

DECISION AFFIRMING TWO-DAY SUSPENSION

VIRGIL FERGERSON, 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 his suspension for alleged violations of specified Career Service Rules, and Agency rules, regulations, and orders. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on January 30, 2018. The Agency was represented by Ashley Kelliher, Assistant City Attorney, while the Appellant was represented by Donald Sisson, Elkus & Sisson, PC. Agency exhibits 1-4, 8-12, 13 (page 6 only), and 14-17 were admitted. Appellant's exhibits A, C-J, M, N, and P-V were admitted. The Appellant and Alfredo Hernandez, Civilian Review Administrator, testified during the Agency's case-in-chief. The Appellant did not call any additional witnesses.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated Career Service Rule (CSR) 16-29 A. or R.;
- B. if the Appellant violated either of the cited Career Service Rules, whether the Agency's decision to suspend him for two days conformed to the purposes of discipline under CSR 16-41.

III. FINDINGS

The Appellant, Deputy Virgil Ferguson, has been employed by the Denver Sheriff's Department for 11 years. At the time of the incidents underlying this appeal, he was assigned to one of the dorm-style residential pods for inmates. He was responsible for complying with all department rules and orders, including pat-searching all inmates leaving and entering the pod, in order to avoid the introduction and transport of contraband. [Exh. 15-3; 9-4; 8-2]. For the same reason, Ferguson was responsible for keeping inmates from having unfettered access to the officer's desk in the pod. He was also responsible for ensuring the exit door from the pod is secured at all times.

On February 23, 2017, Ferguson was the pod officer in Building 22C at the Denver County Jail. During his shift, five inmates entered or left the pod through an unlocked door. Ferguson was aware of three of them. In each instance, he failed to pat-search the inmates in violation of his post orders. [Exh. 10].

While Ferguson left his desk to conduct a mandatory cell-check, six inmates crowded around his desk. One of them reached into Ferguson's desk and was later found to have contraband in his cell of the type he could have obtained from Ferguson's desk. Ferguson saw the inmates crowded around his desk from upstairs in the pod and told them they shouldn't be there, but he did not intervene to disburse them, the inmates remained around his desk, and he did not search them for potential contraband taken from the desk. One of them, unbeknownst to Ferguson, took some paperwork on a clipboard from the desk.

A review of the security video recording revealed Ferguson was lax in securing the door to the pod. An inmate entered through an unlocked pod door which Ferguson had failed to secure. Ferguson did not see the inmate enter and the inmate hid from Ferguson's view without having been pat-searched. Another inmate, Chapman, who had reached into Ferguson's desk while Ferguson was conducting a round, walked out of the pod through the unlocked pod door unbeknownst to Ferguson. Chapman was stopped at a secured door where he began to yell obscenities. Deputies there called for a supervisor and medical staff. He was taken to a cell in another building where he jumped on a bunk until it broke. He also tried to cut his wrist with a broken plastic bottle. He was handcuffed and taken to another cell where he was placed in a restraint chair. A team of deputies placed him in a suicide smock. [Exh. 13]. None of this would have occurred had Ferguson secured the pod door to 22C. When Chapman's cell in 22C was searched, contraband was found, including two highlighters, one pen, one pencil, one partial roll of trash bags, and a smashed battery.

When Chapman's sortie was reported, an investigation ensued into how he left 22C unaccompanied. The investigation turned to Ferguson's role. He was served with a letter in contemplation of discipline and he attended a contemplation of discipline meeting on September 28, 2017 with his attorney-at-law. The Agency issued its notice of suspension to Ferguson on October 19, 2017, and he filed a timely appeal.

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,¹ 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 retains the burden of persuasion, throughout the case, to prove Ferguson violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend Ferguson's employment for two days complied with CSR 16-41. The standard by which the Agency must prove its claims is a preponderance of the evidence.

C. Career Service Rule Violations

16-29 A. Neglect of duty or carelessness in performance of duties and responsibilities.

To sustain a violation under CSR 16-29 A., the Agency must establish Ferguson 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 notice of discipline did not specify what actions related to this rule. At hearing, the decision maker found Ferguson in violation of this rule for "not wanting to do what he

¹ Under current CSR 20 (effective October 20, 2017 and amended January 10, 2018), disciplinary appeals by uniformed deputy sheriffs are no longer reviewed *de novo*.

needed to do, at certain points in time.” [Hernandez testimony]. He also stated another basis for finding a violation under this rule was Ferguson’s failure to secure the door to the pod. The duty to secure the pod door is specific to Building 22 Post Order, Exhibit 9. In the absence of another specified duty, no violation, apart from those cited below, is found under CSR 16-29 A.

16-29 R. Conduct which violates the Career Service Rules, the City Charter, the Denver Revised Municipal Code, Executive Orders, written departmental or agency regulations, policies or rules, or any other applicable legal authority. When citing this subsection, a department or agency must cite the specific regulation, policy or rule the employee has violated.

As it pertains to the following Denver Sheriff Department Rules and Regulations:

300.19.1 Disobedience of Rule

Deputy sheriffs and employees shall not violate any lawful Departmental rule (including CSA rules), duty, procedure, policy, directive, instruction, order (including Mayor’s Executive Orders), or Operations Manual Section.

As it pertains to

200.9 Full Attention to Duties

Deputy sheriffs and employees shall devote their full attention to their duties in accordance with the policies and procedures of their assigned post.

Hernandez, testified Ferguson violated this rule by permitting a group of inmates to congregate around his desk, for failing to pat-search each inmate who left or entered the pod, and for intentionally failing to secure the pod door which allowed inmates to exit and enter the pod, both with and without his knowledge.

Congregating around the officer’s desk.

In response to this claim, Ferguson stated there is no rule or post order addressing such a duty. The duty to prevent inmates from congregating around the deputy’s desk in the housing pods - particularly when the deputy is absent from the officer’s desk - derives from several sources. First, deputies are obligated to search for and prevent inmates from obtaining contraband. The officer’s desk in the residential pods contains contraband which may be readily accessed if the deputy is not vigilant. Such items include: pens and pencils which are used as stabbing tools; highlighters which are used as inhalants; paperclips which are used as escape tools; and clipboards which contain sharp metal parts, which can also be used for stabbing. [Hernandez testimony; *see also* Exh 2-4]. The officer’s desk also contains inmates’ personal information, including whether they are to be separated from certain other inmates, medical information, and other details which inmates might use to target or intimidate other inmates.

Ferguson acknowledged, and the video clearly shows, he was aware six inmates gathered next to his desk while he was upstairs conducting rounds. [Exh. 11 at 11:06:00]. Even after seeing them crowded around his desk, he did not stop them, despite recognizing his obligation to do so. [Ferguson testimony; Exh. 3-14; 3-20; 3-21]. Contraband of the kind kept in the officer’s desk was later found in an inmate’s cell. That discovery was ample evidence of the danger of allowing such assemblies, and of the duty to prevent them.

Second, deputies are obligated to ensure the safety of inmates and their own safety. Allowing a group of inmates to congregate around an officer's desk, in close proximity to sharp objects, endangers the deputy and other inmates. Ferguson acknowledged he could not tell from his position on the second floor what the inmates surrounding his desk were accessing.

Third, not every duty is required to be separately addressed in writing. Such a practice would create an impractical tome, and every situation is different, making it impossible to state in writing every duty for every situation. Nonetheless, basic duties, such as maintaining a safe environment, are explicit in the Agency's rules and regulations,² and are expected to be upheld by every officer. For these reasons, the oft-repeated defense "if a duty is not in writing it is not a duty," is incorrect. Ferguson was obligated to prevent groups of inmates from gathering at his desk while he was conducting rounds. He was aware that a group gathered and failed to prevent or disperse it. He also acknowledged he "wouldn't have that many inmates [around his desk]." [Exh. 4-10]. That failure was a violation of his duty to maintain a safe and secure pod. Accordingly, he failed to pay full attention to his duties in violation of RR 200.9.

Ferguson responded he was not in violation of this rule because he was conducting rounds at the time inmates gathered around his desk, consequently since he was performing a duty, there could be no violation of this rule. [Exh. 6-6]. This claim is patently false. First, it is irrelevant to the Agency's claim. The issue is whether Ferguson allowed inmates to crowd around his desk. He did. Ferguson's follow-up response, that it is impossible to focus on more than one duty at a time, was aptly rebutted by Hernandez, who testified deputies are expected to perform more than one duty at a time in order to maintain safety, just as the driver of an automobile is expected to see an approaching pedestrian, a changing light, and traffic from the left and the right, all at the same time. [Hernandez cross-exam].

Unlocked pod door. The Agency also found Ferguson failed to pay full attention to his duty to secure the pod doors. The Post Order governing Building 22 specifies doors to the pod "shall be secured during the hours of 0600-2200, with the exception of allowing authorized entrance and/or exit." [Exh. 9-3]. The Agency found Ferguson allowed inmates in or out of the pod through an unlocked door in the following instances.

- 10:49:25 – Ferguson placed key near but not in key hole, and door opened;
- 10:49:34 – Ferguson closed door, but did not pull the door closed securely;
- 10:53:16 – Ferguson accompanied an inmate to the pod door, placed his key near the key hole without inserting it, door opened, and inmate left;
- 10:53:25 – Ferguson closed the door without securing it.

[Exh. 10].

Ferguson claimed security specialists manning the door controls remotely may have opened the inmates entering the pod could have had the door opened by a. There were two instances cited by the Agency of inmates entering the pod through an unsecured door: 11:03:17 and 11:07:43.

First, Appellant's explanation, even on its face, does not address or justify the above-cited instances of Ferguson allowing inmates to exit the pod through an unsecured door or failing to secure the pod door after an unsecured access by an inmate. [See Exh. 9-3]. In addition, Ferguson provided no testimony or other evidence that security specialists engage in such practice without communicating with the pod officer. Further, that explanation makes little sense, since such a practice would place pod officers in jeopardy of failing the requirement to

² See, e.g. Exh. 8-1: "Procedures will regulate movement to maintain control, safety and security" and Exh. 9-4: "Making rounds to ensure the pod is safe, secure..."]

search each inmate entering the pod if they were unaware of such remote unlocking of the pod door. In either case, housing officers are required to maintain secured doors to and from the residential pods they control. Ferguson failed to secure the pod door when he opened it, as seen at video time-stamp 10:49:34 and 10:53:16. He also failed to secure the pod door when it was apparent to him that inmates intentionally left the pod door ajar at time-stamp 11:03:20 and 11:07:45 during his shift on February 23, 2017.

Failure to pat-search.

The Agency alleged Appellant's actions in failing to pat search inmates entering or leaving the pod also violated CSR 16-29 R. as it pertains to the following Departmental or Post Orders:³

Denver Sheriff Department County Jail Division – Building 22 Post Orders

D. Pod Officers B, C, D Pods. The Pod Officers shall be responsible for the following, but not limited to:

...
Pat searching all inmates prior to leaving housing unit and upon return (Department Order 4050 Control of Inmates Movement A.2.b.).

and

Department Order 4050.1I – Control Inmate Movement

...
b. Inmates will be “pat” searched prior to leaving a housing area and upon return.

The departmental order governing inmate movement and the post order governing the operation of building 22 require the housing deputy to pat-search every inmate who enters or leaves the pod. As pod officer in 22C on February 23, 2017, Ferguson was required to fulfill those duties.

The Agency cited these instances when Ferguson should have, but did not, pat search an inmate entering or leaving the pod:

- [Exh. 10 @ 10:49:08] - Another deputy left the pod with an inmate without searching the inmate. Ferguson also did not search the inmate.
- [Exh. 10 @ 10:53:16 – Ferguson walked to pod door with an inmate and allowed him to leave without pat-searching him.
- [Exh. 10 @ 11:03:17]: an inmate entered the pod door and spoke with Ferguson, but Ferguson did not pat-search him.
- [Exh. 10 and 11 @11:07:43]: an inmate entered the unlocked pod door while Ferguson was not watching. No one had entered or left since the previous inmate left at 11:03:17. This inmate sat quickly to avoid detection, but Ferguson looked directly at him. The Inmate then hid behind a post. Ferguson looked for him, first to where inmate had been seated, then toward the post and either didn't see him or saw him but did not conduct a pat-search.

Since Ferguson was aware that inmates entered or left without conducting a pat-search, he failed to pay full attention to the duty to pat search each of them, in violation of D.O. 200.9.

³ See also, Denver County Jail General Post Orders: “The Housing Officer shall be responsible for pat searching each inmate when the inmate leaves and returns to the housing unit.” [Exh. 15-3].

Ferguson acknowledged he was trained in the duty to search every inmate entering and leaving the residential pods. He also acknowledged he did not pat search every inmate entering and leaving the pod he controlled on February 23, 2017. [Ferguson testimony; Exh. 3-10]. His acknowledgment, that he was aware of those orders and failed to comply with them, is *prima facie* proof of a violation.

In response to the first cited incident, Ferguson complained he should not be responsible for pat-searching an inmate who is taken out of the pod in the control of another officer. Building 22 post orders require the pod officer – Ferguson - to pat search each inmate who enters or leaves the pod. It is therefore the responsibility of the pod officer to perform the search and not leave it up to another officer. While this constitutes a violation by Ferguson for not enforcing this post order, I do not accord it any weight, below, in terms of the degree of discipline. As a practical matter, it seems a wasteful use of resources to require the pod officer to double-check an inmate who is under the control of another officer.

The second and third failures to search are clear and unmistakable. These failures to pat-search clearly violated the post order and departmental order, above.

Regarding the fourth bullet point above, Ferguson claimed he did not see the inmate enter, and therefore cannot be responsible to pat search him. First, if he had secured the door when he saw the previous inmate enter an unsecured door at 11:03:17, this inmate would not have been able to enter undetected. Second, based on a review of the video evidence, I find it more likely than not that Ferguson did see this inmate after he entered, yet did not pat search him. Finally, even if Ferguson did not see this inmate, the previous two failures-to-search remain a valid basis to find a violation of these post orders.

Ferguson offered another reason for not pat searching every inmate entering or leaving the pod. He claimed it was impossible to fulfill all duties simultaneously and that “no one” pat-searches every inmate who enters or leaves the pod.

The post order requiring the pat search of every inmate entering or leaving is clear and unambiguous. Ferguson presented no testimony of anyone else who complained about such impossibility. He presented no evidence of having complained about the duty as overly-burdensome. On the other hand, the danger of his casual enforcement of these post orders was amply demonstrated by the facts in this case: inmates entered and left freely while it was unknown if they entered or left with contraband which, as Ferguson acknowledged, is the principle reason to search inmates. A mentally unstable inmate created havoc in another building when he left through an unsecured door. Whether Ferguson was directly responsible for the unsecured door through which the inmate left is beside the point. Ferguson’s practice of leaving doors unsecured created the conditions which enabled such unfettered ingress and egress.

In summary, Ferguson failed to prevent inmates from congregating around his desk with the result that contraband was taken by one or more inmates; he failed to secure the pod door as required; and he failed to pat-search each inmate entering or leaving the pod, all as required by duty or order. Consequently, he failed to pay full attention to those specified duties resulting in a violation of DO 200.9, and failed to comply with the requirement to pat search inmates in violation of DO 4050.11 and the Building 22 Post Order, establishing violations of 16-29 R.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-41 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-41.

A. Seriousness of the proven offenses

The video record in this case could be a training video of the dire consequences of failing to comply with the pod officer duties. Contraband was taken, and the result could have been grievous if the contraband taken could be weaponized. Inmates had unfettered access to personal information of other inmates. Inmates, both seen and unseen by Ferguson, entered and left the pod because he failed to lock the door. Inmates could easily have introduced contraband, or taken it out of the pod without detection because Ferguson failed to search them.

Hernandez's assessment of the Ferguson's lapses as having "a pronounced negative impact on the operations or professional image of the Department" is amply justified by the evidence. Under the Agency's disciplinary matrix, that description properly falls into a category C violation which carries a presumptive penalty of a two-day suspension.

B. Prior Record

Ferguson had a verbal reprimand for a minor matter unrelated to charges in this case that was more than five years old. The Agency noted the previous discipline in its Notice of Suspension, but Hernandez admitted "it was [my] mistake... [and] ultimately didn't make a difference. I do not believe the weight of that particular reprimand was aggravating in any way." [Hernandez Direct]. Another prior verbal reprimand was removed from Ferguson's personnel file and also was not a consideration in this case. However, the Agency demonstrated the seriousness of the violations offset Ferguson's otherwise-complimentary record.

C. Likelihood of Reform

The Agency presented no reason to believe Ferguson would be unwilling or unable to amend his non-complying behavior. Pursuant to these determinations under CSR 16-41, the degree of discipline assessed by the Agency falls within the range of alternatives available to a reasonable administrator. In re Economakos, CSB 28-13A, 2 (3/24/14).

VI. ORDER

For reasons stated above, the Agency's two-day suspension of Ferguson, beginning on November 18, 2017, is AFFIRMED.

DONE March 16, 2018.



Bruce Plotkin
Career Service Hearing Officer