

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 57-07

DECISION

IN THE MATTER OF THE APPEAL OF:

BOBBY ROGERS, Appellant,

vs.

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

The hearing in this appeal was held on February 22, 2008 before Hearing Officer Valerie McNaughton. Appellant Bobby Rogers was present and represented by Jeff Town, Esq. The Agency was represented by Assistant City Attorney Robert A. Wolf, and its advisory witness was Major Phillip Deeds. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following order:

I. STATEMENT OF THE CASE

Appellant Bobby Rogers is a Deputy Sheriff with the Denver Sheriff's Department (Agency). This is his appeal of a 45-day suspension dated August 30, 2007. Appellant filed a timely appeal of the action on September 6, 2007 pursuant to the jurisdiction provided in the Career Service Rules (CSR) § 19-10 A. 1. b.

The Agency's Exhibits 1, 2, 5, 6, 8, 11 - 23, and 30 - 32 were admitted into evidence.

II. ISSUES

The following issues are raised in this appeal:

1. Did the Agency prove by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules, and
2. Was a 45-day suspension within the range of discipline that could be imposed by a reasonable administrator for the violations proven by the Agency?

III. FINDINGS OF FACT

On August 30, 2007, the Agency suspended Deputy Sheriff Bobby Rogers for forty-five days. The suspension was based on a May 30, 2007 incident between Appellant and Officer Francisco Hernandez during the noon shift change that was witnessed by four other officers.

The disciplinary letter asserts that Appellant and Officers Hernandez, Banks, Willingham, Marr and Murray were in and around the small office known as the control center cage at the Denver County Jail on that day. Hernandez leaned over the desk to get his keys, and Appellant slapped him hard on the buttocks. He stood up, turned around, and said, "What the hell!" to Appellant. Hernandez heard laughter, and Appellant said, "I think I cupped it". Deputy Murray added, "I think you got lift." Appellant then said, "If you're going to stick it out, I'm going to hit it", and other officers laughed.

Officer Hernandez was hurt and embarrassed by this act. He left the cage and sat down at a table outside. Appellant came up to him and tried to shake his hand, saying, "No hard feelings?" or, "Are we cool?" Hernandez pushed his hand away. He later asked for relief to go see the Captain about the incident. Officer Willingham asked him, "Is this about the slap in the ass? Because you know he was only kidding." [Exh. 1.]

Appellant was placed on investigative leave that day [Exh. 3], and Internal Affairs opened an investigation into the incident. During two separate interviews, Appellant denied that he hit Hernandez on the buttocks, stating he only pulled him close and patted him on the back. After conducting eight interviews with the five eyewitnesses, the Agency concluded that Appellant had violated rules and regulations on violence and dishonesty, and suspended him for forty-five days. [Exh. 1.]

Appellant was interviewed twice by Internal Affairs regarding this incident. On June 8, 2007, he stated that he yanked Hernandez by the hand, brought him close, and patted him on the lower back. On June 25th, he recalled it as a pat on the middle or lower back. At the pre-disciplinary hearing on August 9th, Appellant said he touched Hernandez on his back and hugged him. At the February 22, 2008, hearing in this appeal, Appellant testified that he was feeling very good that day after a problem-free shift, and greeted everyone in the cage by shaking their hands and patting their backs. He stated that he grabbed Hernandez, gave him a hug, pat him somewhere on the back, and told him to be safe. Appellant admitted that, on the way out of the building, he asked Hernandez, "[a]re you cool?" He denied saying or hearing any of the other statements reported by the witnesses. [Exhs. 17, 18; testimony of Appellant.]

Francisco Hernandez made two video-recorded statements to Internal Affairs. [Exhs. 15, 16.] His testimony at the hearing was consistent with those statements. In all three, he stated that Marr and Banks were sitting across from each other at the desk to Appellant's right and left, respectively, when he entered the cage. Hernandez bent over the near end of the desk to reach his keys, and Appellant slapped him hard on the buttocks while standing behind him to his left. Hernandez stood up abruptly and said, "What the hell!" Murray said, "I think you got some lift." Appellant added, "Yeah, I think I even cupped it." They both laughed. Appellant vaguely recalls hearing Appellant say something like, "If you stick it out, I'm going to hit it." He left the room and sat at the table outside the cage. When Appellant approached him to shake his hand, Hernandez pushed it away and said, "Get the fuck out of here."

After Appellant left the jail at the end of his shift, Banks approached him and asked, "What the hell was that all about? It sounded like it hurt." [Exh. 16.] Hernandez admitted it did, then prepared his lunch and waited to let the prisoner groups out. He decided he was more affected by it than he thought, and called Sgt. Zuniga to see if he could get relief. Officer Calvin Willingham arrived shortly thereafter, saw that Hernandez was going to see the Sergeant, and asked, "Is this about the slap on the ass? Because you know he was only kidding." Hernandez didn't answer, but went into the Sergeant's office and reported the incident. [Exhs. 11 - 13, 15, 16; testimony of Hernandez.]

Officer Daniel Banks was not looking at Appellant or Officer Hernandez at the time of the incident, but he heard a slap and looked over. Officer Hernandez straightened up immediately and stared at Appellant for several seconds. Banks then heard Appellant say, "If you stick it out, I'm going to hit it." [Exh. 19; testimony of Banks.]

Officer Willingham heard no slap, but looked around to see Appellant's hand on Officer Hernandez' waist and buttocks. He felt that it looked odd and awkward. As soon as he noticed it, Appellant's hand was moving away. Willingham and Appellant left the cage together, and passed Officer Hernandez, who was sitting at the table. Appellant said something like, "It's cool" to Officer Hernandez. Shortly thereafter, Officer Willingham noticed that Officer Hernandez was going in to see the Sergeant. He remarked, "I hope this doesn't have anything to do with what happened with you and Rog [Appellant]." [Exhs. 20, 23; testimony of Willingham.]

During the interview with Internal Affairs, Officer Murray admitted hearing the slap. [Exh. 20.] At the hearing in this appeal several months later, he stated he did not recall either hearing a slap, or seeing Appellant strike Officer Hernandez on that day.

Officer Sheldon Marr testified he saw Appellant slap Officer Hernandez on the waist and lower buttocks area. Later, he heard Appellant ask Officer Hernandez, "Are we cool?" [Exh. 20; testimony of Marr.]

During both Internal Affairs interviews and his testimony, Officer Hernandez became emotional. Appellant admitted he is much larger than him. Hernandez was shocked by the slap, since it was unexpected, and he did not know Appellant well. He was also humiliated by being the public recipient of a painful slap on the buttocks in front of his colleagues. In his four years with the department, he had never seen that done to anyone else. Most importantly, he was concerned that he could not continue to function as a deputy sheriff because he reported the incident. "Guys give guys shit for giving a bag lunch to an inmate. I'm a snitch now, no matter where I go." [Exh. 16.] Ultimately, Officer Hernandez resigned from his position and relocated out of state.

The reaction of the other deputies indicates that Hernandez' concern was not unfounded. Banks believed the slap was not anything serious, and the type of thing that occurs every day. He testified that rumors circulated in the department about this event, and he noticed that most employees were more stunned by Hernandez' reaction than by what Appellant did. Marr testified he didn't think the slap on Hernandez' buttocks was "a big deal." Murray stated there was nothing out of the ordinary about what occurred in the cage that day. All of the deputies testified that their relationship with Hernandez was simply that of a co-worker, but that they were either friendly or very friendly with Appellant.

Based on her review of the interviews and the entire record of this incident, Deputy Manager of Safety Mary Malatesta found that the facts supported the charge that Appellant slapped Hernandez on the buttocks. She also concluded that Appellant had been persistently untruthful during the internal investigation in denying the incident, which was substantially corroborated by the eyewitness statements of the five other deputies present during the event. Because honesty goes to the essence of what is expected of an officer, Ms. Malatesta determined that a 45-day suspension was appropriate given the nature of the incident and Appellant's past disciplinary record, which included a 2004 verbal reprimand for departing from the truth. [Exh. 8.]

IV. ANALYSIS

1. Discipline under the Career Service Rules

In an appeal of a disciplinary action, the Agency has the burden to prove the action was taken in conformity with Rule 16 of the Career Service Rules, and that the degree of discipline was reasonably related to the seriousness of the offense, taking into consideration the employee's past record. CSR § 16-20.

A. Violent behavior

The Agency asserts that Appellant's actions violated a number of regulations prohibiting assaults or abusive behavior. The first issue to be determined is whether Appellant struck Officer Hernandez on the buttocks during shift change on May 30, 2007.

Each of the six officers present at shift change recalled events somewhat differently. All of them testified that officers came and went, but that Appellant, Hernandez, Marr and Banks were in the office at the relevant time. All but Appellant either heard or saw a slap. Officer Hernandez consistently stated on five occasions that Appellant slapped him hard on the buttocks in front of the other officers. Banks heard a slap as Hernandez was leaning over the desk, and heard Appellant say, "If you stick it out, I'm going to hit it." Murray heard a slap, and conceded that Appellant could have slapped Hernandez on the buttocks. Marr saw Appellant slap Hernandez on the waist or lower buttocks. Willingham saw Appellant's hand on Hernandez' waist and buttocks. The sight was so odd and awkward-looking that Officer Willingham later connected it to Officer Hernandez's subdued behavior during the shift, and his request to see the captain. Appellant's four colleagues admitted what they saw and heard, despite their obvious reluctance to verify information that could negatively affect Appellant, an outgoing and popular officer.

In additional corroboration that the contact was a slap and not a friendly pat on the back, Appellant admitted that he patted Hernandez on the lower back in his first statement to Internal Affairs a few days after the incident. Marr and Willingham both heard Appellant ask Hernandez if he was "cool" when he saw him sitting by himself at a table right after the incident. Appellant testified that asking a fellow officer if he was cool meant asking him if he was okay.

Appellant argues that he didn't intend to cause harm to Officer Hernandez. However, Appellant testified that he is about six inches taller than Officer Hernandez. He is also much larger than him. Officer Banks, whose testimony was largely sympathetic to Appellant, heard Appellant say, "If you stick it out, I'm going to hit it", a statement that Appellant denies making. Officer Hernandez recalled hearing a similar statement. That is direct evidence of Appellant's intent at the time of the physical contact. This slap was hard, and aimed at the buttocks when Officer Hernandez was bent over the desk in a vulnerable position. As such, it was different in nature from the goodbye hugs, pats or handshakes Appellant routinely gave to others at shift changes.

While it appears that Appellant's intention was to tease rather than assault Officer Hernandez, it is incontestable that the act itself was intentional. Once an action is taken, the actor loses the power to control the effect of his behavior on the victim. Officer Hernandez's emotional reaction was foreseeable given the nature of the encounter: an unexpected spank in front of four of his peers by a

much larger co-worker who was a mere work acquaintance, followed by insulting banter between Appellant and another officer and laughter. In addition, Officer Hernandez believed there was a departmental culture against "snitches" that gave him no choice but to resign after he reported the incident. As a result of this incident, Hernandez did resign his position as an officer with the Denver Sheriff's Department. The fact that his resignation caused disruption of his professional and personal lives demonstrates the genuineness of his strong emotional reaction to this event.

The Agency contends that Appellant's action violated Denver Sheriff Departmental Order 2441.1D, which prohibits intimidating, threatening, or hostile behavior, and assault. The disciplinary letter also cited department rule 200.15, which bans abusive behavior towards any department employee. I find that Appellant's slap violated both the order and the rule, and therefore violated C.S.R. § 16-60 L, Failure to observe written departmental or agency regulations, policies or rules.

Finally, the Agency contends that Appellant violated C.S.R. § 16-60 M, which makes abusing employees subject to disciplinary action, and § 15-110, the city's policy that violence, including physical assault, will not be tolerated in any city workplace or location. I find that Appellant's slap of Hernandez constitutes both abuse of an employee and a physical assault in a city workplace, and thus violates both rules.

B. Dishonesty

The Agency next contends that Appellant's statements to Internal Affairs were dishonest in violation of CSR § 16-60 E.3., and Denver Sheriff's Department Rule 200.4. Section 16-60 E.3. prohibits "any act of dishonesty". Rule 200.4 reads, "Deputy Sheriffs . . . shall not depart from the truth [or] knowingly make misleading statements".

Dishonesty is the knowing communication by an employee of a false statement within the employment relationship. In re Dessureau, CSA 59-07, 6 (1/16/08). The Agency relies upon Appellant's two oral statements during the Internal Affairs investigation in charging him with dishonesty. Appellant is the only witness who had a direct personal interest in the outcome of the investigations, and a motive to minimize the incident. Appellant repeatedly insisted that he was greeting his fellow officers, who he considered family, in order to remind them to be safe. In the first statement, Appellant admitted only patting Hernandez on the lower back. In the second, he said he patted Hernandez on the middle or lower back.

In contrast, every other witness heard a slap or saw Appellant's hand striking or resting on Hernandez' buttocks. Marr saw the slap on the buttocks. Willingham saw Appellant's hand on Hernandez' buttocks, thought it looked "odd"

and “awkward”, and later asked Hernandez if he was going to see the Captain about it. Banks heard Appellant say, “If you stick it out, I’m going to hit it.” All but one witness told the same version of events from the day it occurred until the hearing nine months later. Hernandez had no interest in making up an event that caused him so much embarrassment and personal disruption. The other four officers felt much friendlier toward Appellant than they did toward Hernandez. I conclude that Appellant was dishonest in his statements to Internal Affairs in an attempt to avoid responsibility for his actions. As a result, the Agency proved Appellant violated CSR § 16-60 E.3. and departmental rule 200.4. In addition, the Agency established that Appellant violated CSR § 16-60 Y by his conduct which violated the Career Service Rules.

2. Appropriateness of Penalty

The final issue is whether the 45-day suspension was too severe for the nature of the proven misconduct. Appellant’s disciplinary history included two verbal warnings, one in 2002 for failing to attend required training, and one in 2004 for, among other things, departure from the truth and disrespectful treatment of a supervisor. [Exh. 8.]

Deputy Manager of Safety Malatesta found that information from every one of the witnesses demonstrated that Appellant’s persistent denials were false. She believed Appellant slapped Hernandez in a playful mood, with no malicious intent. However, the disparity in size between Appellant and Hernandez and the force of the blow rendered it an assault, which seriously affected the victim. More importantly, Ms. Malatesta concluded that Appellant’s pattern of dishonest statements struck at the core of what the department expects of its officers. As Senior Deputy Monitor with responsibility for civilian oversight of complaints against officers, she sees integrity as an obligation that each employee owes jail inmates, other deputies, the department, and the public.

Given Appellant’s past discipline for departure from the truth, Ms. Malatesta determined that only a serious penalty such as a lengthy suspension or termination would be appropriate. She considered termination, but rejected it as too severe based on Appellant’s apparent intent to be funny when he administered the slap. A long suspension of forty-five days was imposed in an attempt to give Appellant one more chance to conform his conduct to departmental standards, and to send a strong message that future misconduct would likely result in dismissal.

The corrective purpose of discipline is fulfilled when an agency tailors the penalty to the nature and circumstances of the misconduct and the employee’s past disciplinary history. An employee’s steadfast refusal to acknowledge a need for improvement despite numerous mistakes and an extensive disciplinary history justified dismissal in In re Diaz, CSA 72-06, 3 (CSB 9/20/07). The Agency’s termination of a deputy sheriff who continued to deny wrongdoing in the

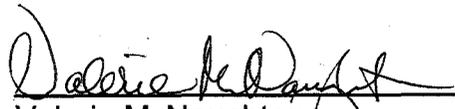
face of strong evidence to the contrary has likewise been upheld. In re Simpleman, CSA 31-06, 10-11 (10/20/06), *affirmed* CSB 8/2/07.

Here, the length of the suspension was based largely on the Agency's institutional need to rely on the honesty of its officers during official investigations. This matter consumed the time and energy of six officers and an investigative team, and led directly to the resignation of the deputy who was slapped. Appellant's testimony repeated his prior statements in similar words, with no explanation as to why his memory of this event was so different from that of the other officers present. I do not find Appellant's testimony about the event credible. Throughout the investigation and appeal proceedings, Appellant attempted to avoid the consequences of his actions by withholding the truth. In light of these facts, a 45-day suspension was within the range of penalty that a reasonable administrator may see as necessary to achieve the desired behavior, given the centrality of truthfulness to the mission of the Agency.

Order

Based on the foregoing findings of fact and conclusions of law, it is determined that the Agency's action dated August 30, 2007 is AFFIRMED.

Done this 18th day of March, 2008.


Valerie McNaughton
Career Service Hearing Officer