

DECISION AFFIRMING TWO-DAY SUSPENSION

ERIC GIVENS, 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 October 4, 2017. The Agency was represented by John Sauer and Kristin George, Assistant City Attorneys, while the Appellant was represented by Daniel Foster, Esq., of the law firm Foster Graham Milstein & Calisher, LLP. Agency exhibits 1-33 were admitted. Appellant's exhibits A-G were admitted. These witnesses testified for the Agency: Appellant; Ms. Ann DelNigro; Deputy Julie Kirkbride; Sgt. Robert Hitchcock; Cap. Michael Jordan; and Shannon Elwell, former Civilian Review Administrator. 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., R., or T.;
- B. if the Appellant violated any of the 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. FINDINGS¹

The Appellant, Sergeant Eric Givens, has been employed by the Denver Sheriff's Department for 23 years. At the time pertinent to this appeal he was assigned to Denver's Downtown Detention Center in the Operations Unit.

On September 8, 2017, Givens's supervisor Captain Phazaria Koonce called Givens to assist her in expediting the arrest of Jamie Webb, who was turning herself in on a warrant for her arrest. Webb is the granddaughter of the former Mayor, Wellington Webb, and niece of Executive Director of Safety Stephanie O'Malley. Koonce was unfamiliar with any aspect of the intake process. She called Givens because he had experience with handling warrants. Givens had never taken anyone into custody on a warrant from the lobby of the DDC and didn't know the process, nor was he familiar with the intake process. [Exh. 2, n. 6].

¹ For additional background to this case see the Findings section in Koonce v. Dept. of Safety, CSA 34-17 (12/20/17) and In re Wilson, CSA 38-17 (12/8/17)..

Koonce told Givens her goal was to expedite Webb's appearance in court. She asked Givens if he still knew people in the NCIC who could expedite the warrant-checking process.

Koonce and Givens met Webb in the DDC lobby. Givens went to the ID bureau to retrieve Webb's warrant. He explained to the civilian agent that he was trying to expedite the process, because the warrant was for the granddaughter of the former Mayor. In her 12 years in the warrants division, the Agent had never been asked to expedite the book-in process for anyone other than for safety reasons, such as a violent inmate. The Agent referred Givens to her supervisor. The supervisor later said it was the first time she had been asked to expedite a warrant because of a family relationship.

Givens told the warrants supervisor he was trying to expedite Webb's warrant so that she could go to court the same day. The supervisor asked her manager to notify the Commander of the unit - Commander Lisa Fair - about the request. Fair accommodated Givens's request. The supervisor told her staff to expedite the process, which meant taking Webb's warrant out of sequence and processing her warrant before any others. The supervisor calculated expediting Webb's warrant saved several hours compared with the normal process.

Givens went to the Intake Unit before returning to the lobby to meet Koonce and Webb. He asked Deputy Kirkbride for Webb's paperwork, announcing "I'm going to go take it to Records to try and get her to court the same day." Deputy Kirkbride felt it was not her place to question superior officers Koonce and Givens, about the failure to follow normal procedures in the Intake area, but the incident created widespread discussion about the special treatment afforded Webb. Givens returned to the DDC lobby to meet Koonce and Webb with Webb's now-processed warrant.

The normal procedure for a self-reporting arrestee is to provide photo identification. The Information Officer then calls Intake and an officer comes to the lobby to handcuff, pat down the arrestee, and walk them back to Intake. The inmate is escorted through metal detectors, with emptied pockets, and everything metal is removed. The inmate is searched again by facing the wall on footprints painted on the floor, and a deputy searches them head to toe. The deputy then passes a wand called a Transfrisker over the arrestee's entire body to search for metal. Deputies also check inside of the mouth, bare feet, and shoes and socks. Arrestees then walk through another metal detector, then stand for their photograph, after which they sit in a waiting area while their cell assignment is determined. In short, the intake process is extensive and exacting in order to maximize security and to avoid security risks.

Koonce conducted a required cursory search of Webb, but did not handcuff Webb when she took custody of her in the lobby as required. Koonce and Givens walked Webb the wrong way, against the normal inmate processing direction, to the Intake area, did not have Webb pass through the metal detector, did not use a Transfrisker, did not thoroughly pat-search her as required in the Intake area, and did not require Webb to remove metal beads from her hair.

Intake Deputies Kirkbride and Pohl told Sergeant Hitchcock, a 22-year veteran, that Koonce and Givens were "walking somebody through." [Exh. 9-2]. Sgt. Hitchcock intervened, announcing "we're not walking anyone through." Givens protested "it's Mayor Webb's granddaughter," but Hitchcock replied, "I don't care about that, she's not walking through." Hitchcock later said it was not Koonce's or Givens's function to take an inmate to Intake and described their route as "'cross-contamination' because

everybody that's coming out already has their stuff and should be heading out... it's not an in-door."

Deputy Britton, also assigned to the Intake post, assumed Webb was being given a tour by Koonce and Givens since she was not handcuffed or searched. Deputy Sawyer approached Britton, telling him "that is former Mayor Wellington Webb's granddaughter and they want us to rush her through and this is bullshit and this is what Frank Gale got fired for and I'm not getting fired for it." ²

Givens told Sgt. Jordan that Webb needed to be rushed through the process. Jordan replied "we don't do that anymore. That's an unlawful order." The request reminded Jordan about the Gale case. He was sufficiently concerned to contact Captain Gutierrez, who told him to treat Webb like anybody else, and advised Jordan to call Chief Oliva to advise him what was happening. Deputies Jarock and Vigil overheard the exchange between Jordan and Givens and said about the attempted curtailed procedure "that isn't right." They approached their supervisor, Hitchcock about it and were told "we don't rush anybody through the process; she will get processed just like everybody else." Jarock and Vigil, who dealt with the ID Bureau daily for a long time said, "we've never seen anybody's fingerprints clear that quick, even on days like holidays when we're really slow."

While in the Intake area, Givens and Koonce saw Deputy Foos, a 27-year deputy with eight years in the Records Unit. Givens advised Foos that the ex-Mayor's granddaughter was in Intake booking and asked Foos if Webb could be added to the court docket that day. Foos was unable to accommodate the request, explaining it takes 12 hours or more to clear a warrant. Givens had never asked Foos to expedite any other inmate's court appearance.

Later, Sgt. Jordan contacted Chief Oliva about the brouhaha caused by the unusual treatment afforded Webb. Oliva called Koonce and directed her to ensure there was no preferential treatment for Webb. Executive Director of Safety Stephanie O'Malley sent an email to Sheriff Firman directing him to treat her niece the same as any other inmate.

An investigation ensued into alleged misconduct by Givens. During his IA interview, Givens was asked about bringing Webb through Intake without following required procedures. He acknowledged "I don't think we intentionally avoided that process, but maybe the process got left out." [Exh. 19-37]. Asked if he requested Webb's booking to be expedited based on Koonce telling him to do so, Givens replied "Well I wouldn't say 'telling.'" She was asking me if I knew somebody up in NCIC who could kinda speed this process up." He also explained "I don't really think its preferential treatment. I wouldn't say it's a favor because I don't know her. I was just trying to consciously get her through the process a little bit faster because it was asked of me by Koonce, and in my mind I didn't think I was really doing anything wrong or I wouldn't have did it."

Givens was served with a contemplation of discipline letter on March 30, 2017, and an amended notice on April 11, 2017. A contemplation of discipline meeting was held on May 31, 2017, which Givens attended with his attorneys Daniel Foster and Steve Wienczkowski. On June 16, 2017, the Agency served its notice of a two-day suspension on Givens, signed by the decision-maker, Shannon Elwell, Civil Review Administrator [Exhibit 1]. This appeal followed timely on June 21, 2017.

² Sawyer was referring to In re Gale, CSA 02-15 (11/23/15), *aff'd In re Gale*, CSB 02-15A (7/21/16). Gale, a high-ranking officer, was fired for allowing an inmate who was also a Captain in the Agency, to leave out the front door after her court appearance, without following normal and required protocols, then lying about his role in her improper release. Givens was a witness in that case.

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, 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 Givens violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend Givens'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.

The Agency claimed Givens violated this rule by claiming, in conclusory fashion, "he neglected his duty to 'use sound judgment and discretion in the performance of [his] duties.'" This circular reasoning, by quoting Agency Rule/Regulation 200.19, fails to provide notice what wrongdoing is to be addressed, and fails to connect any particular duty with any particular wrongdoing. Elwell's testimony at hearing was not any more helpful in identifying an enforceable duty. She testified Givens's violated this rule in that he neglected his "overarching duty as a member of the department, as well as a supervisor, to abide by the policies and procedures of the department... and to recognize when something was unlawful and respond accordingly." [Elwell testimony]. The Agency's conclusory statements failed to establish a violation of 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.

Denver Sheriff Departmental Rules and Regulations

200.19 Performance of Duties

Deputy sheriffs and employees shall use sound judgment and discretion in the performance of duties.

I infer from the Agency's notice of discipline, that Givens was alleged to have violated this departmental order when "he neglected his duty to 'use sound judgment and discretion in the performance of [his] duties....'" [Exh. 2-26]. Determining that a violation occurred by citing a rule ignores the obligation to connect conduct to the rule, and presents no claim.

The notice also alleged Givens "used poor judgment by blindly following Captain Koonce's order to bestow preferential treatment upon an inmate due to her familial associations." The second sentence suggests a violation in that Givens "blindly followed" Koonce's request.

As noted below, an officer must refuse to follow an illegitimate order or request. Givens claimed the refusal to obey Koonce may also have subjected him to discipline for failing to

obey an order. This “damned if you do, damned if you don't” allegation describes a legitimate conundrum for Agency subordinate officers. The obligation to distinguish between the two is precisely what RR 200.19 requires. Had other and more subordinate officers been confused about the propriety of Givens's conduct, Givens may have had a legitimate claim. But, there was widespread recognition that Givens's actions were somehow wrong, albeit without specifying this rule. That innate sense of “this is wrong” demonstrated the kind of judgment under this rule that Given should have, but failed to use. Similarly, the widespread and contemporaneous refusals to comply with Givens's and Koonce's wrongful orders actions demonstrated those officers' discretion to challenge those orders and actions. Givens's failure to exercise that same discretion, here to refuse an illegitimate order, was a violation of RR 200.19.

300.21.2 Impartial Attitude

Deputy sheriffs and employees shall maintain a strictly impartial attitude in the performance of their duties.

This rule includes a prohibition against the preferential treatment of arrestees and inmates. In re Wilson, CSA A038-17 (12/8/17); In re Koonce, CSA A034-17 (12/22/17).

Givens was a witness in the Gale termination. Thus, in addition to other officers' awareness that providing preferential treatment is improper, Givens was specifically on notice of the impropriety of preferential treatment due to his direct involvement in the Gale case.

Givens stated the preferential treatment rule in effect at the time applied only to members of the Agency, and was only later amended to include family members of Agency relatives. While true, that rule is not this rule. Many other members of the Agency, on September 8, 2017, inherently recognized conduct prohibited by RR 300.21.2 – the preferential treatment of any inmate, particularly one with some degree of celebrity status due to her family.

Givens claimed he simply carried out a request by his Captain and did not see any wrongdoing by pushing for Webb's expedited new-inmate processing. He also claimed his background in the military and in the Agency taught him to follow orders unquestioningly; however, in both military and quasi-military employment such as the Denver Sheriff's Department, it is axiomatic that one can and must refuse an illegitimate order. [See 10 U.S.C. § 890 art. 90; see also DSD RR 200.13]. Deputy Vigil recognized Givens's actions as such. “We don't do that [preferential treatment] any more... That's an unlawful order, Sergeant.” Hitchcock refused Givens's request to expedite Webb's booking process. Deputies Jordan, Kirkbride, Sawyer, Jarok and Britton all recognized it was improper to expedite an inmate's intake, simply based on her family name. At a minimum, given the number of officers who challenged Givens's actions, he should at least have been alerted to seek clarification from a superior officer other than Koonce. Thus, while put in a difficult position by Koonce's request, Givens should have, but failed to recognize his insistence on expediting the clearance of Webb's warrant, his participation in shortcutting security protocol for processing Webb, and his attempt to have a Records deputy place Webb on the same-day court docket, improperly provided preferential treatment which demonstrated a partial attitude in violation of 300.21.2.

300.11.6 Conduct Prejudicial

Deputy Sheriffs and employees shall not engage in conduct prejudicial to the good order and effectiveness of the department or conduct that brings disrepute on or compromises the integrity of the city or the Department or conduct unbecoming which:

a. May or may not specifically be set forth in the Department rules and regulations or the Operations Manual; or

b. Causes harm greater than would reasonably be expected to result, regardless of whether the misconduct is specifically set forth in Department rules and regulations or the Operations Manual.

CSR 16-29 T. Conduct which is or could foreseeably:

- 1. Be prejudicial to the good order and effectiveness of the department or agency;**
- 2. Bring disrepute on or compromises the integrity of the City; or**
- 3. Be unbecoming of a City employee**

Without specifying the connection between particular conduct and any particular portion of these rules, the Agency alleged Givens was in violation of both 16-29 T. and Agency RR 300.11.6 when he:

...placed subordinates in jeopardy of unjustified discipline and led to an environment in which "all hell broke loose" among veteran officers who were fearful of being disciplined and held responsible for carrying out Sergeant Givens's and Captain Koonce's orders that were so clearly in flagrant violation of commonly understood policies and rules. The ensuing "commotion" and "rumblings" reverberated throughout the shocked and disturbed Intake Unit and ultimately the Department. The IAB file contains multiple complaints and statements by involved deputies and sergeants expressing their shock and dismay at being placed in a position where they would have to violate policy at the behest of a superior officer. Therefore, not only did Sergeant Givens engage in misconduct that brought disrepute on the Department, it also compromised the Department's integrity, and was conduct unbecoming of one who is entrusted to providing "quality leadership."

[Exh. 1-27].

Despite the vagueness of the first part of the paragraph above, the second part of the paragraph described concrete and justifiable concerns by various officers in reaction to seeing Givens cut corners and subvert post orders in his attempt to expedite Webb's appearance in court. Givens's shortcuts were, for that reason, prejudicial to the good order (i.e. not cutting corners) and effectiveness (in maintaining security) of the Agency in violation of RR 300.11.6.a. The same evidence proving a violation of this subpart also proves, for the same reasons, that Givens violated CSR 16-29 T.1., conduct prejudicial to the good order and effectiveness of the Agency.

The Agency presented no evidence that expressly or readily implicated RR 300.11.6, subpart b., above. Thus, no violation was established under that subsection; nor did the Agency present sufficient evidence to link particular conduct to subparts 2. or 3. under CSR 16-29 T. Any allegation that inferred a violation of either of those sections fails for lack of notice and lack of proof.

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

Givens's actions unjustly alarmed a large number of sergeants, deputies and civilian employees with whom he crossed paths on September 8, 2016. Some reacted with anger and refutation of Givens's actions rather than fear, but it is apparent those varied reactions were all borne out of a legitimate concern that Givens's actions improperly compromised security and placed them in jeopardy of discipline, as several officers recognized by their references to the Gale case.

The Agency determined the degree of discipline according to its disciplinary matrix. Under that standard, Givens's conduct fell into a Category C violation. Conduct under this category is described as follows.

Conduct that has a pronounced negative impact on the operations or professional image of the Department, or on relationships with other deputy sheriffs, employees, agencies, or the public.

[Exh. 2-89].

By comparison Category B conduct is described in the matrix as:

Conduct that has more than a minimal negative impact on the operations or professional image of the department; or that negatively impacts relationships with other deputy sheriffs, employees, agencies or the public.

[Exh. 2-88].

Givens shortcut established Intake Unit standards, and ignored others. The Agency aptly categorized those actions as having a pronounced negative impact on those operations. Similarly, the substantial concerns of many deputies and sergeants affected by Givens's actions were correctly deemed to have a pronounced negative effect on relationships with those officers. For those reasons, the Agency's election of Category C, with a presumptive penalty of a two-day suspension, was within the range of options available to a reasonable and prudent administrator, and consistent with CSR 16-41. In re Economakos, CSB 28-13 (3/27/14). The extent of Givens's running roughshod over established safety procedures, and jeopardizing fellow-officers careers, merits consideration as an aggravating factor under both the Agency's matrix and pursuant to CSR 16-41.

B. Prior Record

Givens had no prior discipline in his 23 years with the Agency. That record was noted in the notice of discipline, and deserves to be considered as a mitigating factor.

C. Likelihood of Reform

To some extent, Givens accepted responsibility for his misconduct. He stated "maybe the process got left out," but he also denied wrongdoing. It is, therefore, unknown to what extent Givens is likely to recognize and avoid similar wrongdoing in the future.

VI. ORDER

The Agency's two-day suspension of Givens, beginning on July 12, 2017, is AFFIRMED.

DONE December 28, 2017.



Bruce A. Plotkin
Career Service Board Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR 19-60 et seq., within fifteen 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 following:**

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.