

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO
Appeal No. 30-13A and 32-13A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

DAVID SHELLEY and CHRISTINE MARTINEZ,

Respondents/Appellants.

vs.

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

Petitioner/Agency.

Sgts. David Shelley and Christine Martinez (Appellants) were issued disciplinary suspensions of four days and ten days, respectively, for their alleged failure to follow proper procedures in their dealings with a drunken maintenance worker at the Denver County Jail. The sergeants appealed their discipline to a hearing officer who vacated the discipline against Sgt. Shelley and modified Sgt. Martinez's discipline to a written reprimand. The Agency has petitioned for review of the Hearing Officer's decision.¹

The Agency first takes issue with footnote 3 found at page six of the Hearing Officer's decision. In that footnote, the Hearing Officer states, "it would not be unduly burdensome for the Agency to add drug and alcohol protocol to its training" It would appear that this comment is nothing more than *dicta*; a helpful suggestion to the Agency, not requiring comment from us.

We would, however, caution future litigants not to make any more out of this statement. First, we agree with the Agency that the record is insufficiently developed for the Hearing Officer to have made such a comment. More importantly, however, we believe the comment is an inappropriate intrusion by the Hearing Officer into the operational province of the Agency. We do not believe that a Hearing Officer has the authority to dictate to an agency the nature and

¹ Since the filing of the Petition for Review, Sgt. Martinez has apparently resigned her position. As a result, the Agency no longer seeks review of the Hearing Officer's decision modifying her ten-day suspension to a written reprimand. That portion of the decision, therefore, is affirmed.

amount of training received by employees or whether an Agency will conduct training at all. That is a management decision and is not for a hearing officer to decide.

The Agency next takes exception to one of the Hearing Officer's repeatedly stated rationale for overturning the discipline, that being, because Sgt. Shelley was not specifically, sufficiently or recently trained on the alcohol policies in question, he cannot be held responsible for failing to act in accordance with those executive orders and regulations. We agree that this was error on the part of the Hearing Officer

There is no question that the existence and the terms of Executive Order ("EO") 94 (City's alcohol and drug policy) and Departmental Order ("DO") 2035.1B (regarding the duty to initiate testing of employees suspected of being impaired on the job) were disclosed to Sgt. Shelley and that his job duties and responsibilities included being aware of and familiar with the rules and regulations governing the workplace. The fact that these rules and regulations might have been given to the Sergeant for review at the same time he was given numerous other documents, policies, rules and regulations to review and, ultimately, understand, is of no consequence. As a matter of policy, we expect all Career Service employees to be familiar with the published rules, regulations and policies governing their workplace. Lack of training, or lack of recent training, does not relieve employees of their obligation to know the rules and act in accordance with them. Consequently, we disagree with the Hearing Officer where he concludes that the EO and DO were not reasonably communicated to Sgt. Shelley. To the extent that the Hearing Officer relied on this wrongfully decided issue, we reverse the Hearing Officer's decision.

The Agency next objects to the Hearing Officer's finding in which he interpreted EO 94 and the Agency's alcohol policy to require the concurrence of two supervisors before reasonable suspicion testing for drugs or alcohol use could be performed. We agree with the Agency that such an interpretation is not supported by the record. The policies are the policies. They were admitted into evidence in the hearing record as Exhibits 13 (DO) and 14 (EO). We have reviewed both EO 94 and DO 2035.1B and see no provision in either which requires agreement of two supervisors before reasonable suspicion testing can be initiated.

The Hearing Officer, in his footnote 5 (page 7 of his decision), cites to the provision of EO 94 which states, "When possible, have a second supervisor confirm the specific, contemporaneous, articulable observations of the employee's appearance, behavior, speech or body odors." But this provision does not say that two supervisors must agree before testing can be performed. It states that when possible, two supervisors should confirm their observations of the employee in question. In this case, both supervisors, Sgts. Shelley and Martinez, were in a position to confirm that the maintenance worker had red eyes, stumbled, repeated himself, fumbled with keys and could not open his locker. Both officers smelled something like alcohol on the employee. That is all this section speaks to.

So, to the extent that the Hearing Officer relied on the testimony of two witnesses (Heinrich and Hitchcock)² to support his finding that the regulations require two supervisors to concur before testing can be initiated (Hearing Officer decision, p. 7-8), we hold that the mistaken recollection of two, or any number of witnesses, as to the terms of a written Order, rule or policy, do not constitute evidence of the actual terms of the rule or policy where those actual documents, the actual rules, orders or policies, have been introduced into the record in this case.³ Both the DO and the EO have been admitted into evidence as Agency Exhibits 13 and 14 respectively. The Departmental Order and the Executive Order both speak for themselves. Testimony cannot change the terms of the Orders. We find that the Hearing Officer's conclusion that EO 94 and/or DO 2035.1B require the concurrence two supervisors before reasonable suspicion testing can be initiated is not supported by the record; and that the reliance on testimony for determining the provisions of the Orders, when that testimony is inconsistent with the actual terms of the orders introduced into the record, is contrary to sound policy.

Finally, we believe the record reflects that Appellant was required to issue the drunken maintenance worker an order to undergo testing. The record further reflects that Appellant did not do this.⁴ The record also reflects that when Appellant saw that the drunken employee was not being cooperative, and declared his intention to leave the workplace and then did, in fact, leave the workplace, that Appellant was required to follow him outside, order him not to drive, and, if the employee still refused to cooperate, write down his vehicle information and alert the police. Appellant took none of these actions. Rather, when faced with the drunken employee's lack of cooperation, Appellant responded with "shocked"⁵ inaction. Appellant's inaction constitutes violations of both CSR 16-60A and 16-60L.

For the above-stated reasons, the Hearing Officer's decision is REVERSED. However, because Appellant attempted (though imperfectly) to comply with the DO and EO, and because he has apparently learned from his mistakes and it appears unlikely that any such mistakes would be repeated in the future, we MODIFY the penalty imposed to a Written Reprimand.

² The basis for Sgt. Heinrich's testimony regarding the Orders was that at some time after a 2011 incident involving the same maintenance worker, someone, unidentified, told him. (Transcript, Vol. I, p. 79:5-7) This anonymous utterance cannot serve as evidence of the terms of the policy.

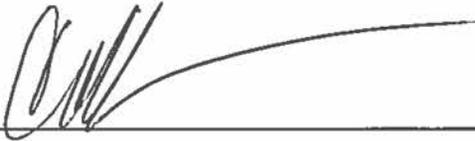
³ We note that while it is Sgt. Shelley's conduct at issue, the Hearing Officer does not rely on Sgt. Shelley's testimony for coming to an understanding of the terms of the Orders. And though Sgt. Shelley's apparent initial understanding was somewhat consistent with the Hearing Officer's conclusion, we note that his understanding was based on nothing but "scuttlebutt." (Transcript Vol. II, p. 57:16-58:8) Scuttlebutt, of course, would also be an inadequate foundation for proving the terms of an Executive or Departmental Order.

⁴ Appellant admitted that he was wrong in not issuing a direct order. The Hearing Officer determined that this admission was not an admission of a rule violation (Hearing Officer decision, p. 8, n.6); but this holding was based on the mistaken conclusion that there needed to be the concurrence of two supervisors before reasonable suspicion testing could be initiated. As we have already held, neither the DO nor the EO requires this.

⁵ Transcript Vol. II, p. 123:1-9. We express some concern with a supervisor, who, when confronted with an uncooperative person, loses the ability to respond to a potentially emergent situation.

SO ORDERED by the Board on October 9, 2014, and documented this day of December, 2014.

BY THE BOARD:



Colleen Rea

Chair (or Co-Chair)

Board Members Concurring:

Patti Klinge

Derrick Fuller