CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER,
STATE OF COLORADO

Appeal No. 51-14A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

WILLIAM LEWIS,
Respondent-Appellant,

vs.

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

Denver Deputy Sheriff Thomas Ford punched an inmate. Deputy William Lewis, who was working with Ford at the time of the punch, failed to report the punch and some other facts associated with the incident, and included in his report some matters that were not accurate. The Department of Safety and the Denver Sheriff's Department (Agency) believed Deputy Lewis was being intentionally deceptive in the writing of his report and discharged him.¹

Deputy Lewis appealed his discharge to a hearing officer. The Hearing Officer determined that Deputy Lewis did not see Deputy Ford punch the inmate and that the policy concerning reporting was, essentially, ambiguous as to whether it required a deputy to report matters he learned of second-hand after the fact. The Hearing Officer also determined that other matters left out of Deputy Lewis's report and some inaccurate facts contained in the report were not omitted or made with any intent to deceive. Ultimately

¹ Deputy Ford was also discharged. He too appealed his discharge. (Case no. 48-14)
the Hearing Officer ordered Deputy Ford’s reinstatement and imposed a penalty of a six-day suspension for rules violations committed by Deputy Lewis’s inaccurate reporting.

The Executive Director of Safety (EDOS) has appealed the Hearing Officer’s decision. After a thorough review of the record and the arguments made by the parties in support of their respective positions, we AFFIRM the Hearing Officers decision, except as it pertains to one evidentiary matter, as will be discussed below.

The Agency first takes issue with the Hearing Officer’s decision where she found that Deputy Lewis was not required to report matters he had simply learned about after the fact but had not witnessed himself. In support of this argument, the Agency refers to Departmental Order (D.O.) 1115.1A (Reporting System) which states in relevant part:

It is the policy of the Denver Sheriff Department (DSD) that all employees who participate, witness, or are informed of an incident complete and submit a written report detailing the information as soon as possible...written reports shall be completed on the Jail Management System...

We believe, however, that there is sufficient ambiguity created by the entire collection of various policies so that the Hearing Officer could reasonably conclude that Deputy Lewis had not violated policy by failing to report matters he was told about but did not witness personally.

First, we must note that while the Hearing Officer recognized the above-cited portion of D.O. 1115.1A, she also acknowledged some additional language from that Order. Specifically, she also referenced the following language from the Order which requires

2 Such as, for example, the punch Deputy Ford administered to the inmate.
that reports:

shall be accurate and limited to factual events free from opinion or prejudice and detail all of the necessary information to provide a complete depiction of the incident, to include actions both taken and observed.

We believe this language creates ambiguity within D.O. 1115.1A. While it is a possibility, we believe a second-hand recounting of an incident will rarely contain all necessary information to provide a complete depiction of an incident, including both actions taken and observed. And we would ask, observed by who? The person reporting on a second-hand recounting did not observe anything. Further, the person reporting on a second-hand recounting would never be in a position to know whether that second-hand recounting actually provided a complete description of the incident. Similarly, the person making a report from a second-hand accounting would have no way of knowing if what he or she was being told was “free of opinion or prejudice.”

The Hearing Officer, in her decision, noted other sources of policy that could reasonably lend credence to Deputy Lewis’s belief that he was required to include in his report only matters that he personally witnessed.

The Hearing Officer first referenced the Agency’s Disciplinary Handbook.

(Exhibit 21-71) It states, in part:

Due to the importance of ensuring that only appropriate force is used by Denver deputy sheriffs, the Department has created policies to ensure that all uses of force are reported by both the deputies who use force and those who witness others’ use force as well. The Department requires witnesses to uses of force to report their observations in order to ensure that Department managers are able to tightly control the application of force and ensure accountability for the Department as a whole. Deputies who use force or witness force being used need to memorialize the incident while their memories are fresh in order to protect themselves, other deputies and the Department from liability for unjustified claims of inappropriate force.
This portion of the handbook supports Deputy Lewis’s belief and the Hearing Officer’s finding. This section of the handbook contemplates only two groups of people filing Use of Force Reports; “deputies who use force” and deputies “who witness other’s use of force.”

The Hearing Officer next took note of D.O. 200.2 Use of Force Reporting, which states, “Deputy sheriffs and employees, who use force or witness the use of force, shall immediately report the use of force to a supervisor and complete a written report.” Again, this D.O requires only two groups of people to report a use of force; those who use force and those who witness the use of force. This D.O. does not require persons who hear about a use of force to report to file a use of force report.

Finally, the Hearing Officer referenced Departmental Order 5011.1M, which itself references a portion of Colorado’s Criminal Code which provides, “an officer who witnesses another officer using excessive force must report it....” 3 The law does not appear to require an officer who merely learns of another officer’s use of excessive force to report that use of force.

The record further demonstrates that Deputy Lewis was not the only person who believed that reports needed to be written based on first-hand knowledge or observation. Other Deputies and Sergeants testified truthfully (in the eyes of the Hearing Officer), that they only file reports on things they saw or things they knew. As one sergeant testified to at hearing, “if they [deputies] didn’t see anything, there’s nothing to report.”

We, of course, acknowledge that a mistaken belief about a policy neither changes

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3 C.R.S. 18-8-802
that policy nor excuses one from following that policy. Implicit in this, however, is the assumption that the policy is clear and adequately disseminated. Based on the record before us, we believe the policy which the Agency claims requires one to file a report on an incident not personally observed by the reporter is not sufficiently clear and has not been sufficiently or adequately disseminated so as to justify discipline against Deputy Lewis for not adhering to that policy.\footnote{Based on the record before us, we cannot even say that this, in fact, is the Agency's policy. And we will not defer to the Agency's selective interpretation of its policy where, as here, we find the policy to be ambiguous, if not actually contradicted by other policies. As noted above, even first line supervisors were unaware of the policy as now interpreted by the Agency. This ambiguity or misunderstanding can be corrected easily with an explanatory bulletin disseminated to all Agency employees.}

The Agency next argues that the Hearing Officer erred when she concluded that the omissions and inconsistencies contained in Deputy Lewis's report were not intentional. It is true, as the Agency asserts, that the issue of intent, in relation to the stated rules violations, is an ultimate issue for which we can make our own, independent judgment. In doing so, however, we hold that the Hearing Officer was correct. After reviewing the record, this Board has come to the conclusion that Deputy Lewis did not intend to deceive. Our reading of the Agency's argument is that any time there is something missing from a statement, or any time there is something inconsistent in a statement, it is the result of an intent to deceive. We do not subscribe to this theory. The fact that Deputy Lewis's statements could have been more complete, could have contained more facts, or may even have been proven to be wrong in part does not mean as a matter

\footnote{The Hearing Officer also found that an investigation of the incident conducted by Denver Police Internal Affairs revealed that one of two sergeants on the scene that night had been informed by Deputy Ford that he had punched the inmate. Neither sergeant made a report of the punch. Neither sergeant was disciplined for failing to write such a report. This failure to discipline one of the sergeants is either further evidence of the ambiguity of the reporting rule, or evidence of discipline arbitrarily being imposed against Deputy Lewis (given a lack of explanation in this record for the difference of treatment).}
of law that he was being deceptive or that he intentionally omitted facts.

The Hearing Officer heard all of the same facts the Agency now claims proves that Deputy Lewis was intentionally dishonest. She, however, did not reach that conclusion. We believe she was correct in her assessment.  

The Agency further argues that the Hearing Officer's decision sets bad policy precedent by allowing employees to omit key facts in their use of force reports. But the key facts which the Agency claims the employee was allowed to omit were facts the Hearing Officer determined the employee did not know. The Hearing Officer did not permit Deputy Lewis to omit key facts from his report.

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6 We are concerned that the Agency has transformed officer statements into lie detector tests. The Agency, of course has the right, duty and obligation to expect its officers to be totally forthcoming and to be absolutely truthful and honest when providing statements concerning their official duties. But what we believe we see happening is the Agency giving microscopic scrutiny to every word of every officer statement, not to assist it in resolution of the incident being investigated, but rather, to see if it can come up with a reason to discipline its employees for dishonesty. We do not believe the report-writing requirements were ever intended to act as constant, non-stop honesty tests, as the Agency appears to be using them. While it is, of course, critical that reports be made accurately and honestly, to the extent that observations, perceptions, and the significance of events may differ in reasonable people; the fact that a report may be missing a fact, or several facts which management believed ought to be in the report does not necessarily mean that the reports were made dishonestly, or even that the reports are inaccurate. If Deputies intentionally omit something from a report they know needs to be in the report; if they make intentional misrepresentations; if they attempt in any way to mislead, either by omission or commission, then discipline is most certainly deserved. If reports are plainly inaccurate due to intent or negligence, discipline may also be appropriate. If, however, all that we are presented with is a report that might be more complete, or is less than complete for innocent reasons, then we question the need for imposing discipline.

7 We see an additional problem with this argument to the extent that it assumes that everyone would have the same understanding of what the key facts would be to each incident. For example, in a group of people witnessing an auto accident, one may report a key fact to be ice on the road, while another may report the speed of the vehicles, while another may note that someone was texting, while another person might find the angle of the sun in the drivers' eyes important. If each person does not report all of these factors, were they intentionally omitting key details? We think not. We simply attempt to point out that reasonable professionals may, in some instances, differ as to what constitutes a key fact. The potential problem here is that a reasonable disagreement as to what amounts to a key fact can put a deputy's job in jeopardy — and management's determination of what amounts to a key fact is always made after the fact. We do not intend to convey that management cannot or should not make these key fact determinations and exercise discretion in determining that an officer's report contains material omissions or errors. We only express the hope that management will exercise that discretion in a reasonable and thoughtful manner.
The agency next claims that the Hearing Officer did not have sufficient evidence to conclude that that Appellant had no knowledge of Ford's use of force, and that he did not have a duty to report the use of force by Deputy Ford. The record reveals otherwise. The Hearing Officer had sufficient record evidence to conclude that Deputy Lewis did not know of Deputy Ford's punch because that was what Deputy Lewis testified to. She found his testimony credible. This credibility determination was within the Hearing Officer's province. Deputy Lewis claimed he did not see the punch at the time it was thrown. The video of the incident does not provide indisputable evidence to the contrary. The Hearing Officer's finding that Deputy Lewis did not see the punch is supported by record evidence.

Similarly, as we noted above, we believe there is more than ample evidence in the record to support the Hearing Officer's finding that Deputy Lewis was not required to report the punch he had only been told about but did not witness. In fact, in weighing all of the evidence in the record, it would appear to us that there is much more evidence in the record supporting Deputy Lewis's understanding of the policy than there is supporting the Agency's interpretation of the reporting policy.

Finally, though it does not affect our final decision in this case, we address an evidentiary issue raised by the agency in its appeal. The Hearing Officer, over objection by the Agency, admitted into evidence a letter written by Denver District Attorney Mitch Morrissey explaining why he would not be bringing criminal charges against Deputy Ford. We hold, without hesitation, that as a matter of policy, the letter (Exhibit OO), should not have been admitted into evidence.

First, the letter is plainly hearsay, and the fact that someone received the letter (even if it was received as part of their official duties) does not bring the letter under any
exception to any hearsay rule. Second, the letter is plainly prejudicial, while at the same time, having no probative value to the ultimate employment issues which must be decided by the Agency, the Hearing Officer and this Board. Third, the District Attorney's opinion as to whether he believes he can prevail in a criminal prosecution is simply irrelevant. It adds nothing to the Agency's, nor our determinations of the issues. Fourth, admission of the letter is plainly unfair to the Agency, since the proponent of the Exhibit never produced the District attorney for cross examination. The District Attorney conclusions and opinions are not afforded any presumption of correctness, or even reasonableness, simply because they are the opinions of the District Attorney. Should the District Attorney have written a letter stating that he intended to prosecute the employee, accompanied by an explanation as to why he thought the employee was guilty, we are quite sure the employee would (justifiably) be raising hell about the admissibility of the letter, and we seriously doubt the Hearing Officer would be allowing that letter into evidence, probably for all of the reasons we have stated herein. Finally, admitting the letter into evidence and allowing questioning on the letter was a monumental waste of the parties' and the Hearing Officer's (and hence our) time. To be perfectly clear, we do not expect to see any similar letter in any of our hearings in the future.

For the above reasons, the Hearing Officer's decision imposing a six-day suspension is AFFIRMED.

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8 Even if the District Attorney had been available for cross examination, we doubt that would change our mind about the utility of the letter for the purposes of our hearings.
SO ORDERED by the Board on September 17, 2015, and documented this 5th day of November, 2015.

BY THE BOARD:

Chair (or Co-Chair)

Board Members Concurring:

Gina Casias (Co-Chair)

Patti Klinge

Derrick Fuller

Neil Peck