HEARING OFFICER, CAREER SERVICE BOARD  
CITY AND COUNTY OF DENVER, COLORADO  
Appeal No. 12-15

DECISION MODIFYING TWO-DAY SUSPENSION TO A WRITTEN REPRIMAND

IN THE MATTER OF THE APPEAL OF:

ED REYES, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Deputy Ed Reyes, appeals his two-day suspension from employment with the Agency, the Denver Sheriff’s Department, for alleged violation of specified Career Service Rules and an Agency rule. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on June 11, 2015. The Agency was represented by John Sauer, Assistant City Attorney, and the Appellant was represented by attorneys Marcy Ongert and Dan Foster of Foster Graham Millstein & Calisher, LLP.

Agency exhibit 1 was withdrawn prior to hearing, and exhibit 8 was admitted into evidence by stipulation. The Agency’s offer of exhibit 6 was met with objection, taken under advisement, and is now admitted. Of Agency’s remaining proffered exhibits, 2 through 5, plus 7 and 8, were admitted. Appellant’s exhibits A and B were withdrawn before hearing, and C-G were admitted by stipulation.

The Agency called the following witnesses during its case-in-chief: the Appellant; Sergeant Earl Sims; Deputy Troy Motley; and Civilian Review Administrator Shannon Elwell. The Appellant called witness Chuck Clark-Martin.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant violated any of the following Career Service Rules: 16-60 B. - Carelessness in performance of duties and responsibilities; and 16-60 L. - Failure to observe written departmental or agency regulations, policies or rules, as it relates to Agency rule 200.9 – Full Attention to Duties.
B. If the Appellant violated any of the aforementioned Career Service or Agency rules, whether the Agency’s decision to suspend him for two days conformed to the purposes of discipline under CSR 16-20.

III. FINDINGS

Before hearing, the parties stipulated to the following as facts.

- Reyes was served a pre-disciplinary letter on February 3, 2014.
- A pre-disciplinary meeting was held on February 23, 2015.
- Reyes has worked for the Agency for approximately 17 years.
- He was assigned to housing unit 2D corridor post on February 17, 2014.
- A video recording of the incident in this case shows Reyes seated behind a desk and shows deputy Troy Motley handing supplies to inmates.
- Reyes identified himself in the video during the course of the Internal Affairs investigation.
- The video recording shows Deputy Motley hand something to an inmate at slider door 101.
- The recording shows another inmate standing outside slider door 101.
- The video shows inmate Braden leaning into the doorway of slider door 102.
- An inmate needing supplies approached slider door 101.
- The video shows Deputy Motley access a cabinet in front of the desk, then approach slider door 101.
- The video shows slider door 102 closing briefly on inmate Braden’s head.
- Reyes did not see inmate Braden, did not ignore inmate Braden, and did not make eye contact with inmate Braden.
- Reyes’ act of closing slider door 102 on inmate Braden’s head was an accident.
- Under Agency practice, only one slider door may be opened at a time.
- Reyes has accepted responsibility for his conduct.
- The circumstances of the incident indicate Reyes did not intend to close the sliding door on the inmate.

I adopt those stipulations, immediately above, as findings for purposes of this decision. In addition, I enter the following findings.

Reyes has been a deputy sheriff in the Agency for 17 years. In that capacity, his principal duties are the care and custody of inmates in the Denver jail system. His work performance reviews have always exceeded expectations.

On February 17, 2014, Reyes was on duty in a corridor between two housing pods in the Downtown Detention Center. He was assigned to a monitoring panel which, among other functions, controls sliding doors about ten feet in front of the panel, one on the left side of the corridor - slider door #102 - and another directly opposite - slider door #101. Reyes acknowledged he was responsible for operating those doors in a safe and responsible manner. (Reyes cross-exam).
At 9:55 a.m., Deputy Motley was handing out supplies to inmates through doors 101 and 102. From the control panel, Reyes opened only one of the slider doors at a time in accordance with established safety protocol, and only enough for inmates to extend a hand or arm to receive requested supplies. (Exhibit 4).

An inmate approached closed door 101 to request supplies. Motley obtained supplies from a nearby cabinet. Slider door 102 was slightly open from supplying another inmate. Reyes was looking in the direction of the inmate behind door 101. At the same time, inmate Braden approached door 102, stuck his head into the opening, and began speaking with Motley. At 9:22:58, in order to allow the inmate behind door 101 to take the supplies from Motley, Reyes, without looking in the direction of door 102, closed it unintentionally on Braden’s head for 2 seconds. (Exhibit 8). Braden cried out. Reyes looked toward Braden, and immediately pressed on his control panel to release slider door 102, while Motley pulled it wide open by hand.

Reyes apologized to Braden and had him taken to the nurse station, where no significant injury was found. (Motley testimony; Sims testimony; Reyes testimony; Elwell testimony). Braden was given Tylenol the next day for a self-reported headache.

The Agency undertook an investigation through its Internal Affairs Bureau into the incident. During its investigation, IA interviewed Reyes on July 7, 2014, approximately 5 months after the incident.

On February 3, 2015, the Agency sent its notice in contemplation of discipline to Reyes, (Exhibit 2), and held a pre-disciplinary meeting on February 23. Reyes attended with his attorney. Both Reyes and his attorney made statements in mitigation. The Agency sent Reyes its notice of discipline on March 10. This appeal followed timely on March 25, 2015.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10A.1.b., as a direct appeal of a suspension. 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 the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend the Appellant employment complied with CSR 16-20. The standard by which the Agency must prove its claims is a preponderance of the evidence.
C. Career Service Rule Violations

1. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

A violation under this rule occurs for performing an Important duty poorly. The Agency claimed Reyes violated his duty to operate the sliding doors safely when he closed door 102 on Braden's head.

Reyes agreed he was under a duty to ensure the sliding doors are clear before operating them remotely from the corridor officer station. (Reyes testimony). Reyes claimed he was not careless in failing to see Braden before he closed the sliding door on his head because (1) he was unable to see Braden place his head in the opened door due to the placement of a monitor at his station which obstructed his view. Specifically, Reyes complained that the monitor for door 102 is taller and obstructs his view of door 102, while a shorter monitor for door 101 does not obstruct his view of that door. (2) he was unable to see Braden place his head in the door opening because he (Reyes) sits low in his chair at his station. (3) he was unable to see Braden place his head in the open door because he can see, at most, the tops of heads from his vantage at the control desk, and saw Braden only when Braden's yell caused him to raise up from his chair.

Despite his claims, Reyes could have seen the Inmate's head in the door from his seated position if he had looked because:

- He was able to see an inmate on his right behind slider door 101, yet, contrary to his assertion, the monitor to his right is taller than the monitor to his left, in front of slider door 102;
- A review of the video evidence makes it clear Reyes never raised up as he claimed to IA when he heard Braden cry out, yet he looked in Braden's direction at the time he said he heard him. (Exhibit 8).
- If Reyes sat so low as not to see the slider doors, it was still his duty to ensure the door was clear before closing it;
- Exhibits D-1 through D-3 more accurately depict the view of slider door 102 as seen from Reyes' seat than his own description of his view as blocked or mostly blocked.1
- Deputy Motley was present at the time Braden's head was caught in slider door 102. When viewing the photographs of that door, (Exhibit D), he recalled Braden's head was above the door handle, thus visible from where Reyes sat, even from the lowest position behind the computer monitor. (Exhibit D-2).

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1 At the end of the hearing, it was still unclear whether Reyes' view of slider door 102 was so obstructed by the monitor configuration that he might not be able to have seen Braden's head in that door when he closed it. With the agreement of both parties, I went to the DDC corridor 2D station where Reyes sat. Both parties were invited to accompany me but declined. I sat in the chair at the 2D corridor station with the chair raised to the maximum, then lowered to the minimum, then adjusted to approximately a middle position. Sgt. Sims, who is 5'8"., served as a model by placing his head in the partially opened slider door 102 as Braden did. I could clearly see his head from all three chair positions without straining. Testimony at hearing determined Braden is 6'3" making it more likely than not that Reyes would have seen Braden's head in slider door 102 from any position in his chair if he had simply looked in that direction before closing it.
• Most notably, Braden is 6'3" tall. His head was at least one foot above the
door 102 handle when it was caught in slider 102, (Exhibit 8 @ 9:58:21-
9:58:24), well above even the most obscured position according to Reyes’
own representation. (Exhibit D-2).

For those reasons, it is more likely than not that Reyes would have seen
Braden’s head in door 102 before closing it, had he looked. Reyes agreed he
had a duty to operate that door with due care. Consequently, by failing to
check before closing that door, Reyes was careless in his duty to operate slider
door 102 with due care, in violation of CSR 16-60 B.

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

The Agency claimed Reyes violated the following written rule.

Department 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 assigned post.

Reyes told the IA Interviewer that he sits low in his chair and, because of the
monitors in front of him, he could only see the upper part of the sliding door. He said
he could not see Braden’s head in the opened door when he (Reyes) inadvertently
closed it on Braden’s head. He said when the door closed, Braden made a noise
which caused him to rise up from his chair and that is when he saw Braden’s head in
the door. Then he quickly released the door from his panel. (Exhibit 4. Reyes IA audio
interview).

A security video recording shows Reyes seated at his consol and shows both
doors 101 and 102 at the time of the incident. (Exhibit 8). Contrary to Reyes’
statement, Reyes did not rise up from his chair or even look toward door 102 when he
closed on the inmate’s head but, after the door closed, he did look in Braden’s
direction, which is consistent with his statement that he responded to Braden’s cry.
Reyes then pressed on the control panel touch screen to release door 102, which
Motley pulled open all the way to release the inmate’s head. Reyes could have, but
did not look toward Braden until Braden cried out, and Reyes, contrary to his claim,
could have seen Braden from his seated position had he simply looked.

Reyes also claimed he was assigned as a pod officer and not as a corridor
officer on the date of the incident, therefore different duties applied. Reyes was
familiar with the corridor officer station and the associated duties. Since he was
performing the duties of corridor officer at the time of the incident, including the safe
operation of doors 101 and 102, and he was familiar those duties, this argument is
unpersuasive. Moreover, the absence of a specific rule does not suspend the need to
use common sense, in this case to make sure a heavy, sliding security door, is clear
before closing it. (See also Motley testimony; Sims testimony). Without a common
sense component to their duties, deputies would not be responsible for any misconduct not specified in the Agency rules.

In addition, Reyes claimed the sliding doors are inherently dangerous. He testified that he has requested safety flaps be installed to avoid accidents like the one in this case. (Reyes testimony). He argued the Agency is at least equally culpable for the incident in this case because of its negligent failure to install safety flaps on the sliding doors. This venue does not determine tort liability nor does it parse contributory negligence for violation of the Career Service Rules.

Even if this venue determined contributory negligence, the primary purpose of tort law, to compensate injured victims for the harm caused by tortfeasors, is inapplicable here, since the potential tort plaintiff would be Braden, not Reyes, as advocated by his representatives.

Moreover, Reyes’ averment only re-affirms that he had notice of the dangerous condition. (See also Reyes testimony). Therefore, he had the same notice he ascribed to the Agency to use care in the operation of the sliding doors.

In short, Reyes’ failure even to glance toward sliding door 102 before closing it on Braden’s head constitutes a failure to devote his full attention to his duties in violation of Agency rule 200.9. That breach, in turn, constitutes a violation of CSR 16-60 L.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee’s past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20. I review the reasonableness of the Agency’s choice of discipline under the measure of whether it was within the range of penalties that could be issued by a reasonable administrator. In re Morgan, CSA 63-08, 9 (4/6/09)(additional citations omitted).

A. Seriousness of the proven offenses

Elwell, the decision-maker, determined a 2-day penalty was called for based on the following assessment.

With respect to D.O. 200.9, Full Attention to Duties, Elwell determined the totality of the circumstances required a finding that Reyes conduct fell under Category B of the Agency’s disciplinary matrix. The difference between a decision-maker’s assessment that conduct falls under Category B rather than A is that Category A conduct has a minimal impact on Agency operations or image, whereas Category B conduct (1) has more than a minimal impact on Agency operations or image or (2) has a negative impact on the deputy’s relations with other deputies, employees, agencies, or the public. (Elwell testimony; Exhibit 3-7, 3-8). Elwell determined Reyes’
violation fell under category B because his conduct had a negative impact on his relationship with the public, which she specified as injury (specifically, pain) to inmate Braden. (Elwell testimony).

Even assuming an inmate is member of the public, Elwell presented no evidence that Braden’s minor injury had a negative impact on his relationship with the Reyes, as required under Category B. Elwell’s assessment that Reyes inadvertently caused Braden’s injury, (Elwell testimony), is unrelated to whether their relationship suffered, particularly as she acknowledged it was an accident. (See stipulations, above, at p.2). The notice of discipline did not address if there was such an impact. No other Agency evidence claimed to demonstrate such impact, and the Agency did not claim any other basis for a Category B violation. Consequently, the Agency failed its own parameters to establish a basis to assess a category B violation for Reyes’ conduct.

Irrespective of the Agency’s decision under its matrix, I am not bound by that disciplinary decision tool. Instead I assess the Agency’s choice of the level of discipline under the Career Service Rules under a reasonableness standard. See Gordon, 10-14A (CSB 7/16/15). The Career Service Rules require the decision-maker to fairly consider the seriousness of the proven violations. (CSR 16-20; In re Leyba, CSA 59-14 (7/7/15)).

When viewing the 2D corridor control desk and sliding doors 101 and 102, it is apparent the view from Reyes’ vantage was less than ideal. He likely could not have seen Braden’s entire figure due to the angle of view, partial obscurity caused by a solid column on the sliding door wall, and the monitor in front of him. However, in support of the Agency’s position, had Reyes looked in the direction of door 102 before he activated the closing mechanism, it is also apparent he would have seen the 6’3” Braden’s head protruding into the opened door even if he (Reyes) were sitting low in his chair.

Nonetheless, the consequences of Reyes’ failure to check door 102 before closing it were minimal or nil because: (1) Braden had already exceeded his pain medication for the day, so it was unclear if the pain he reported derived from this incident or from a prior event for which he was already receiving pain medication; (2) no medical record was produced to show he sustained any injury, including pain, from the sliding door; (3) Braden did not testify, and his presence could not be procured after due diligence, so his IA statements were not subject to cross-examination; (4) his statement during his IA interview, that he was injured from the door, was unreliable in light of his failure to testify, his prior pain medication the same day, and the lack of medical records; and (5) Elwell’s testimony that Braden suffered

2 An assumption with which I continue to disagree. In re Carothers, CSA 13-11, 15 (1/5/12) (“inmates are not members of the public and therefore, the rule [CSR 16-60M] is inapplicable to inmates, particularly as other rules specifically address inmate abuse”), affirmed on other grounds, In re Carothers, CSB 13-11, (7/16/12), citing In re Weeks, CSA 26-09, 5 (7/20/09), rev’d on other grounds, City and County of Denver v. Weeks, No. 10CA1408 (Colo. App. Oct. 13, 2011); In re Webster, 03-11, 10 (8/09/11).

3 See n.1

4 Statement of counsel for Reyes.
any injury, including pain, depended entirely on unreliable hearsay and double hearsay. Under those circumstances, the basis for Elwell’s conclusion - that Reyes’ wrongdoing had a negative impact on his relationship with Braden - was not based upon reliable evidence. See Industrial Claims Appeals Office v. Flower Stop, 782 P.2d 13 (1989) and, therefore, exceeded the bounds of a reasonable administrator. In re Foley, CSA 19-06, 8 (11/10/06), citing Lawley v. Dept. of Higher Education, 6 P.3d 1239, 1252 (Colo. 2001); In re Redacted, CSB 31-13, 3 (8/8/14); In re Morgan, CSA 63-08, 9 (4/6/09).

Next, Elwell found substantial mitigating factors present, including all Reyes’ work reviews being rated as “exceptional” or “exceeds”, that he accepted responsibility for the incident, and that the incident was an accident. She concluded, without analysis, that “the mitigating factors were noted and considered, however, they were not found to be sufficiently weighty to warrant a penalty other than the presumptive penalty, given the nature of the sustained rule violations...” (Exhibit 3-7, 3-8; Elwell testimony 6/11/15 @ 11:29:00-11:30:00).

The Career Service Rules’ requirement to give fair consideration to the seriousness of violations and mitigating factors require more than conclusory statements. (See also, e.g., In re Leyba, CSA 59-10, 10 (7/7/15), in which the same decision-maker acknowledged significant and plentiful mitigating factors, but concluded, as in the present case, they were simply “not sufficiently weighty to depart from a presumptive penalty given the nature and circumstances of Deputy Leyba’s conduct...”). Thus, the basis for the Agency’s conclusion - that mitigation was insufficient to reduce the penalty - was based upon considerations not supported by a preponderance of the evidence, without which the degree of discipline, based on the seriousness of the proven conduct, was unreasonable. In re Gordon, 10-14A (CSB 7/16/15).

B. Prior Record

Reyes had never hurt an inmate. (Exhibit 7; Reyes testimony). He had one violation in the last five years, a written reprimand in 2010 for off-duty conduct “unlawfully entering upon private property to hunt.” (Exhibit 3-3). I attach no aggravation to that violation, based on its age and nature. His work performance reviews have always been graded as “exceeds expectations” or “exceptional.” (Exhibit F). His supervisors have consistently commented that he excels in security and safety. (See, e.g. Exhibits F-97, F-98; F-90; F-87; F-55).

C. Likelihood of Reform

Reyes took immediate responsibility for the incident. He apologized to Braden immediately. (Exhibit 7). Reyes credibly testified he has already changed the way he operates the sliding doors, making sure to check they are clear before activating the closing mechanism. Before this incident, he had a consistently elevated record of safety-consciousness. (See immediately above).
During its investigation into this incident, the agency placed Reyes in a position of no inmate contact. Ironically, that position involved, almost exclusively, operating doors to inmate areas, and there was no indication that Reyes had any difficulty operating them safely. (Reyes cross-exam). Thus, the Agency appears not to have been concerned about Reyes’ safe execution of the duty for which it disciplined him. Moreover, he has been reinstated to full duties with no reported incidents. (Exhibit 5; Reyes testimony).

In view of the minimal seriousness of the proven violations, Reyes’ record of consistently excelling in his work performance, excellent record, and likelihood he could, and indeed has, reformed the offending behavior, a reasonable administrator could assess no more than a minimal penalty under the Career Service Disciplinary Rules. In view of those circumstances, the Agency’s determination that Reyes’ conduct had more than a minimal impact and deserved no mitigation resulted in the assessment of an unreasonable level of discipline. In re Gordon, 10-14A (CSB 7/16/15).

VI. ORDER

The Agency’s two-day suspension is MODIFIED to a written reprimand.


Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 et seq. within fifteen calendar days after the date of mailing of the Hearing Officer’s decision, as stated in the certificate of mailing below. The Career Service Rules are available at www.denvergov.org/csa/career service rules.

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX:
(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.