DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

BRUCE MITCHELL, Appellant,

vs.

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

The hearing in this appeal was held on March 3 and 28, 2014 before Hearing Officer Valerie McNaughton. Appellant was present and was represented by Donald Sisson, Esq. and Scott McLeod, Esq. Assistant City Attorney John Sauer represented the Agency in the appeal. The Agency called Lori Robirds, Patricia Gabel, Jess Vigil, Gena McCall, Robert Kline and Dwayne Gibson. Appellant testified on his own behalf.

I. STATEMENT OF THE APPEAL

Appellant Bruce Mitchell appealed his twenty-eight day suspension by the Denver Sheriff's Department (DSD or Agency). The parties stipulated to Agency Exhibits 1, 2, 9, 22, 23 and 25. Administrative notice was taken of Exh. 10. Exhibit 12 and Appellant’s Exhibit A were admitted at the hearing.

II. ISSUES FOR HEARING

The issues in this appeal are whether the Agency established by a preponderance of the evidence that Appellant’s conduct violated the Career Service Rules (CSR) alleged in the disciplinary letter, and that the twenty-eight day suspension was a reasonable penalty for the proven violations.

III. FINDINGS OF FACT

Appellant Bruce Mitchell has been a Deputy Sheriff for sixteen years, and has been assigned to the release desk at the Denver Detention Center (DDC) for the majority of the past seven years. As the release officer, Appellant’s duties were to determine prisoners’ eligibility for release, and coordinate releases to other agencies. The specific duties of this position are set forth in the Release Officer Post Order issued in 2011 by the Sheriff’s Department. [Exh. 9.]

On Oct. 31, 2013, Appellant was suspended for 28 days for the erroneous release of a prisoner. On Oct. 29, 2012, while on duty at the release desk, Appellant received a call from the Colorado State Patrol (CSP) that a driver was coming to pick up inmate Elvie Bellamy, who was
being held on traffic offenses and was scheduled for release to the CSP. Appellant called the housing unit to have Bellamy and others sent down to the release office. He then left to go to the records department. While he was gone, Dwayne Gibson, Appellant’s partner at the two-person release desk, verified Bellamy’s identity and sent him back to the property desk. When Appellant returned, Gibson left to take his dinner break. [Appellant, 3/28/14, 1:26 pm.]

At 7:21 pm, one inmate entered the release area directly from the property desk, holding his belongings in a jail-issued bag. Appellant was behind the L-shaped release desk, and was looking at an internet site he identified at hearing as Craigslist. The inmate handed Appellant his bag and Appellant removed the property receipt stapled to it. The inmate asked to use the phone, and Appellant moved the desk phone towards him. [Exh. 22, 19:21:00.)

Inmate Bellamy entered the area wearing civilian clothes and carrying his labeled bag of property. Appellant touched his computer keyboard to minimize his Craigslist search, and removed the label from Bellamy’s bag. Appellant then pointed with his right hand to the door on the right, which leads through the public lobby to the building exit. Bellamy tipped his head in a questioning manner, and Appellant pointed to the same door with the label in his hand. A few seconds later, both Appellant and the inmate on the phone pointed to the right-side door. Bellamy then walked to that door and pushed the button. While Bellamy stood waiting at the door, Appellant compared the two property receipts and placed one of them in a plastic bag. Seconds later, Central Control released the door lock, and Bellamy exited into the sally port and lobby. Bellamy looked around in the lobby for a few minutes, then left the building through the main entrance. [Exh. 22; Appellant, 3/28/14, 1:47 pm.]

A few minutes later, Appellant realized that Bellamy was on a CSP hold and should not have been released to the street. He went out the sally port door, looked around the lobby, and went outside to check the detention center’s perimeter. When he did not see Bellamy, he went back into the jail and found the only supervisor on duty, Sgt. Lori Robirds. He told her that there may have been an erroneous release, and asked for the keys to the staff car so he could look for the prisoner. When told the staff car was on a dialysis run, Appellant stated that he “would handle the matter another way”, intending to use his own vehicle. Sgt. Robirds was never trained in release procedures, and only supervises that function when the release sergeant is not on duty. Sgt. Robirds testified that she was unaware of the procedures used when there has been an erroneous release. [Robirds, 3/3/14, 9:20 pm.] Sgt. Patricia Gabel was also in the room, but she was also unfamiliar with those procedures because it was her first day at the Denver Detention Center. Neither questioned him about how he would handle it, or instructed him not to use his own vehicle. [Gabel, 3/3/14, 10:25 am; Appellant, 3/28/14, 1:55 pm.]

Appellant retrieved his own car and drove east on Colfax, in search of Bellamy. He left his car at Pennsylvania Street and walked west on Colfax, since newly released inmates have been known to gravitate to that area. At the State Capitol, Appellant noticed an African American man with the same features, receding hairline and body type as Bellamy. The man denied being the missing prisoner. Appellant took no further action, since he was alone and on foot. [Appellant, 3/28/14, 2:04 pm.]

Back at the jail, Appellant met with Watch Commander Gena McCall, Sgt. Gabel and Deputy Robert Kline. The deputies were given Bellamy’s last known address in Aurora, and told to take the staff car to look for Bellamy. McCall got on the phone to notify Chief Than, Major Anderson, and her direct chain of command. She was under the impression that it had been a couple of hours since Bellamy’s exit, although it had only been one hour. McCall emphasized to
Appellant and Kline that they should try to get Bellamy to voluntarily return to the jail, as is the
practice when a prisoner is held on a minor traffic offense. At the time, the Post Orders
contained no procedure governing erroneous releases. [McCall, 3/3/14, 2:45 – 2:57 pm; Exhs. 9,
A.]

At about East High School on Colfax Avenue, Appellant told Kline he thought driving to
Aurora was “a waste of time” because Bellamy could not have gotten that far in the time
elapsed. Kline agreed, and they headed back west on Colfax. When they reached Logan
Street, Appellant spotted the same man he had contacted earlier, and asked Deputy Kline to
stop. They searched him and asked for identification. The man had none, but denied he was
Bellamy. The man did not object to their suggestion that they take him to the jail for
identification. When they pulled into the detention center lot, Deputy Gibson looked in their car
and immediately told them the man was not Bellamy. Officers then drove the man back to
Logan Street. The next day, Bellamy was located at a hotel by the Warrant Unit Task Force. He
was returned to the jail, and later released to the CSP.

An internal affairs case was commenced to investigate this incident. Appellant admitted
during his interview that he had not adequately checked Bellamy’s paperwork, and that he was
distracted by the inmate who was using the desk phone in front of him. [Appellant, 3/28/14, 3:00
pm.] The jail video shows that Appellant was focused on the two property receipts during the 23
seconds in which Bellamy was in the release room. [Exh. 22, 19:22:22 - :45.]

Release officers are responsible for processing and authorizing the release of inmates
from the Denver Detention Center. They are required to cross-check inmate and computer
records, coordinate with the records and property officers, verify the inmate’s identity, and
release them to the proper authority. The two officers stationed at the release desk must
review the paperwork presented by the one to two hundred prisoners scheduled for release
every day. [Exh. 9.] If inmates are being held for pickup by another jurisdiction, deputies are
to direct them to the door straight ahead leading to the garage where that agency’s vehicle
awaits. If they are to be released to the street, they are instructed to wait at the door to the
right of the release desk. Release officers first radio Central Control to authorize an inmate’s
release through that door, which remains secured unless Central Control “pops” the lock. A
camera monitored by Central Control personnel is trained on any person standing in front of
the door into the lobby. Once the lock is released, the inmate may exit through the sally port
and lobby to leave the building. At the time of this incident, there was a buzzer at the door,
which was used to alert Central Control that a person was ready to exit. [Appellant, 3/28/14,
1:40 pm; Gibson, 3/3/14, 4:08 pm.]

Appellant estimates that he has been responsible for about 250,000 releases in his seven
years at the DDC release desk. Over the past five years, release officers have prevented about
200 erroneous releases by comparing inmate and computer records. [Appellant, 3/28/14, 1:08
pm.] Gibson recalls five erroneous releases that occurred over this same period. Appellant was
given verbal reprimands in 2010 and 2011 based on two unauthorized prisoner releases. [Gibson,
3/3/14, 4:07 pm; Exh. 2-6.]

Deputy Manager of Safety Jess Vigil made the disciplinary decision. He found neglect of
duty based on Appellant’s failure to release Bellamy to the proper authority. Mr. Vigil determined
that Appellant was careless in the performance of his duties because he was inattentive to
Bellamy during the release process, resulting in his improper release from custody and the need
to expend Agency efforts to apprehend and re-incarcerate him. Executive Order (E.O.) 16

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allows employees limited access to the internet on duty, but Vigil found Appellant's use interfered with his ability to perform his duties, in violation of E.O. 16 and DSD Rules and Regulations (RR) 200.9 and 200.10.

Vigil found that after the erroneous release, Appellant acted recklessly in taking his own vehicle to look for Bellomy. He concluded that Appellant disobeyed an order when he decided not to go to Bellomy's last known address, contrary to RR 200.13. Vigil considered Appellant's detention and transport of the man found on Logan Street to be outrageous and an abuse of Appellant's authority, in violation of CSR § 16-60 Z. [Vigil, 3/3/14, 11:26 – 11:43 am.] Deputy Gibson was also disciplined for failing to communicate with Appellant on the status of the inmate before going on break. (Vigil, 3/3/14, 12:21 pm.)

Vigil next calculated the penalty by use of the Manager of Safety's Disciplinary Matrix for each of the three acts of misconduct found. [Exh. 10.] First, the erroneous release of Bellomy was determined to be a Category B violation in that the conduct "has more than a minimal negative impact on the operations or professional image of the department; or that negatively impacts relationship with other deputy sheriffs, employees, agencies or the public." [Exh. 10-89.] Since this was Appellant's fourth offense, Vigil found that discipline level 5 was appropriate. He also found that the offense deserved to be treated as aggravated based on Appellant's detention of the wrong man in his efforts to find Bellomy. On that basis, he imposed the maximum penalty of 16 days for the erroneous release. [Vigil, 3/3/14, 1:59 pm; Exh. 10-87.]

Next, Appellant was deemed to have misused the city-provided internet by devoting his attention to an internet search instead of performing his duties when Bellomy was at his desk awaiting approval for release. Deputy Manager Vigil considered this conduct a first violation of a Category B offense, carrying a presumptive penalty of five days. [Exh. 10-91.] He doubled that number to ten days because the internet use resulted in an erroneous release. [Vigil, 3/3/14, 2:01 pm.] Finally, Vigil considered Appellant's failure to obey the order to go only to the last known address as a Category C offense, carrying a presumptive penalty of two days. The three penalties run concurrently to total a 28-day suspension.

After this incident, the buttons used to signal Central Control were removed, and deputies are now required to contact Central Control by radio and personally authorize each prisoner release. Staffing at Central Control has now increased from two to three officers on duty, and the policy was amended to require three verifications before any inmate could be released. [Appellant, 3/28/14, 2:22 pm.] The Release Officer Post Order was amended on Oct. 3, 2013 to include an erroneous release procedure, including an absolute bar against a supervisor sending officers to an inmate's last known address. [Exh. A-14.]

IV. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and that a twenty-eight day suspension was within the range of discipline that can be imposed under the circumstances. In re Carter, CSB 87-09, 2 (7/1/2010.)
A. VIOLATION OF DISCIPLINARY RULES

1. Neglect of duty under CSR § 16-60 A.

In order to establish a violation of this rule, an agency must prove an employee failed to perform a job duty he knew he was required to perform. In re Serna, CSB 39-12, 3-4 (2/28/14), citing In re Campos, CSB 56-08 16/18/09). Here, Deputy Manager of Safety Vigil found Appellant had a duty created by the Post Order to release inmates to the proper authority. (Exh. A-4.) The Agency contends that he neglected his duty by failing to release Bellamy to the Colorado State Patrol pursuant to the CSP hold in effect at the time of his erroneous release.

Appellant admitted at his IAB interview, as well as at the hearing, that he was not paying attention to Bellamy because he was distracted by the other inmate using the phone in front of him. (Appellant, 3/28/14, 2:56 pm; Exh. 12.) The video showed that the other inmate was in front of Appellant using the phone. Appellant was looking at the property receipts and placing them into envelopes. Bellamy was wearing civilian clothes and was carrying his property, as if he was being released to the street rather than to CSP. Appellant never looked at Bellamy directly, and his attention was elsewhere. He denied pointing to the door, but the video tells another story. He pointed to the outer door three times, clearly under the impression that the street-clad Bellamy had been authorized for full release.

The error was caused in part by the property desk in delivering Bellamy's clothing and property to him instead of to the CSP, and in part by the failure of Appellant and Gibson to communicate about pending releases before Gibson went on break. In addition, Central Control violated protocol by releasing the door lock without receiving a radio approval from the release officer. However, the last clear chance to avoid the improper release was in Appellant's hands, and he did not take the steps needed to prevent it. Throughout this process, Appellant has readily admitted that his actions directly led to the erroneous release. (Appellant, 3/28/14, 3:01 pm; Exhs. 2-6, 12.) Appellant thereby neglected his duty to release Bellamy to the proper authority. As found below, these same action violated both RR 300.19.1 and RR 400.4.4 by releasing a prisoner who was not eligible for release. Appellant also violated the departmental rules requiring him to devote full attention to his duties and to perform his job using sound judgment and discretion. RR 200.9; RR 200.19.

2. Carelessness in the performance of duties under CSR § 16-60 B.

Carelessness is proven by work performance conducted in an unsatisfactory manner. In re Gomez, CSA 02-12, 3 (5/14/12). Here, the Agency claims that Appellant violated this rule because he did not pay attention during Bellamy's release process, failed to check his release eligibility, and directed Bellamy to the outer door based on his unthinking assumption that Bellamy had been cleared for a full release. During the entire 23 seconds when Bellamy was in the release area, Appellant glanced at him twice, and waved him to the door before even looking at his property receipt. This evidence establishes that Appellant's performance of his duty to ensure proper prisoner release of Bellamy was done carelessly, in violation of this rule.

3. Unauthorized use of city equipment, CSR. § 16-60 D.

The Agency determined that Appellant's use of the internet interfered with his job performance, in violation of both the Career Service Rule and departmental RRs 200.10 and 300.19.1. CSR 16-60 D prohibits in relevant part "the unauthorized use of the internet." City
personnel are permitted to use the internet on a limited basis as long as it does not "interfere with the employee's performance of job duties". E.O. 16; Vigil 3/3/14, 12:20 pm.]

Appellant admitted throughout the disciplinary process that he was on the Craigslist internet site at the time in question. However, he also testified that he minimized the site when Bellamy approached his desk. [Appellant, 3/28/14, 3:25 pm.] The video confirms that Appellant was not actively looking at the internet site at any time when Bellamy was in the area. It also shows that Appellant was distracted by the property receipts rather than the internet during the 23 seconds Bellamy was in the release area. [Exh. 22.] Therefore, I find that Appellant did not violate either § 16-60 D. or E.O. 16, which likewise prohibits internet use that interferes with performance.

The similar Agency rule bars use of city equipment "which is prejudicial (detrimental) to the efficient and orderly performance of [employee's] assigned duties, and/or the operation of the Department". RR 200.10. Based on the foregoing evidence, I find that the Agency also failed to prove that Appellant's use of the internet was prejudicial to his efficient performance of his duties or that he disobeyed a rule based on his internet use in violation of RR 200.10 or 300.19.1, as charged.

4. Failure to observe written departmental rules or regulations, § 16-60 L.

I have found above that Appellant neglected his duty in allowing the erroneous release of a prisoner. The findings supporting that rule violation also prove violations of four of the six departmental rules. RR 200.9 states that deputies shall devote their full attention to their duties. RR 200.19 orders deputies to use sound judgment and discretion while performing their duties. RR 300.19.1 requires Appellant to release the inmate to the proper authority, and RR 400.4.4 mandates that deputies "shall not release a prisoner who is not eligible for release." The Agency proved a violation of all four of these rules by undisputed evidence Appellant's inattention to duties resulted in Bellamy's erroneous release to the street, contrary to his CSP hold. I have also determined that the same evidence did not prove that Appellant violated a fifth rule or E.O. 16 based on his use of the internet.

The remaining rule violation charged is disobedience of a "lawful order of a supervisor" under RR 200.13 based on his failure to obey Watch Commander McCall's instruction to go only to Bellamy's last known address. The evidence is disputed as to whether such an order was given. Both Appellant and Deputy Kline testified that they were given the last known address, but neither recalled a specific instruction that they must go there and only there. [Kline, 3/3/14, 3:36 pm; Appellant, 3/28/14, 3:19 pm.] The sergeant who was present during that conversation testified that the deputies were told to go out together, and were given the last known address. [Gabel, 3/3/14, 10:33 am.] The preponderance of the evidence does not establish that the order given specified that Appellant could only go to the last known address of the missing inmate.

At the time, there were no written procedures related to erroneous releases. A few weeks before this discipline was issued, the Post Orders were amended to include a policy on erroneous releases. The new policy bars supervisors from issuing an order to go to the last known address. That is the same order as Appellant is here alleged to have disobeyed. [Exh. A-14.]
The facts surrounding Appellant’s actions after Bellamy’s departure indicate that he acted reasonably in the absence of policy or supervisory guidance. Officers are required to use their judgment and discretion in the performance of their duties under RR 200.19. Appellant acted promptly and diligently to locate Bellamy once he was aware that Bellamy had left the building contrary to his CSP hold. Neither of the two sergeants to whom he reported the incident was familiar with release procedures. Watch Commander McCall agreed that Appellant’s actions in bringing his gun, Bellamy’s picture and information sheet “sounds prudent”, and were consistent with usual practice in erroneous releases. [McCall, 3/3/14, 3:07 pm.] Deputy Manager Vigil conceded that there were some policy issues raised by this incident that need to be examined. [Vigil, 3/3/14, 12:20 pm.] Both Appellant and Deputy Kline agreed on their course of action, which included turning around before they reached the last known address. Kline was not disciplined for disobedience to an order, although he was driving at the time they decided to turn around. Based on this unrebutted evidence, I cannot find that the Agency established a violation of RR 200.13 by a preponderance of the evidence.

5. Conduct which violates rules, charter, ordinance, executive order or other legal authority, § 16-60 Y.

The Agency established that Appellant violated three Career Service Rules and four departmental rules as a result of his role in the erroneous release. Therefore, separate analysis under this Career Service Rule is unnecessary for disposition of the issues raised in this appeal.

6. Conduct prejudicial to the good order of the agency or which brings disrepute on the city, § 16-60 Z.

This rule “requires the agency to prove that an employee’s conduct resulted in actual harm to the agency’s mission or actual harm to the City’s reputation or integrity”. In re Jones, CSB 88-09, 2, 9/29/10.

Deputy Manager Vigil based his finding of violation both on the erroneous release and Appellant’s actions in attempting to locate Bellamy. Vigil considered Appellant’s detention of the man on Logan Street outrageous and a violation of his civil rights. He believed that Appellant targeted African American men for unlawful detention during his search for Bellamy because both the man detained and Bellamy are African American. He noted that deputies who spent the same amount of time with Bellamy immediately knew the man detained was not Bellamy.

The video shows that Appellant spent 23 seconds in the same room with Bellamy. Although he only glanced at the prisoner, he formed an impression of his facial features, body type, and receding hairline. During his efforts to find Bellamy, Appellant twice noticed that the man on Logan Street shared his general appearance. [Appellant, 3/28/14, 2:14 pm.] On his last trip down Colfax, Appellant noticed the man again and asked Deputy Kline to stop. After comparing the picture they brought with them, both Appellant and Deputy Kline believed the man resembled Bellamy enough to justify asking him to come to the jail to be identified. Appellant himself is African American.

In contrast, the deputy who met them in the garage and told them he was not Bellamy spent a great deal more time with him. Deputy Gibson completed the first four tasks required for release, including verification of his identity and review of his release documents. [Exh. 9-4.]
It was Gibson's extra time with Bellamy that allowed him to quickly determine the man they brought in was not Bellamy. The totality of the evidence supports a conclusion that Appellant was exercising reasonable judgment in his search for Bellamy, and was not placing African American males at increased risk of incarceration in violation of their civil rights.

In any event, the only evidence offered on the issue of actual harm was the Deputy Manager's testimony that "people would be outraged if they knew" of Appellant's conduct. [Vigil, 3/3/14, 11:45 am.] As held by both the Career Service Board and Hearing Office, potential harm may be based on a subjective view of the circumstances, and gives employees "no guidance as to the standards by which their conduct will be measured". For those reasons, proof of actual harm is necessary to establish a violation of this rule. In re Jones, CSB 88-09, 2 (9/29/10), quoting In re Strasser, CSB 44-07, 2-3 (2/29/08).\(^{1}\) The Agency therefore failed to establish a violation of § 16-60 Z.

B. DEGREE OF PENALTY

The erroneous release offenses carrying a penalty of sixteen days' suspension is supported by the evidence. I find that the Agency's aggravation of the presumptive ten-day penalty to sixteen days was not unreasonable based on Appellant's deprivation of an innocent man of his freedom for the brief period needed to establish his identity. However, the disobedience and equipment misuse offenses were not established at hearing. Therefore, the two-day and ten-day suspensions imposed based on those allegations must be removed.

Order

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that the Agency's disciplinary action dated October 31, 2013 is MODIFIED to a sixteen-day suspension.

Dated this 7\(^{th}\) day of May, 2014.

Valerie McNaughton
Career Service Hearing Officer

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\(^{1}\) Although the Agency could have chosen to charge Appellant with a violation of D.O. 300.11.6, which does not require proof of actual harm, it did not do so. See In re Khelik, CSB 31-12, (3/3/13).