HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. A004-20

DECISION AND ORDER

SONYA LEYBA, Appellant,

v.

DENVER SHERIFF DEPARTMENT, and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

Appellant Sonya Leyba (Appellant) appeals the Denver Sheriff Department's (Agency) February 4, 2020 ten-day suspension of her for an alleged violation of Career Service Rule (CSR) 16-28 R. On June 3, 2020, Hearing Officer Federico C. Alvarez conducted a hearing to determine the propriety of the suspension. Reid Elkus, Esq., represented Appellant; and Richard A. Stubbs and Margaret C. Tharp, Assistant City Attorneys, represented the Agency. The Parties stipulated to the Agency's exhibits 1 (a through bb), and 2 through 6. Appellant and Deputy Shane Squire testified in her case. Deputy Director of Safety Mary J. Dulacki testified for the Agency.

II. ISSUES

The issues presented for appeal were whether:

A. Appellant violated CSR 16-28 R. as it pertains to Agency Rules and Regulations (RR) 200.19; and

B. the Agency's decision to suspend her, if Appellant violated CSR 16-28 R., conformed to the purposes of discipline under CSR 16-41.

III. FINDINGS

The City has employed Appellant for over 13 years in the Agency. On September 15, 2019, the Agency had assigned her as one of the two deputies to work in the Intake area of the Downtown Detention Center (DDC). At about 6:13 p.m., Appellant left the Intake area and went upstairs to the Medical area on the third floor of the DDC. She responded to an unknown person that called her to investigate Deputy Squire, who had been assaulted by an inmate and was receiving allegedly inadequate medical attention. She does not recall getting permission from her supervisor to leave her post to go to the Medical area and no one admitted giving her such permission. At hearing, she testified that it was her practice to advise other staff when she left her post, and she therefore must have done so on this day. Appellant investigated Deputy Squire in her role as an officer of the Fraternal Order of Police Lodge 27 (FOP), a union that represents some of the Agency employees and is their exclusive bargaining agent.

The Medical area has a waiting area that has chairs in the middle, adjoining the nurse's station, a rectangular room with large windows. These windows allow a person outside the station to view most of what occurs inside it. A desk with a computer and telephone is located across the waiting area from the station. (Ex. 1-x). Appellant walked through the waiting area into the nurse's station and spoke to Deputy Squire, who was seated while medical staff attended to him. She took notes while interviewing him. He then left to be taken to the hospital to be examined for a possible broken jaw.

Deputy Kendall Albert, victim of an assault by an inmate the prior day, also came to the Medical area and sat in a chair in front of the desk. Appellant also spoke to him and photographed his injuries on the back of his neck with her cell phone. (Ex. 1-x).

On Deputy Squire's return to the DDC, Appellant photographed his injuries with her cell phone while they were in a sergeant's office. When she began photographing him, Deputy Squire became uncomfortable and told her so. She explained that she was taking the photos for purposes of advocacy by the FOP. He then consented to her photographing him, so long as she did not include his face.

On September 15, 2019, Appellant was not on the Agency's list of individuals authorized to carry a telephone into the DDC. However, she testified without rebuttal that Captain Paul Oliva (former Chief) authorized her to bring her telephone into the DDC in years past, when he supervised the DDC. He had done so due to her position as a board member of the FOP.

On September 17, 2019, Captain Michael Jordan filed an Investigation Request Form on Appellant's photograph activity. (Ex. 1.b). It confirms Deputy Squire's testimony. Capt. Jordan wrote in it that, on this date, Deputy Squire reported to Capt. Jordan that Appellant had photographed his injuries. He had explained to Capt. Jordan that he felt uncomfortable when she began taking the photos without his permission. He had next asked her why she was photographing him. After she replied that it was "for the FOP", he then consented for her to photograph him so long as she did not photograph his face.

On September 17, Sergeant Tina Klosiewski was compiling information for the report on the assault on Deputy Squire. She had requested photographs of his injuries from Sergeant Khelik, then assigned to the Denver Health Medical Center where Deputy Squire was examined. Sgt. Klosiewski deemed that the photos she received from Sgt. Khelik to be of poor quality. Appellant learned of this concern, so she provided the photos she took of Deputy Squire to Sgt. Klosiewski. (Ex. 1.c). This report was likely provided to the Denver District Attorney's Office since Deputy Squire agreed that criminal charges could proceed against the inmate who assaulted him. The District Attorney charged the inmate with a felony second-degree assault. (Ex. 1.g-1).

On September 19, 2019, Captain Jamison Brown counseled Appellant and, on September 27, he wrote a Memorandum to Majors Blair and McManus summarizing that counseling. (Ex. 1.i). He stated that he advised her that she: (1) was not on the list of persons authorized to have a cell phone in the DDC, (2) was not to photograph anything in the DDC, and (3) should notify a captain or at least use Agency equipment if she thought a deputy's injuries were not properly documented. Appellant agreed to not take photographs in the DDC in the future. On September 19, 2019, Appellant also requested that Division Chief Elias Diggins add her to the list of individuals authorized to have personal cell phones in the DDC, and he did so the next day. (Ex. 1.j).

On September 30, 2019, Gregory Huff, Senior Investigator of the Administrative Investigations Unit, interviewed Appellant. She admitted taking her cell phone into the DDC and photographing the injuries of Deputies Albert and Squire in the DDC. She stated that she relied on Capt. Oliva's past authorization for her possession of her cell phone in the DDC. Upon specific questioning, she stated, "I don't know if I'm authorized, but I took pictures as a FOP board member." (Ex. 1.n-4, Ln. 72-3). She explained that she took the photos for the FOP's use in its advocacy on behalf of Agency employees.

On January 22, 2020, Appellant and Mr. Elkus met with Sheriff Frances Gomez; Chief Diggins; Gillian Fahlsing, Melissa Elson, Nate Emswiller and Brigitte Sadler from the Conduct Review Unit; Gregg Crittenden from the Office of the Independent Monitor, Assistant City Attorney Jennifer Jacobson, and Ms. Dulacki for a contemplation of discipline meeting.

Appellant and Mr. Elkus supplemented the investigative record on her behalf. Appellant was also asked and answered:

> 210 SHERIFF GOMEZ: Okay. And did you let your
> 211 supervisor or one of the -- someone else know that you were
> 212 going up there just so your post was covered?
> 213 DEPUTY LEYBA: I may have. I don't -- I
> 214 don't remember. (Ex. 1.v-10).

On February 4, 2020, the Agency suspended Appellant for ten days.

IV. ANALYSIS

A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction over this appeal pursuant to CSR 20-20 A.2. as it is a direct appeal of a suspension. The Hearing Officer is not to conduct a *de novo* review. CSR 20-56 A.

B. Burden and Standard of Proof

The Appellant retains the burden of proof throughout the case to prove that the decision of the Agency was clearly erroneous and/or that the application of the disciplinary matrix was clearly erroneous. CSR 20-56 A.

C. Career Service Rule Violations

1. Authority

CSR 16-28 R. authorizes discipline for:

> 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.
> The Agency alleges that Appellant violated CSR 16-28 R. as it pertains to RR 200.19: Performance of Duties: Deputy Sheriffs and employees shall use sound judgment in the performance of duties.

The Agency defines Conduct Category B in its Discipline Handbook as:

> Misconduct that (i) has more than a minimal negative impact on the operations or professional image of the Department; or (ii) negatively impacts relationships with other deputy sheriffs, employees, agencies, detainees or the public. (Ex. 2-116).

2. Discussion

Appellant generally defended against the Agency's discipline on two bases. The first defense is that Capt. Oliva's authorization of her to bring her telephone into the DDC included her use of it to take photographs. Her second defense is that the Agency's notice regarding discipline is so vague as to fail to give her notice of its allegations, in violation of her right to due process.

The Agency responded to Appellant's defenses by arguing that the Capt. Oliva did not authorize Appellant to take photographs in the DDC and that it did not violate her due process rights through its finding that she violated RR 200.19 or its contemplation of discipline to her.

Captain Oliva's Authorization

The Hearing Officer divides Appellant's first defense into two parts. The first is whether Capt. Oliva gave Appellant authority through his express consent to take photographs in the DDC with her telephone. The Hearing Officer resolved this issue against Appellant in the May 29, 2020 Order on Appellant's Motion to Reconsider, affirming the denial of a subpoena for Capt. Oliva.

The second part of this defense is whether Capt. Oliva gave Appellant implied authority[1] to take photographs in the DDC with her telephone. This argument also fails based on the facts of this case. She noted that Capt. Oliva authorized her to use her telephone in the DDC to conduct FOP business. She argued that he thereby gave her implied authority to use any function of her telephone in the DDC to conduct FOP business. Appellant insists that she conducted FOP business when left her post, entered the nurse's station, and photographed the injured deputies.

Appellant relies on Raitz v. State Farm Mutual Insurance Company, 960 P.2d 1179 (Colo. 1998). However, Raitz is inapplicable to these facts. It extended insurance coverage pursuant to the "initial permission rule" to a subsequent driver permitted to drive a vehicle by the driver initially authorized to drive it. *Id.,* at 1181. It implemented the policy of the No Fault Act, which was to be construed liberally, of compensating accident victims. Neither Raitz nor the No Fault Act govern the grant of implied authority in the employment context. The facts here are also distinct. Capt. Oliva did not receive a grant of authority which he extended to Appellant, and she did not receive authority from him which she purported to extend to any other person.

The principle of implied authority in the employment context is generally part of the analysis of whether the employer is liable for an act of its employee. Ellerman v. Kite, 625 P.2d 1006, 1008 (1981), explains this concept as follows:

> The act complained of must have been expressly or impliedly authorized by the employer. Sagers v. Nuckolls, 3 Colo.App. 95, 32 P. 187 (1893). We have held that: "Implied authority is such as is proper, usual and necessary to the exercise of that authority actually granted to the servant or such as is actually necessary to accomplish the task assigned by the master to the servant."
>
> Cooley v. Eskridge, 125 Colo. 102, 110, 241 P.2d 851, 855 (1952).

[1] Appellant argued that Capt. Oliva had apparent authority to authorize her to take photographs with her telephone. This argument is inapplicable since the Agency did not claim that Capt. Oliva lacked authority to authorize her to do so.

That is, the employee can exercise implied authority when necessary to exercise the authority already granted to her to implement the employer's directives, or is necessary to do her work for the employer. These authorities do not extend implied authority to an employee to act for the benefit of any person or entity other than her employer.

First, Appellant clearly did not need to activate the camera feature of her telephone to exercise her authorized action of communicating for or to the FOP, as the camera feature was not necessary for her to communicate with her telephone.

Next, Appellant tried to use the authority granted to her by the FOP, what she described as her "job description," to claim implied authority from Capt. Oliva to use take photographs with her telephone in the DDC. This effort fails. While the FOP may have assigned to Appellant her "job description" duties that may have included the taking of photographs, the Agency did not assign said duties to her. The FOP cannot redefine the duties the Agency has assigned to Appellant since it is a distinct entity, at times adverse to the Agency. In fact, neither entity can define the duties of the employees or members of the other entity. Hence, Appellant cannot meet the elements of "implied authority" from the Agency since she did not exercise authority or perform work on its behalf when she took photographs in the DDC, she instead did so on behalf of the FOP.

Last, Appellant argues that she had received implied authority to take any action with her telephone that Capt. Oliva did not prohibit. This sweeping claim it is not recognized by the caselaw defining implied authority and does not need to be discussed further.

Adequacy of the Notice of Contemplation of Discipline

Appellant argues that the Agency's notice to her of potential discipline is too vague because RR 200.19, which she allegedly violated, is so broad as to violate her due process rights. The Agency responded that it cannot formulate a rule for every discretionary call that deputies might make in the performance of their duties and it has therefore enacted RR 200.19, a general, catchall rule which comports with due process, to require deputies to exercise sound judgment.

Appellant relies on **In re Rolando**, CSA 40-15 (1/26/16) to argue that RR 200.19 is unenforceable. This decision declares that RR 200.19 may not provide sufficient notice of what conduct constitutes a violation, but assumes that it may have done so, and next analyzes the allegations against the Appellant therein. *Id.*, at 4. However, other cases have enforced discipline based on violations of RR 200.19, including **In re Mitchell**, CSA 57-13, 5 (5/7/14) (deputy released inmate instead of honoring the CO State Patrol hold on the inmate); and **In re Leyba**, CSA 31-16, 6 (8/29/16) (Appellant improperly allowed an attorney into the chute between the court and holding cell, and allowed others to get too close to her and her weapon and to impede her view of the courtroom.) Although unlike this case, the Appellants in those cases were also accused of violating other rules in addition to RR 200.19.

A definition for the adjective "sound" is "free from error, fallacy, or misapprehension" or "logically valid and having true premises." SOUND, MERRIAM-WEBSTER DICTIONARY ONLINE, http://www.Merriam-Webster.com/dictionary/sound (last visited June 10, 2020). A definition for the noun "judgment" is "the process of forming an opinion or evaluation by discerning and comparing" or "an opinion so formed." JUDGMENT, MERRIAM-WEBSTER DICTIONARY ONLINE, http://www.Merriam-Webster.com/dictionary/judgment (last visited June 10, 2020). So, when a Deputy Sheriff or Agency employee has to exercise discretion in the performance of duties, she should arrive at an opinion as to how to proceed based on available facts.

As such, sound judgment likely provides various ways in which a deputy or employee can exercise discretion, so long as she did so consistent with the facts. Therefore, an allegation of a violation of RR 200.19 has a high bar. Where other rules are not implicated, the analysis of such allegation should include a determination of whether the deputy or employee knew or should known of facts which would make the conduct violative. The Hearing Officer analyzes Appellant's alleged misconduct to determine whether she knew or should have known that it was improper.

Appellant's specific duties were in the Intake area of the DDC, where she would help fulfill the Agency's mission of generally providing for the safety and security of the inmates and staff. But she left her post on September 15, 2020. She testified that a deputy needs permission from a supervisor to leave her post. She then attempted to show that she obtained this permission by describing her personal practice of advising someone whenever she left her post. She did not recall advising anyone when she left her post but claimed she would have done so consistent with her personal practice.[2] Yet even under Appellant's version of events, she had no confirmation that the remaining deputy would alone be able to staff the Intake area adequately or that her supervisor would assign another deputy to staff her post.

Appellant entered the nurse's station to interview Deputy Squire while he was receiving medical attention. She did not enter to provide security or medical services for anyone there. The Parties did not dispute that the Health Insurance Portability and Accountability Act (HIPAA) confidentiality protection applies to the nurse's station.[3] Most adults know of HIPAA as they have had it applied when obtaining medical attention. No one expects that another person will intrude into a medical consultation, even for supportive reasons. Appellant did not explain why her FOP duties authorized her to intrude into Deputy Squire's medical consultation without his permission.

Appellant photographed the injuries of Deputies Albert and Squire inside the DDC without the Agency's permission. The Parties agree that it prohibits photographs in the DDC unless it has assigned or granted permission to a deputy to take them. (Ex. 1-k-2). Although she now argues that her implied authority gave her permission to have taken photographs, she stated at her interview and hearing that she did not know whether she had such permission. Given her uncertainty, Appellant should have confirmed with a supervisor whether she had permission to take photographs, but if not, obtained it before taking them, and if was denied, refrained from taking them.

Appellant inserted herself into the procedure of the criminal case against the accused inmate by photographing and interviewing Deputy Squire. However, she did not identify herself to the police investigator or District Attorney as a witness. She argues that she is not implicated in any discovery procedure, relying on Ms. Dulacki's concession that Part I. - Disclosure to Defense of Crim. P.16, at (a)(3), does not require a District Attorney to automatically disclose Appellant's evidence as she was not a formal investigator or evaluator of the criminal case.

However, subsection (c) - Material Held by Other Governmental Personnel of this Part I, could easily make the District Attorney responsible for disclosing Appellant and her name, address, photographs and notes of her interview with Deputy Squire.[4] It states at (1):

---

[2] Based on the evidence and because Appellant has the burden of proof, the only available finding of fact is that she did not advise anyone or get permission to leave her post. Appellant's argument that she possibly did both lacks a factual basis.

[3] The door to the nurse's station was open and other deputies came in freely to check on Deputy Squire, so this action alone by Appellant would likely be insufficient to sustain discipline.

[4] Appellant's photos and identification were perhaps disclosed, as Sgt. Tina Klosiewski sent the photographs to Sgt. Duke Cole to be included in the assault report. (Ex. 1-c-1).

> Upon the defense's request and designation of material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to the defense.

Such discovery request regarding the Agency would be routine since the inmate's felony charge was based on an assault against its deputy in its DDC. Having served in the criminal court system,[5] Appellant was at least vaguely aware that discovery is a substantial part of all criminal cases as judges routinely address it in open court. She must have known she could be involved in the case as a witness or holder of evidence. The judge presiding over the case would decide this issue. So, she could impair the criminal case by obstructing the production of discovery.

In all four bases on which the Agency concluded that Appellant failed to exercise sound judgment: (1) leaving her post, (2) entering a HIPAA protected area, (3) taking photographs of Deputies Albert and Squire without permission, and (4) withholding her identity as a holder of discovery in a criminal case obtained while on duty, Appellant knew or should have known that she was acting in areas that are subject to some regulation. She also knew that she is not the person to decide whether and what was necessary for her to comply with the regulation of her actions in these areas.

Although Appellant was acting to advocate for Agency staff,[6] she needed to exercise sound judgment in her actions while on duty in a secure facility. She could have: (1) confirmed that she had permission to leave her post, (2) asked permission to enter Deputy Squire's medical consultation or waited for him exit the nurse's station to interview him, (3) met Deputies Albert and Squire outside the DDC or after work to photograph them, and (4) identified herself to the police investigator as having knowledge of the assault on Deputy Squire. Instead she elevated her FOP duties over her duty as a deputy to exercise sound judgment.

Thus, Appellant failed to show that the decision of the Agency that she violated CSR 16-28 R. as it pertains to RR 200.19 was clearly erroneous.

V. DEGREE OF DISCIPLINE

16-41 Purpose of Discipline:

> The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

Appellant argued that her discipline was improper since she did not commit any CSR violation. In the alternative, she argued that, should the Hearing Officer sustain her CSR violation, the Agency's discipline of her therefor was excessive. She claimed that Capt. Brown's counseling of her addressed her misconduct, she agreed to avoid it in the future, and she has not repeated it. She cited this fact as proof that she reformed and that no other discipline of her is appropriate.

The Agency responded that its discipline was appropriate, given Appellant's violation. It categorized Appellant's violation of CSR 16-28 R. as it pertained to RR 200.19 as a Conduct

[5] Appellant had previously been assigned to escort inmates to and from court appearances. (Ex. 4).
[6] There is no evidence that Deputies Albert and Squire are FOP members but that is not a requirement for FOP advocacy.

Category B violation, from the available range of Conduct Categories A through F. For its conclusion, it noted that Appellant's misconduct had a "more than a minimal negative impact on the operations and professional image of the Department; or negatively impact[ed] relationships with other deputy sheriffs, employees, agencies, detainees, or the public."

As decisionmaker, Ms. Dulacki considered that Appellant left her post unsure that it would be attended, and that one deputy felt uncomfortable when Appellant photographed him in the DDC due to uncertainty that she had authority to photograph him there. Several deputies complained to Sgt. Duke Cole that Appellant had taken photographs in the DDC, who relayed the complaint to Capt. Jordan, who reviewed the video and requested an investigation of Appellant. (Ex. 1-g-1). Appellant's actions thus had a more than a minimal negative impact on the Agency operations and on the relationships between her and others of its staff, therefore Ms. Dulacki's designation of this as a Conduct Category B violation was appropriate.

Further, the District Attorney staff who handled the prosecution of the criminal case had to unravel the history of the seven photographs of Deputy Squire, four of which explicitly show his face. (Ex. 1.e). Appellant's photographs were to be included in the assault report, but she was not to photograph his face. The photographs lack the identification of the photographer. So, it appears that different sets of photos were merged, complicating the discovery in the case. The Agency's investigation would have appeared to be disorganized to the District Attorney, possibly creating a negative impression of the Agency's investigative procedure.

The Agency increased the penalty level to five from two for Appellant's discipline from its Discipline Handbook's Matrix, mandated by Appellant's three (out of four) prior violations in the prior four years of a Conduct Category B or greater. Ms. Dulacki concluded that there were no significant mitigating or aggravating factors warranting a mitigated or aggravated penalty. So, she imposed the presumptive ten-day suspension on Appellant.

1. Seriousness of the proven offense

Appellant's misconduct was serious. She disregarded four apparent responsibilities to execute her FOP role. However, she could have easily avoided this misconduct. The Agency appears accommodating of Appellant in her role as a FOP officer. But she should have advised her supervisor(s) of her intended action and identified whether or not she could execute it. If the Agency did not permit her to perform her perceived FOP duty, her next step should be to escalate the discussion of how the Agency could accommodate it at meetings between the Agency management and the FOP. Appellant instead elevated herself to a position as decisionmaker above her supervisors at the expense of her duties from the Agency.

2. Prior Record

In 2016, the Agency suspended Appellant for ten days for violation of Full Attention to Duties (S2015-0010); in 2016, it suspended her for three days for violation of Performance of Duties (S2015-0009); in 2017, it Reprimanded her for a violation of Accurate Reporting (S2016-0058); and in 2018, it Reprimanded her for Misuse of Leave Time (S2018-0223) (did not increase the Penalty Level.)

3. Likelihood of Reform

Appellant likely will reform. She stated that she will not again take photographs in the DDC. The Hearing Officer takes Appellant at her word. However, her misconduct was broader than just taking photographs in the DDC. She could have better articulated a commitment to avoid all misconduct in the future. Regardless, the weight of progressive discipline should deter future misconduct by her.

VI. CONCLUSION AND ORDER

Considering the evidence, the Hearing Officer concludes that the Agency's suspension of Appellant was appropriate. It comported with CSR 16-41 as it was properly fashioned to address inappropriate behavior, and was reasonably related to the seriousness of Appellant's conduct; and (2) the record reflected a sufficient, reasonable, and articulated justification for it, it was within the range of alternatives available to a reasonable and prudent administrator, and was not clearly excessive. *See* **In re Romero**, CSB 28-16A, 2 (6/15/17); **In re Redacted**, CSB 31-13A, 1-2 (8/8/14).

Accordingly, the Hearing Officer AFFIRMS the Agency's ten-day suspension of Appellant.

DONE June 11, 2020.

Federico C. Alvarez
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this final order, in accordance with the requirements and limitations of CSR § 21-20 et seq., within fourteen 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:

Career Service Board
c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
EMAIL: CareerServiceBoardAppeals@denvergov.org

Career Service Hearing Office
201 W. Colfax, Dept. 412, 1st Floor
Denver, CO 80202
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.