

DECISION AFFIRMING 10-DAY SUSPENSION

SONYA LEYBA, Appellant,

v.

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

I. INTRODUCTION

The Appellant, Sonya Leyba, appeals her 10-day suspension from the Denver Sheriff's Department (Agency), assessed on May 9, 2016, for alleged violations of specified Career Service Rules and an Agency regulation. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on July 28 and December 16, 2016. The Agency was represented by Assistant City Attorney Richard Stubbs, while the Appellant was represented by Reid Elkus Esq. and Steven Mandelaris Esq., of the law firm Elkus & Sisson P.C. Agency Exhibits 1, 2, 4, 5, 10-15, and 17 were admitted. These witnesses testified for the Agency: Civilian Review Administrator Shannon Elwell, Security Specialists Monica Zavala, Gabrielle Deniro, Deputies Jeffrey Gibbs, Jharquis Scott, and Sergeant James Szumowski. The Appellant testified on her own behalf, and recalled Deputy Scott during her case-in-chief.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules: 16-60 B; or 16-60 L;¹
- B. if the Appellant violated one or both of the aforementioned Career Service Rules, whether the Agency's decision to suspend her for 10 days conformed to the purposes of discipline under CSR 16-20.

III. FINDINGS

The Appellant, Sonya Leyba, has been a Denver Deputy Sheriff for nine years. At the time pertinent to this appeal, she was assigned to the Court Services Downtown Division from 7:30 AM to 5:30 PM, where her main duties, as for all deputies, were to provide for the care, custody and security of inmates and the public.

On January 5, 2015, Leyba was directed to relieve Security Specialist Monica Zavala from 3:00 PM to 5:00 PM, in the Court Services Control Center. Security Specialist Deniro remained in the same room as Leyba, but was re-assigned to another post. Leyba was familiar with the

¹ The Career Service Rules have been revised since this appeal was filed. Because the previous version of the rules was in effect when discipline was assessed, the earlier version applies here.

Control Center post, the Sierra Security system to run it,² and its requirements, as she had worked that post successfully on an intermittent basis between 50 and 100 times. [Leyba testimony; Szumowski testimony; Deniro testimony].

Among other post duties, the deputy or security specialist at the Control Center, operates elevators to transport inmates to and from their various courtroom appearances. They are also responsible for ensuring inmates placed onto the elevators at the courtroom level actually arrive at the basement and leave the elevator. [Exh. 4].

A deputy at the courtroom level may press a call button for an elevator to return an inmate to the basement level, from where the inmate is returned to his/her cell, but neither the courtroom deputy nor the inmate can operate the elevator by pushing a button inside the elevator. The elevator can be operated only by the deputy or security specialist manning the Sierra Security System post within the Control Center. The Sierra Security System has several monitors to view inside and outside the elevator. Two cameras inside the elevator are fixed. Two cameras outside the elevator may be maneuvered by the Control Center officer seated at the Sierra Security System desk.

Inmate CQ had a court appearance in a courtroom on the 4th floor. After his appearance, a courtroom deputy placed him in an elevator at 16:49:08 at the courtroom level in order to return him to his cell. [Exh. 10; Exh. 1-5]. Leyba was on duty in the Control Center at the Sierra Security system at that time. She did not check the elevator while CQ remained unattended. She left the Control Center at 16:57, eight minutes after CQ was placed on the elevator. [Exh. 11]. CQ remained unattended in the elevator until 17:25:34, which was another 28 minutes after Leyba left, for a total of 36 minutes, until Sergeant Szumowski saw he was not in his cell and investigated.

Following the investigation, the Agency held a contemplation of discipline meeting on April 18, 2016. [Exh. 1-2]. Leyba attended with her attorney. She denied she was responsible for the inmate being placed in the elevator, and stated she has had no training regarding the Control Center or the operation of its cameras.

The Agency suspended Leyba for ten days on May 9, 2016. This appeal followed in timely fashion on May 10, 2016.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper as the direct appeal of a suspension. CSR §19-20. 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 Leyba violated one or both of the cited Career Service Rules, and to prove the degree of discipline complied with CSR 16-20. The standard by which the Agency must prove each violation is by a preponderance of the evidence.

² The Sierra Security system enables an officer to monitor and control doors, cameras, phone, and radio throughout the Lindsey-Flanigan Courthouse. [Szumowski testimony]. Leyba occupied that post during part of the time CQ was unattended in one of the elevators controlled from that post.

C. Career Service Rule Violations.

1. CSR 16-60 B. Carelessness in the Performance of Duties.

To sustain a violation under CSR 16-60 B., the Agency must establish Leyba performed a known duty deficiently. In re Leslie, CSA 10-11 (12/5/11) *citing* In re O'Meallie, CSA 92-09, 4 (6/18/10). Civilian Review Administrator Elwell, the decision-maker in this case, claimed Leyba violated this rule because she was responsible for monitoring the courtroom elevators, but failed to notice an inmate remained in one of them when she left for the day.

Leyba stated she was not careless for the following reasons:

a. Lack of training. Leyba claimed she was never formally trained how to operate the Control Center Sierra Security system. This argument fails since she had filled in successfully at that same post 50-100 times previously, by her own estimate. Deniro credibly testified she had observed Leyba successfully operate that post without any previous issues. [Deniro testimony]. Moreover, Leyba never complained about, or asked for additional training. [Szumowski rebuttal testimony].

b. Not notified. The courtroom deputy did not remember who he talked to when placing Inmate CQ on the elevator. It is clear from the video evidence, however, that Leyba was at the Control Center Post for at least part of the time the inmate remained unattended and stranded on the elevator while Leyba was required to monitor the elevators. [Exh. 10; Exh. 11; Leyba testimony; Elwell testimony; Exh. 4-3 @ par. II.3.; Exh. 4-4 @ par. VII].

c. Not distracted. Leyba denied being distracted, but Deniro recalled Leyba was using her personal phone for much of the time she was in the control center, had visitors, and also used the Control Center landline. [Deniro testimony; Exh. 1-6]. She described Leyba as "distracted" on January 5. That testimony remained un rebutted by Leyba, and Leyba presented no evidence that Deniro disliked Leyba or had any reason to make trouble for her.

d. No image, no sound. At hearing Leyba claimed she did not observe CQ or anyone else stranded in the elevators during the time she manned the Control Center Sierra System post on January 5. She claimed the cameras occasionally "freeze," inferring that is why she did not see CQ. Others acknowledged the occurrence as well, but affirmed such occurrences are momentary, and the cameras may be instantly refreshed by the Control Center officer. [Szumowski testimony; Deniro testimony]. Szumowski stated the elevator cameras may operate for a week at time without any freezing. [Szumowski testimony]. It is, therefore, more likely, by a preponderance of the evidence, that camera freeze did not prevent Leyba from seeing CQ during the time he was unmonitored in the elevator.

At hearing and in her prehearing statements, Leyba claimed she did not "set" the two moveable cameras when she worked at the Sierra System because she was only filling in for a security specialist, and did not feel she should move them. First, the Control Center Post Order requires whoever works at that post must check the elevators, [Exh. 4-3, 4-4], so even if the cameras had been positioned in a way that Leyba was unable to see inside the elevator, she was obligated to change the camera view, or investigate why she was unable to see into the elevator in order to comply with her post orders. In addition, at least one of the camera recordings clearly showed CQ for the entire 36 minutes he remained inside. [Exh. 10]. Thus, regardless how Security Specialist Zavala had adjusted the exterior cameras during her shift, CQ was visible to Deputy Leyba had she looked, in compliance with her post orders.

While acknowledging the elevators make an easily-heard tone in the Sierra System when they arrive at their destination, Leyba presented testimony that the audible signal may be disengaged by the Control Center officer, simply by pressing twice on the destination key. [Scott cross-exam; Szumowski cross-exam]. Deniro testified that, while she was present in the Control Center and tending to her other assigned duties, she did not recall hearing a tone that an elevator had arrived. Leyba presented no evidence that anyone, including her, had pressed the destination button twice. Deniro, engaged in other duties, may or may not have been paying attention to the elevator tone. It is not more likely one way or the other whether the elevator carrying CQ made an audible signal in the Control Center when it arrived at the basement level.

e. Not my sole responsibility. Leyba drew an analogy to tort liability, stating she was on duty at the Control Center only until 4:57 PM, so Security Specialist Deniro, who remained after she (Leyba) was relieved from her post, was responsible to clear the elevators. She reasoned that, because CQ remained on the elevator only for 8 minutes under her watch, she was, at most, responsible for only 22% of the excessive time CQ remained unmonitored in the elevator. Wrongdoing under the Career Service Rules is not susceptible to such tortfeasor division of liability. In the same way a lightswitch is either on or off, wrongdoing under the Career Service Rules, is either established or not established. At most, Leyba's argument may apply to the degree of discipline, but not whether she violated either of the charged violations, or to what degree.

In a similar vein, Leyba stated Security Specialist Deniro, who remained in the Control Center when CQ remained unattended in the elevator, had greater responsibility for the elevator mishap. Leyba claimed she did not relieve Deniro, but was there only to "help" her. Leyba concluded Deniro, though engaged in other tasks, was not relieved of her Control Center duties. [Exh. 1-3; Leyba testimony].

Deniro denied she retained any responsibility for monitoring the elevators while she was reassigned to another part of the Control Center where she monitored the "Occupy Denver" protest. Their supervisor, Sgt. Szumowski, stated whoever was assigned to the Control Center Sierra Security System is responsible for monitoring the elevators, contradicting Leyba's assessment.

Similarly, Deputy Scott credibly testified he worked in the Control Center "a lot." Asked how the duties for monitoring the elevators are divided between officers within the Control Center, Scott replied "whoever is in the chair." Since Leyba was assigned to monitor the elevators while CQ remained unmonitored in the elevator, and that post requires monitoring of the elevators, [Exh. 4] Leyba was responsible for, but inadequately monitored, the elevators, in violation of CSR 16-60 B.

Leyba's claim, that Deniro was equally or more responsible for monitoring the elevators does not abate her own wrongdoing, notwithstanding her claim of tortfeasor division of liability. Even if Deniro were responsible for failing to detect CQ on the elevator, such a finding would not relieve Leyba's wrongdoing under this rule for her own carelessness in failing to monitor the elevator which held CQ during the time she sat at the Control Center post.

Leyba's additional claim that she was not responsible for the Control Center Post because she was not assigned there on January 5, 2015 is without merit. The Control Center Post Order does not distinguish the duties of an officer while filling in at the Sierra Security System in the Control Center from the duties of the officer assigned for the day. Moreover, this argument

would impermissibly waive responsibility for complying with rules and orders for every officer while serving in a relief capacity.

2. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

The Agency claimed the Appellant violated the following written policy.

Sheriff's Dept. Rules and Regulations

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 post.

Violations of this Department Order have been sustained previously when deputies have fallen short of their duties. In re Mitchell, CSA 57-13, 5 (5/6/14); see also In re Norman-Curry, CSA 28-07 and 50-08, 5 (2/27/09). Failure to pay full attention to one's duties incorporates the concept of careless performance of duties.

The same facts which established a violation of 16-60 B., above, also establish that Leyba failed to pay full attention to her duties, to wit: Leyba was aware of her duty to monitor the elevators while in control of the Sierra Security System in the Control Center. Her failure to do so constituted a careless performance of that duty pursuant to the Control Center Post Order. [Exh. 4].

V. DEGREE OF DISCIPLINE

The purpose of discipline under the Career Service Rules is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense(s), the employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20. The measure of these considerations is whether the penalty assessed is within the range of penalties that could be imposed by a reasonable and prudent administrator, or is clearly excessive. In re Ford, 48-14A, 8 (CSB 9/17/15).

A. Seriousness of the proven offenses

Under the Agency's disciplinary matrix, Elwell determined Leyba's transgressions fell under category D, which defines such violations as "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." [Exh. 17]. The Agency deems category D violations are determined to merit a penalty of 4-16 days suspension. [Exh. 17]. Elwell's assessment of a ten-day suspension, therefore, was within the range of penalties that could be imposed by a reasonable and prudent administrator, and is not clearly excessive. In re Economakos, CSB 28-13A, 2 (3/27/14).

Leyba claimed she should not be penalized for leaving an inmate unattended for 36 minutes because she was at the Control Center post for only 8 minutes of that 36. Based on her assessment, Leyba claimed she could be held responsible for only about 22% of the time the inmate remained captive in the elevator. As stated above, the Career Service Rules are not susceptible to a division of liability. In this instance, an employee is either careless or not careless on her own, without regard to possible misconduct by another. That another employee may also have been careless does not affect whether Leyba was careless.

As regards the degree of discipline, Elwell testified the number of minutes Leyba was at the Control Center Post while the inmate was stuck in the elevator was immaterial to her decision regarding the degree of discipline. [Elwell testimony].

Leyba argued even if she was careless in attending to the duties of her post while in the Control Center, the violation did not fall under the "D" category in the Agency's disciplinary matrix. Szumowski's testimony wavered for and against whether Leyba's actions and inactions substantially interfered with Agency operations or the image of the department. [Szumowski testimony, cross-exam]. Elwell, however, had no such hesitation. She stated the Agency operations suffered substantially by an unattended, unmonitored inmate in an elevator, by lost control and location of the inmate, and by the time, resources and concern created by the search for the "missing" inmate, CQ, particularly as staffing is low.

As decision-maker, Elwell is better placed to determine wrongdoing under the Agency's disciplinary matrix. Szumowski seemed unsure of his own assessment, and Elwell's determination was neither clearly erroneous, nor beyond the range of alternatives available to a reasonable administrator, See In re Economakos, supra., even though another administrator could have chosen a lower level of penalty. The operative word is "range" of penalties available to a reasonable administrator, not a "precise" or "only possible" penalty.

Leyba also claimed she was prejudiced by a delay of 16 months between the event and the assessment of discipline. However, she failed to demonstrate any prejudice. A delay of 16 months falls well short of the 26 month delay that the Career Service Board found "unconscionable" and entitled to mitigation. In re Leyba, CSB 59-14A, 10-12 (2/5/16).

B. Prior Record

The Agency did not consider any previous discipline when considering which penalty to impose in this case. [Exh. 1-9]. The Career Service Rules require discipline to be progressive, when possible. CSR 16-20; see also In re Ford, 48-14A, 8-9 (CSB 9/17/15). Elwell's assessment appropriately considered Leyba's disciplinary history.

C. Likelihood of Reform

Deputy Leyba acknowledged no wrongdoing. As such, it remains unknown whether she is amenable to reform or likely to achieve it.

VI. ORDER

For reasons stated immediately above, the Agency's 10-day suspension of Deputy Leyba's employment, assessed on May 9, 2016, is AFFIRMED.

DONE December 30, 2016.



Bruce A. Plotkin
Career Service Hearing Officer