a mitigated discipline only to disavow that plea after actually obtaining a mitigated punishment, we shall not hesitate to impose an increased punishment so that such an appellant will not have benefited from his dishonest actions.

The Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on May 19, 2016, and documented this 21st day of July, 2016.

BY THE BOARD:



Chair (or Co-Chair)

Board Members Concurring:

Patti Klinge

Derrick Fuller