

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 64-11A

In the Matter of the Appeal of:

ANNE KELLY,

Appellant/Petitioner,

v.

DEPARTMENT OF SAFETY, DENVER SHERIFF DEPARTMENT, and the CITY AND COUNTY OF DENVER, a municipal corporation,

Agency/Respondent.

DECISION AND ORDER

Appellant Anne Kelly was a Denver Deputy Sheriff. The essential duties of duties of deputies such as Ms. Kelly involve the care, custody and control of inmates.

Appellant got into a physical altercation with an inmate. During that altercation, the inmate scratched Appellant. Approximately one minute after the cessation of the altercation, Appellant asked the inmate to remove her shoes. The inmate took off one of her shoes and flung it away.¹ In response to the fling, Ms. Kelly slapped the inmate in the face.

During the investigation into the incident, Kelly explained to Internal Affairs that the slap was a justified act of anticipatory self-defense. The Manager of Safety did not see things that way, and brought charges against Kelly for both the slap and then lying about the justification for the slap. The charges resulted in the Manager dismissing Appellant.

Appellant appealed her termination to a hearing officer. The Hearing Officer sustained three of the rules violations brought against Appellant. The Hearing Officer also concluded that discharge was an appropriate discipline given Appellant's misconduct and disciplinary history.² Appellant filed a timely Petition for Review.

Appellant first argues that the Hearing Officer committed an error of law in failing to set out the necessary elements of a CSR 16-60A violation. We do not believe, however, any such "setting out" is required, nor do we believe that it constitutes a proper ground for appeal or reversal of the Hearing Officer's decision.

¹ The shoe was not thrown at Ms. Kelly.

² Which, remarkably, includes a prior instance of Appellant slapping an inmate over a shoe.

Appellant further argues, though, that the Hearing Officer utilized an improper standard for proving a CSR 16-60A violation. We interpret this argument as one alleging an erroneous rule interpretation. As such, we have the authority to entertain this argument under CSR 19-61(B).

The Hearing Officer stated:

A violation under this rule [16-60A] occurs where an employee neglects to perform a job duty which the employee knows she is supposed to perform. In re Campos, CSA 56-08 (CSB 6/18/09).

Appellant claims, however that the standard the Hearing Officer should have employed was the one enunciated in *In re Lottie*, CSA 132-08, 2 (3/9/09), which states:

To sustain a violation under CSR 16-60 A, the agency needs to establish each of the following by a preponderance of the evidence: 1) the appellant had an important work duty; 2) the appellant was heedless or unmindful of that duty; 3) no external cause prevented the appellant's performance of that duty; 4) the appellant's failure to execute his duty resulted in significant potential or actual harm.

In fact, we have already adopted the standard set out by the Hearing Officer in this case. The Hearing Officer's case citation properly notes that *Campos* is a decision of this Board. Board decisions, needless to say, take precedent over hearing officer decisions. *Lottie* was a hearing officer decision issued before we issued *Campos*. We believe our language in *Campos* is still correct and controls in the instant case. Consequently, because the Hearing Officer set out the proper standard for proving a CSR 16-60A violation, and Appellant does not even argue that said standard was not met, we see no reason to overturn the Hearing Officer's conclusion that Appellant violated CSR 16-60A.

We interpret Appellant's next argument to be that there was insufficient evidence supporting the Hearing Officer's conclusion that Appellant violated CSR 16-60(E) in that, she alleges, there is no proof that she made false statements about her rationale for the slap, with any intent to deceive. Again, we disagree.

Under CSR 19-61(D), we overturn factual findings for insufficiency of evidence where those findings are "clearly erroneous." A factual finding is clearly erroneous when it is unsupported by substantial evidence in the record considered as a whole; that is, where the factual finding has no support in the record. *In the matter of the Appeal of: Ryan Murphy and the Department of Safety*, No. 09-11A.

Here, we believe there is considerable support in the record for the Hearing Officer's conclusion that Appellant made false statements to investigators, concerning the slap, with intent

to deceive, in violation of CSR 16-60(E). As the Manager of Safety points out in his brief, the Hearing Officer found:

“Kelly claimed she slapped Tierney proactively out of fear that Tierney may have possessed some weapon that gouged her arm. Even if Kelly’s concern were genuine, it makes little sense that Kelly turned her back to an inmate in possession of a weapon in order to retrieve a shoe. Moreover, Kelly just finished frisking Tierney when Tierney threw her shoe and she did not re-frisk Tierney after she was ‘gouged,’ further diminishing the likelihood that Kelly was concerned about a weapon. [Exhibit 8 Video]. Also, as evident from Kelly’s handling of Tierney, Kelly had no fear of Tierney striking out with a weapon, either before or after Tierney scratched her.” (Hearing Officer’s Decision at 3).

So while Appellant offered justification for her slap of the inmate, neither the Agency, nor the Hearing Officer, afforded any credibility to the explanation. Appellant’s assertion that her explanation of an anticipatory defensive action was her “honest belief” simply does not prove that the Hearing Officer committed any error. Neither the Agency nor the Hearing Officer was obligated to accept Appellant’s claim that her explanation for the slap was truthful.

The Agency found the explanation to be untruthful. The Hearing Officer, after having heard the same explanation and having heard evidence (including the testimony of Appellant) concerning the circumstances surrounding the incident, came to the same conclusion as the Agency. It is the Hearing Officer’s province to weigh the credibility of witnesses and we will not re-weigh credibility nor will we make our own credibility determinations. Our review of the record leads us to conclude that the Hearing Officer was reasonable in concluding that the Appellant’s excuse and justification for slapping the inmate was not credible. The record supports the Hearing Officer’s conclusion that Appellant violated CSR 16-60(E) in that she committed acts of dishonesty in her attempts to justify her misconduct.³

Finally, Appellant argues that she did not use excessive force on the prisoner. In her brief, she neither connects this argument to one of our jurisdictional grounds for review, nor to a particular rules violation. Our jurisdiction over this issue is questionable, but we choose to address it out of an abundance of caution, the importance of the issue, and to emphasize two matters in particular.

³ To the extent Petitioner was arguing that as a matter of law, the Hearing Officer was required to make a specific finding that Appellant intended to commit deceptive acts, we hold: 1) this does not amount to grounds for overturning the decision; and 2) we believe there is no such requirement. We believe the rationale provided by the Hearing Officer is sufficiently clear so that we can conclude that he did, in fact, determine that the statements made by Appellant were lies, that is, that they were uttered with the intent to convey false information.

Appellant urges reversal of the Hearing officer's findings on the excessive force issue because, she claims, the Agency's expert witness, "admitted that Ms. Tierney was engaged in "active aggression" when the slap occurred." We find this assertion to be a blatant misrepresentation of the record. We agree with the Manager that in the portion of the transcript cited by Appellant in making this claim, the witness was, for the most part, simply answering questions about the general definition of "active aggression." In fact, the witness testified as to the precise opposite of what Appellant has represented. (See, Hearing Transcript. Vol. I, p. 177). Based on this testimony alone, the Hearing Officer acted well within his authority when he determined that the Appellant had engaged in the use of excessive force. This conclusion is plainly supported by substantial evidence in the record.

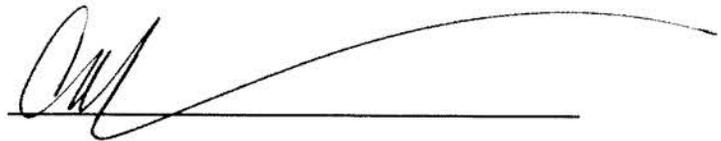
We also take issue with Appellant's characterization of the role of the Manager of Safety as Monday morning quarterbacking and her questioning of the Manager's qualifications to judge her actions. The Denver City Charter grants to the Manager of Safety the authority to "exercise the powers and perform the duties now required or that may hereafter be required by the Constitution or the general laws of the State to be exercised and performed by the Sheriff." (Charter Section 2.6.1). The Charter envisions civilian oversight of the Fire Department, Police Department and Sheriff's Department. The Manager of Safety is not a member of any of these departments, and there is no Charter requirement that the Manager have any background in firefighting or law enforcement to be qualified to serve as Manager of Safety. What Appellant derisively refers to as Monday morning quarterbacking, we think, is more appropriately characterized as the Manager carrying out the responsibilities assigned to him by the Charter.

Appellant has offered us no sound reason why we should overturn the Hearing Officer's finding that Appellant used excessive force when she slapped the inmate. Consequently, we decline to do so.

For the above-stated reasons, we AFFIRM the Hearing Officer's decision in its entirety.

SO ORDERED by the Board on January 3, 2013, and documented this 4th day of April, 2013.

BY THE BOARD:

A handwritten signature in black ink, consisting of a stylized, cursive 'M' followed by a long, sweeping horizontal line that extends to the right.

Chair (or Co-Chair)

Board Members Concurring:

Colleen M Rea

Derrick Fuller

Amy Mueller

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **ORDER** on April 5, 2013, in the manner indicated below, to the following:

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