DECISION AND ORDER

THE MATTER OF THE APPEAL OF:

STEVEN SINGLETON, 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 June 4, 2015 before Hearing Officer Valerie McNaughton. Appellant was present and was represented by Don Sisson, Esq. and Steven Mandelaris, Esq. Assistant City Attorney Kristin Merrick represented the Agency in the appeal. The Agency called Elias Diggins, Michael Steggs, Steven Singleton and Shannon Elwell. Appellant presented the testimony of Steven Crews.

I. STATEMENT OF THE APPEAL

Appellant Steven Singleton appealed his thirty-day suspension issued on March 31, 2015. The parties stipulated to Agency Exhibits 1 - 8, 10, 14, and 18 - 25. Agency Exhibits 9 and 26 were admitted at hearing. The issues in this appeal are whether the Agency established that Appellant violated the rules alleged in the disciplinary letter, and whether the suspension is within the range that a reasonable administrator may impose for the proven violations.

II. FINDINGS OF FACT

Appellant has been a Deputy Sheriff with the Denver Sheriff's Department for the past seven years. On March 31, 2015, he was suspended for thirty days based on an incident with an inmate that occurred on Oct. 6, 2013 in Pod 3-D. The jail video showed that Appellant removed two inmate message forms from a locked receptacle and took them to the cell of inmate Eric Howard. The message form is a yellow half-sheet of paper used for inmate questions or communications, and is known as a kite. (Exhs. 23-22, 26.) Appellant knocked on the window, held up the kite, and said a few words while tearing up the kites. Appellant ripped the kite into smaller pieces while walking away from the cell. He disappeared from the video screen at that point, but testified that he deposited the pieces into the officers' trash. (Appellant, 11:48 am; Exh. 1, video of incident.)

During the pre-disciplinary meeting, Appellant said Howard had told him during rounds that "I wrote that grievance and I put it into the (kite) box." (Exh. 18-6.) The Inmate Handbook states that complaints about jail conditions must be relayed on grievance forms, not kites. (Exhs. 23-14, 23-22.) Appellant then obtained the key to the kite box from the watch commander, pulled out the kites and looked at the two sheets. He took the
kites to Howard's cell and tore them up in front of the inmate to make sure he knew they would not be submitted. As he was tearing them, Appellant told Howard that he needed "to put this on a grievance (form)." (Exh. 8-7.)

Two days after the incident, Howard was released from jail. He telephoned the Internal Affairs Bureau (IAB) with eight complaints, including Appellant's destruction of his kite. (Exh. 25-197.) An investigation was begun on these complaints. Based largely on the jail video and an interview with inmate Howard, IAB found that Appellant's actions violated two departmental rules: DSD Rules and Regulations (RR) 200.21 prohibiting interference with the grievance process, and RR 400.5 banning harassment of prisoners. A finding of not sustained was returned on the specification of intimidation of persons under RR 300-23. The investigation determined there was insufficient evidence on the remaining seven complaints brought by Howard. It assigned a Conduct Category E for the two sustained violations, and imposed the presumptive penalty of thirty days for both, to run concurrently. (Exh. 25.)

The first specification, interference with the grievance process, was based on Appellant's action in removing the kites from the box and tearing them up in front of Howard's cell window. He argued that his actions were justified because the complaint was on the wrong form. The investigator found that the form issue did not justify Appellant's destruction of the kite under departmental rules. The investigator also found that Appellant's retrieval of the kites was contrary to the post order making the Corridor Officer responsible for collecting kites. (Exh. 22-6.) Appellant was assigned as Housing Officer on the day in question. IAB found that his destruction of the kites interfered with the administrative process for resolving inmate problems set forth in the Inmate Handbook, which was designed to evaluate and maintain morale, discipline and order in the jail. (Exh. 25-3.)

The second specification was harassment of prisoners. The investigator found that Appellant "intimidated, taunted and harassed" Howard by knocking on his window and tearing up the kite "directly in front of his cell window." The conduct was found to be contrary to the Agency's mission and its guiding principles of respect, judgment and professionalism. (Exh. 25-8.)

There are few significant factual disputes in this appeal. While Appellant recalled only one kite during the investigation, after viewing the video during the hearing he conceded that it showed two kites. (Appellant, 11:15 am; Exh. 1, 15:52:13; Exh. 8-23.) Howard told IAB that one kite was a message to his Public Defender requesting certain information, but he could not recall the subject of the second kite. (Exh. 9.) When Appellant was questioned five months after the incident, he recalled that the topic of the one kite was "complaining about being moved" from cell to cell. (Exh. 8-15.) At the pre-disciplinary meeting a year later, Appellant believed the kite was a complaint about unsanitary conditions in his cell. (Exh. 16, 23:28.) The contents of the kites cannot be confirmed, since the kites were discarded before Howard made his complaint. It appears that at least one of the kites contained a complaint about jail conditions that should have been filed as a grievance. A kite is authorized for routine messages or

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1 During the inmate's three months in the jail, Howard was moved to fourteen different cells. (Exh. 25-188, 25-195.)
2 One of Howard's complaints to IAB in October, 2013 was about unsanitary conditions. (Exh. 25-184.)
requests, requests for grievance forms, or messages to attorneys. (Exhs. 18-6; 23-13; 23-22; 26.)

Appellant has claimed throughout the disciplinary process that he offered Howard a grievance, but the latter refused. (Exh. 8-7, 18-6.) The video showed Appellant spent only four seconds in front of the cell door, during which he knocked, held out the kites, and ripped them in half. At most, Appellant was speaking during three of those seconds, only enough time to say that he could not use a kite for a grievance. He then walked away without breaking stride. (Exh. 1.) Appellant testified that as he was walking away, Howard said he didn't want a grievance. The video shows no reaction by Appellant during his walk back, which would be unusual behavior if the prisoner was still talking to him. A few seconds after Appellant left the area being filmed, Howard stood up and began pacing, but never faced Appellant. That is consistent with Appellant's testimony that Howard was sitting when he looked into the cell. These facts tend to show that there was no further exchange between the two after Appellant turned away from the cell. I find that Appellant did not offer Howard a grievance form after he tore the kites.

Howard's version of the Incident raises the only remaining factual issues. He stated that Appellant was in his cell and informed him that if he turned in a kite, Appellant would tear it up. Howard told IAB that he asked Appellant not to tear it up, because it was to his lawyer. He nonetheless gave the kites to Appellant, who, according to Howard's recollection, immediately ripped them up. (Exh. 9.)

In contrast, Appellant told the Agency that he and Howard had two separate conversations. The first occurred during prison rounds, when Howard told him he "wrote that grievance and put it in the (kite) box." Appellant responded, "(y)ou can't do that. (Exh. 16, 27:45.) The two are shown on the video during this second conversation, although there is no sound. Appellant removed the kites from the box and took them to Howard's cell door. He knocked on the window, held up the kites and appeared to talk Howard from outside the cell while tearing the kites in half. Appellant testified that he did not tell Howard he would rip the kites if he turned one in. In any event, Appellant did rip the kites during their second encounter. (Exhs. 1; 8-5; 16, 24:40.) The video demonstrates that Howard's recollection of the event was inaccurate as to the location of the incident and his assertion that Appellant warned him he would rip the kites if they were submitted. (Exh. 9.)

Civilian Review Administrator Shannon Elwell made the disciplinary decision. Elwell found that one of the kites contained a message to Howard's Public Defender, and another complained about both unsanitary conditions and a request for movement. She also found that Appellant was at the window for four seconds, during which he knocked, held up the kites, said something, moved his head "as if to emphasize a point", tore the kites, turned and walked away. "These actions indicated that it is more likely than not that Deputy Singleton taunted inmate Howard as (Appellant) was speaking." (Exh. 18-8.) Elwell also found that the short duration of the encounter at the cell door indicates there was a previous conversation between the two in which Appellant told him that if he turned in a kite, Appellant would tear it up. Elwell found that Appellant interfered with the grievance process and harassed a prisoner, in violation of RRs 200.21 and 400.5, both of which fall into Conduct Categories D - F under the disciplinary matrix. It was determined that his conduct neglected his duty to demonstrate the guiding principles of respect, integrity and professionalism. She also found that the actions interfered with the grievance process in violation of RR § 200.21. Lastly, Elwell found that the behavior
taunted and harassed the prisoner in violation of RR § 400.5. Elwell assigned Conduct Category E to the behavior as a serious abuse of authority and an act that cause a serious and adverse impact on the inmate. There were no findings on the allegations of carelessness and Intimidation of persons included in the pre-disciplinary letter, and they were therefore implicitly rejected. Based on the finding that the absence of prior discipline and positive evaluations were not sufficiently weighty to mitigate the penalty, Elwell imposed the presumptive penalty of a thirty-day suspension for each specification, to run concurrently. (Exh. 18-9 to 18-12.)

III. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and to show that the thirty-day suspension was within the range of discipline that can be imposed under the circumstances. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

Appellant argues that Manager of Safety Stephanie O'Malley did not designate the Civilian Review Administrator to act for her in making this disciplinary decision, and that this suspension is therefore ultra vires. He contends that CSR § 16-70 permitting such delegation of authority is void because it conflicts with Denver City Charter § 2.6.4, which names the Manager of Safety as the appointing authority for purposes of discipline and other matters.

Under the Charter, the Career Service Board has full authority to adopt "rules necessary to foster and maintain a merit-based personnel system" as long as they are in accordance with the merit system principles enumerated in Part 1. City Charter, § 9.1.1.A. There is no additional requirement. In fact, delegation of specific responsibilities is a necessary and accepted practice to allow an agency director to accomplish the functions required by the agency mission. See e.g. CSR § 5-15. The Department of Safety employs over 4,000 officers and other employees, making it impractical for the Manager to handle all disciplinary matters. Appointing authorities remain ultimately responsible for accomplishment of the disciplinary tasks delegated to agents.

Appellant further argues that the delegation was improper because it was not reduced to writing. However, CSR § 16-70 does not require a written delegation of authority. Thus, the oral delegation of disciplinary authority to the Civilian Review Administrator was effective and consistent with the Charter.

A. VIOLATION OF DISCIPLINARY RULES

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

An employee who fails to perform a known job duty neglects that duty within the meaning of this rule. In re Serna, CSB 39-12, 3-4 (2/28/14); In re Compos, CSB 56-08 (6/18/09). Here, the Agency contends that Appellant's destruction of the kite and failure to provide the inmate an alternate method of communication constituted neglect of his duty to expedite inmate communications. (Elwell, 6/4/15, 1:36 pm; Exh. 18-10.)
It is the Denver Sheriff's Department's policy to establish and facilitate professional communications and interactions between staff and Inmates in order to evaluate and maintain inmate morale, discipline and good order in the facility. It is the Department's policy to listen to the legitimate suggestions, complaints and grievances which Inmate(s) may express.

(Exh. 25-3, citing Departmental Order (D.O.) 4810.1D.)

Appellant's Performance Enhancement Program (PEP) as a Deputy Sheriff lists care and custody of inmates as his first priority, and customer service as his second most important duty. (Exh. 25-97.) The Inmate Handbook is provided to all Inmates as "a guide to help you adjust to the jail environment." (Exh. 23-1.) It instructs them to direct questions or concerns to a housing officer for assistance. The handbook provides several methods for inmate communications, including kites for messages and grievances for complaints. Both methods require staff efforts to deliver and complete, since inmates are severely restricted in both their movements and activities within the jail. (Exh. 23-13, 23-22.)

Based on his assignment as Housing Officer and the nature of his position, Appellant has a duty to facilitate inmate communications. Contrary to that duty, Appellant retrieved Howard's kite with the intent of examining it to see if it was a complaint and, if so, discarding it. His testimony makes it clear that his actions were based on his firm belief that inmates must always use the right form, even at the expense of delaying or blocking their communications to resolve problems. Appellant described the kite as contraband similar to drugs or a sharp object because it fit his understanding of the word as an object not used for its original purpose. (Appellant, 11:03 am.) Deputy Michael Steggs testified that he shared that interpretation of the word. (Steggs, 10:53 am.) Deputy Steven Crews confirmed that he too has torn up a kite in front of an inmate if it is in substance a complaint rather than a message, but he then offered the inmate a grievance form for his complaint. (Crews, 4:20 pm.) As found above, Appellant did not offer Howard a grievance form after destroying his message.

The word contraband as used in the jail setting means something Inmates are not permitted to possess, such as drugs, tobacco or weapons. (Diggins, 9:09 am.) It also includes an authorized item that has been altered into contraband from its original state, e.g., a toothbrush carved into a shank that can be used as a weapon. (Exh. 23-21; Elwell, 2:30 pm.) The Inmate Handbook and departmental rules do not support Appellant's inflexible approach to inmate communications, or his destruction of the kite as if it were a weapon or drug. On the contrary, the rules require deputies to assist in the delivery of messages from prisoners. Appellant stretched the word contraband to justify his destruction of the kite, and failed to apply the training he received for serving special needs prisoners.

While Appellant was not required as Housing Officer to transport Howard's kites, his actions in removing them from the kite box and destroying them was effectively a failure of his duty to expedite inmate communications. The evidence clearly shows that Appellant failed in his duty to assist Howard in his efforts to communicate, contrary to the Agency's communications policy and the duties of his position.
2. Failure to obey departmental regulations under CSR § 16-60 L.

The Agency found that Appellant's conduct violated the following departmental regulations, which in turn subjected him to discipline under CSR § 16-60 L.

A. RR § 200.21 - Interference with Grievance Process: No deputy or employee shall interfere with the Departmentally established administrative means for resolution of inmate problems. (Exh. 20-103.)

As found above, the evidence showed that Appellant removed the kites from the box and tore them up in front of Howard's cell window. Appellant claims that the conduct was not a violation of this rule because the messages were not on a grievance form. However, the rule is broadly written to prohibit interference with any of the department's administrative means for inmate problem resolution, which clearly includes both grievances and kites under DO 4810.1D. Since kites are the means by which an inmate can request a grievance form, they are a crucial part of the grievance process. (Exh. 23-14.) The kite form contains a list of ten jail functions and the Public Defender's Office, all of which may be the recipient of a prisoner's kite. (Exh. 26.)

Appellant relies on the word "grievance" in the title of RR 200.21, and ignores the actual language of the rule, which makes it clear that it covers the department's entire system "for resolution of inmate problems." Most importantly, his interpretation is inconsistent with the stated purpose of the Agency's communications policy to "maintain inmate morale, discipline and good order", and listen to inmates' "suggestions, complaints and grievances". That policy includes all types of communications, not just formal grievances written on the established grievance form. (Exh. 25-3.) Appellant's interpretation would allow a deputy to destroy a message based solely on an Inmate's unguided decision to use one form over another. That overly technical approach cannot be squared with the broad purpose of the policy to enhance jail communications, and the necessary role kites play in the grievance process.

Howard's kites were an attempted exercise of his available administrative means to resolve his problems, regardless of the form used or nature of the complaint reported. Appellant's purposeful actions in retrieving them from a locked box and tearing them up interfered with Howard's effort to get information or help by administrative means.

Appellant claims that he was merely demonstrating to Howard that his kites would not reach their intended destination. Nonetheless, Appellant failed to provide Howard with another method of communication after having destroyed his first attempt. Two days later when he was released, Howard still had not been given a grievance form or an answer to his questions or issues. Appellant's conduct therefore interfered with the grievance process in violation of RR § 200.21.

The Agency also argued that Appellant's retrieval of the kites was contrary to the post order making corridor officers responsible for collecting kites. (Exh. 22-6.) The evidence does not support that argument. Appellant was assigned as Housing Officer on the day in question. While it is true that the corridor officer has kite duty under the post order, that order does not restrict other officers from assisting in that duty. The Inmate Handbook states that a prisoner may give a kite to a housing officer or any other "person with whom you wish to communicate." (Exh. 23-22.) During her IAB interview, Deputy Womely confirmed Appellant's testimony that it is common practice for housing
officers to collect kites in order to assist corridor officers. (Exhs. 25-18; 8-9.) The key was available through the watch commander, and the Agency did not cite the post order in its disciplinary letter. I find that Appellant did not violate the post order by removing the kites from the box. In any event, the Agency did establish that Appellant violated RR § 200.21, the departmental rule prohibiting interference with the grievance process.

B. RR § 400.5 - Harassment of Prisoners: Deputy sheriffs and employees shall not taunt or harass any prisoner or encourage or permit others to do so. Deputy sheriffs and employees shall not maliciously embarrass, intimate or threaten any person or encourage or permit others to do so. (Exh. 20-109.)

The investigator found that Appellant "intimidated, taunted and harassed" Howard by knocking on his window and tearing up the kite "directly in front of his cell window." The conduct was found to be contrary to the Agency's mission and its guiding principles of respect, judgment and professionalism. (Exh. 25-8.) Elwell confirmed during her testimony that she did not find that Appellant's conduct was intimidating. (Elwell, 2:50 pm.) I also find there is no evidence from the video or other source which would support finding that Appellant acted in any matter intended to instill fear in the prisoner. See Merriam-Webster Online Dictionary, http://www.merriam-webster.com (7 July 2015.) What remains is to determine whether the findings of taunting and harassment were supported by the record.

Taunts are remarks intended to anger, wound or provoke another. Oxford Online Dictionary, http://www.oxforddictionaries.com (7 July 2015.) Harassment is defined as "words, conduct or actions (usually repeated or persistent) that ... annoy, alarm or cause substantial emotional distress ... and serve no legitimate purpose." Black's Law Dictionary (9th ed. 2009.) Therefore, the evidence must be examined to determine whether it showed Appellant's actions were intended to anger or distress the inmate, and if so whether the actions served a legitimate purpose.

Civilian Review Administrator Shannon Elwell based her conclusion that Appellant taunted and harassed Howard on her findings that Appellant warned Howard that if he submitted a kite he would tear it up, and then "moved his head as if to emphasize a point" while talking to Howard and tearing up his kites. "These actions indicated that it is more likely than not that Deputy Singleton taunted inmate Howard as (Appellant) was speaking." (Exh. 18-8.)

As to the first finding, Elwell relied on Howard's statement that Appellant told him he would tear up the kite. However, the video contradicts Howard's version in two important respects. It shows that Howard did not hand Appellant the kites, but that Appellant took them from the box. It also showed that Appellant was outside of Howard's cell when he ripped them up, not inside as alleged by Howard. (Exh. 9.) Shortly after this incident, Howard was found to be mentally incompetent and placed at the Colorado Mental Health Institute at Pueblo. He was not interviewed in this matter until eight months after the event. During Appellant's statement five months after the event, he denied threatening to tear up the kites, but simply told him he could not put a grievance on a kite. Appellant is a law enforcement officer with no prior discipline during his four-year history with the Agency. His demeanor on the stand was straightforward and candid, and he was not charged with dishonesty in this matter. For these reasons, Appellant's statement is more convincing than that of the inmate. I find that Appellant did not tell Howard he would tear up any kite he submitted.
In addition, Elwell's harassment finding relied heavily on her conclusion that Appellant "appeared annoyed, moving his head in a taunting manner." (Elwell, 2:17 pm; 18-8.) However, the video shows no head movement or body language indicating annoyance by Appellant during that four-second interval. (Exh. 1, 15:52:27.) The prisoner did not report that he felt Appellant harassed him. (Exh. 9; Elwell, 2:55 pm.)

The evidence showed instead that Appellant made a unilateral decision to investigate the nature of Howard's kites, and tore them up in front of Howard while informing him, in essence, that he used the wrong form. These actions clearly interfered with the jail's communications and grievance procedures, but they did no more than that. Howard stated to IAB that he did not know why Appellant tore up his kites. (Exh. 9.)

If the rule against harassment Is to have a separate meaning, it must require some showing of actions intended to provoke anger or distress. Appellant's demeanor was purposeful, but revealed no apparent intent to harass or provoke the prisoner. The facts used by the Agency as the basis for its finding of harassment were not proven during the hearing in this appeal, and the evidence did not otherwise prove Appellant harassed the prisoner.

B. PENALTY DETERMINATION

Disciplinary penalties for Denver's career service employees are governed by the criteria stated in CSR § 16-20. That rule requires an agency to consider several factors, including the type and gravity of the offense, past discipline, and the type and level of discipline it believes is needed "to correct the situation and achieve the desired behavior or performance." Deputy sheriffs are career service employees. Denver City Charter, § 9.1.1. E.

The special mission and work of an agency can play an important part in the penalty decision. Here, the Denver Sheriff's Department is a law enforcement agency entrusted with the care and custody of inmates. The Department of Safety and Sheriff's Department promulgated disciplinary guidelines in 2011 for the purpose of establishing "an effective discipline system ... that is fair, rational, efficient, reasonably consistent and transparent ... and fosters respect, trust and confidence" in the Agency and those it serves. (Exh. 20-1.) To that end, a 90-member Sheriff Department Disciplinary Advisory Group convened for eighteen months, and solicited opinions from law enforcement professionals and citizen groups. The Department then published the resulting 119-page Disciplinary Handbook, which enumerates its guiding principles and categorizes its regulations into six groups of increasing seriousness based on described criteria. For each of those category groups, it sets presumptive, mitigated and aggravated penalties for violations, a system commonly referred to as the disciplinary matrix. (Exh. 20-86 to 20-92.)

The six conduct categories describe the relative seriousness of offenses for each in succinct phrases, from conduct having a "minmal negative impact" for category A to a "violation of law (resulting) In death or serious bodily harm" for category F. (Exhs. 20-87 to 20-92.) In order to promote consistency and predictability, each category lists the rules that are presumptively included therein. Some rules, such as the one at issue here, are listed in more than one category. In that circumstance, "(a)nyone reviewing such a case will need to analyze the factors noted below (Section 15.0) and consider the various facts presented in order to determine the most appropriate conduct category." (Exh. 20-24.)

The reviewer is instructed to answer eleven questions designed to assess the nature and impact of the misconduct, bearing in mind "the specific definitions of conduct categories
already established." (Exh. 20-26.) Based on the answers to those questions, the reviewer then selects the appropriate conduct category.

The proven violation here is RR § 200.21, which may be punishable as anywhere from a Category D to a Category F, depending on the nature of the conduct and the harm caused, among other factors. (Exh. 20-90, 20-92.) Elwell assigned Conduct Category E to both rule violations based on her conclusion that destruction of the kite without offering an alternative was a serious abuse of authority that caused serious harm by denying the inmate his constitutional right to counsel and the opportunity to communicate with the outside world. (Elwell, 3:10, 3:57 pm.)

A housing officer with freedom of movement and the right to give orders to a cell-restricted inmate possesses undeniable physical authority over the inmate. He has access to inmate kites based on his duty to deliver them under jail rules. A deputy may misuse that authority if he intentionally diverts or hides a kite or, as in this case, destroys it.

The evidence demonstrated that Appellant took it on himself to retrieve the kite from the box and tear it up in front of the inmate because in his view the kite violated jail communications regulations. By not offering an alternative method, Appellant abused his authority to handle inmate communications.

The Agency contends that this was elevated to a serious abuse of authority because Appellant warned Howard he would rip the kite up, and taunted and harassed Howard as he did so. Based on that same evidence, the Agency found that Appellant displayed indifference to Howard’s rights under the grievance policy. (Elwell, 1:08, 1:25-1:40.)

As noted above, the Agency failed to prove Appellant threatened to destroy the kites, or that he taunted or harassed Howard when he ripped the kites in two. Appellant was consistent throughout these proceedings that he destroyed the kite in front of Howard not to taunt him, but because he wanted him to understand that it was the wrong form and would not be delivered. He believed that the kite would have been rejected by the supervisor because it was on the wrong form. He ripped the kite up to let Howard know he should file a grievance rather than wait two days for the inevitable rejection of his kite, and to assure him no one else could read it. (Appellant, 11:14-11:20 am.) Howard was aware the kites would not be delivered because he witnessed their destruction. In apparent response, Howard used other means to contact his attorney. Based on that uncontradicted evidence, I find that Appellant did not intend to prevent Howard from exercising his rights under the grievance policy.

Next, the Agency asserts that the abuse was serious because it involved a deprivation of a constitutional right to the assistance of counsel. This argument requires a review of cases interpreting the rights of prisoners to communicate with their attorneys as guaranteed by the Sixth Amendment.

"[I]nmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right to access to the courts are invalid." Procurier v. Martinez, 416 U.S. 396, 419 (1974). There is no claim here that Howard was deprived of the assistance of his attorney during a critical stage of the criminal prosecution, as required to find a violation of the Sixth Amendment. Powell v.
Alabama, 287 U.S. 45, 57 (1932). Procunier held that non-delivery of a prisoner letter simply required the minimum procedural safeguard that the inmate shall "be notified of the rejection" and "given a reasonable opportunity to protest that decision." Supra, 417-418. See also Vigliotto v. Terry, 873 F.2d 1201 (9th Cir. 1989) (ruling that withholding legal materials for three days did not deprive an inmate of meaningful access to the courts); and O'Mara v. Dionne, 2009 WL 2170986 (D.N.H. 2009) (administrative regulations on inmate mail are not unconstitutional unless they "unjustifiably obstruct the availability of professional representation" or "unreasonably burden his opportunity to consult with his attorney and to prepare his defense," citing Procunier. Mere delay in a communication to an attorney is de minimis and is therefore not a violation of constitutional rights. LeVler v. Woodson, 443 F.2d 360, 361 (10th Cir. 1971); Ingraham v. Wright, 430 U.S. 651, 674 (1977).

In this case, Howard was temporarily denied one method of contacting his attorney. However, jail rules provide liberal and free access to attorneys by mail, phone and messages. (Exh. 23-23.) As noted above, Howard told IAB that he did contact his attorney and obtain the information requested in the kite. (Exh. 9; Elwell, 2:33 pm.) Thus, the harm done was only temporary. There is no evidence that Howard was denied the services of his attorney during a critical stage in the prosecution against him. Appellant did not deprive Howard of the assistance of counsel under Amendment VI of the U.S. Constitution. Therefore, the Agency did not prove either basis for its conclusion that Appellant seriously abused his authority.

It must also be determined if the record supports the finding that the conduct caused a serious and adverse impact under Category E or CSR § 16-20, as both state the criteria used to determine the nature and seriousness of the offense. Destruction of the kites at very least delayed their delivery until they could be re-written. Two days after this incident, Howard did reconstruct his complaints and submit them to Internal Affairs. At that time, his description of the unsanitary conditions included only not being "allowed to leave his cell when maintenance staff used a blow torch to clean the feed flaps." (Exh. 25-1.) When interviewed by IAB, he described the unsanitary conditions in the following words:

It was in 3 Dog (Pod 3-D) when I first got there. I asked for a clean cell because the cell was dirty, it had bandages, people had used cotton swabs for like blood and stuff like that. So I asked for a clean cell, and the sheriff said it was already cleaned.

(Exh. 9, at 00:06:50)

Neither of the disciplinary letters mentioned blood in the cell. (Exhs. 14, 18.) At hearing, Elwell stated she based her finding of actual and serious impact on the fact that Howard "had to stay away from the blood on that particular bench, ... he had to sit and remain in a cell that was not hygienic or otherwise clean when it had blood from another inmate in it." (Elwell, 3:42 pm.) The only evidence on that subject is that Howard complained to a deputy of unsanitary conditions when he first entered the cell four days earlier, and the deputy told him the cell had just been cleaned. (Exch. 25-195.) There was no evidence that four days later there was blood anywhere in the cell, and no indication in the disciplinary letters that the Agency based its finding of serious harm on that allegation.
The most contemporaneous version of events is Howard's statement just two days after the incident. Based on that statement, I find that the complaint was about the cleaning of the feed flaps, not blood in the cell. (Exh. 25-1.) By that time, he was out of custody and his complaint about jail conditions became moot. Howard did not claim that as a result of Appellant's actions he suffered any harm between Oct. 6th and 8th. (Exh. 9.) The harm done was thus limited to a short delay in his letter to his attorney.

A jailer's destruction of inmate mail may be characterized as serious if it imposes long-term or significant consequences on an inmate, including emotional effects. The jail did not retrieve the cell video during its 30-day life, and so there is no video evidence that Howard became agitated after the incident. (Elwell, 2:50 pm.) Appellant testified that the pod remained quiet thereafter, and that evidence was not disputed. (Appellant, 11:59 am.) I find that the evidence proved harm to the inmate, but not serious harm, under either CSR § 16-20 or the agency's matrix.

The decision-maker did not identify the specific criteria used in measuring the level of harm caused by Appellant's actions. Elwell testified that in comparison, an instance of publicly picking up an inmate by his handcuffs would be of lesser harm than this conduct. (Elwell, 3:57 pm.) Since the example involves physical harm to an inmate and potential damage to the image of the Department, the example does not provide useful guidance in determining the criteria used to select the conduct category here. There is no indication that Elwell engaged in the analysis delineated in the matrix to determine the appropriate category. (Exh. 20-25.)

In the absence of the criteria or analysis used to determine the nature of the conduct, I must analyze the evidence to ensure that the penalty assessed is not arbitrary and capricious, or outside "the range of alternatives available to a reasonable and prudent administrator" under CSR § 16-20 and, by extension, the Agency's disciplinary matrix. In re LaCombe, CSB 10-14, 3 (7/16/15.)

An agency's penalty decision is entitled to considerable deference, since it is an exercise of judgment about whether the punishment fits the misconduct in light of the agency mission, operations, and standards. It also calls on the decision-maker to gauge the level of punishment needed to correct the behavior, a decision requiring knowledge of the agency setting. Thus, an agency's penalty is not disturbed "unless it is clearly excessive or based substantially on considerations that are not supported by a preponderance of the evidence. In re Douglas, CSA 154-02, 5 (1/27/03), citing Adkins v. Div. of Youth Services, 720 P.2d 626 (Colo.App. 1986).

It is an established principle of administrative law that an agency must obey its own rules unless it gives a sound reason for ignoring it. If that failure to comply prejudices a party, it may result in nullification of the agency action. 1 Admin. L. & Prac. § 4:22 (3d ed.).

Here, the concepts stated in CSR § 16-20 control the level of discipline to be imposed on a career service employee. In addition, the Department of Safety has narrowed its exercise of discretion by requiring the agency to choose a conduct category based on the character and seriousness of each violation. A penalty determination can be characterized as a mixed question of law and fact phrased in the language of the legal standard. See State Bd. of Medical Exam'rs v. McCroskey, 880 P.2d
The grounds for an ultimate finding must “be clearly disclosed in the agency decision and adequately supported by the record.” Blaine v. Moffatt County School Dist. RE No. 1, 748 P.2d 1280, 1291 (Colo. 1988).

This decision-maker made the following ultimate findings of fact with regard to the penalty: That the conduct was a serious abuse of authority, unethical behavior, and caused actual serious and adverse impact on the prisoner and the image and professionalism of the Department. (Exh. 20-91; Elwell, 3:08 p.m.) While Appellant's destruction of the kites was certainly an exercise of physical power over the kites, the consequences were temporary. Howard quickly contacted his attorney and obtained the information he requested in his message, and the allegation of blood on the bench was unproven.

There was no evidence that the Agency suffered harm of any degree as a result of this incident. Moreover, the disciplinary letters gave Appellant no notice of one of the most serious allegations used against him: that he left an inmate in a cell with another prisoner's blood, and took no action to assist. The decision-maker did not consider inconsistencies in the inmate's version of events in determining credibility issues. Finally, the Agency did not make use of the disciplinary handbook's standards for determining the appropriate conduct category. The Agency's evidence failed to establish serious abuse of authority, unethical behavior, or serious harm to the prisoner or the image of the Sheriff's Department. Therefore, the penalty determination was based substantially on considerations that were not supported by a preponderance of the evidence. Without such support and on the proven evidence, I find that the penalty is clearly erroneous.

When viewed under the lens of § 16-20, the preponderance of the evidence demonstrated that Appellant abused his authority by destroying two inmate messages based on his unduly restrictive and erroneous interpretation of the inmate communication rules. His action caused the special needs inmate needless irritation, and delayed his effort to contact his attorney. His actions neglected his duty to facilitate communications in the jail, and interfered with the grievance process. At hearing, Appellant stated that he "would handle it differently now (and give him a grievance), not to go through all of this." (Appellant, 11:34 a.m.) While not a model of contrition, the statement indicates that Appellant absorbed important lessons from the disciplinary process, and will correct his future conduct to avoid it. The Agency presented no rebuttal evidence on this issue.

As to Appellant's past record, the parties agree that he had no prior discipline at the time the penalty was imposed. He has received favorable performance reviews for his four years with the Department. While these facts reflect positively on Appellant, an employment history of four years is relatively short.

The Agency's disciplinary handbook presents a well-reasoned approach to discipline reflecting the mission and values of the Sheriff's Department. Its goals of a fair, consistent, and predictable system are consistent with the principles underlying the Career Service Rules. As such, the matrix penalty table is a reliable measure for the level of discipline that is appropriate for the listed violations. That table places a violation of RR § 200.21 at a conduct category D – F. I find that the conduct merits the presumptive penalty of a ten-day suspension under conduct category D. Based on the
nature of the conduct proven by the evidence, I find that Appellant's positive but short employment history is of insufficient weight to mitigate the presumptive penalty.

Order

Based on the foregoing findings of fact and conclusions of law, the Agency's thirty-day suspension of Appellant's employment is MODIFIED to a ten-day suspension.

Dated this 20th day of July, 2015.

Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You 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 decision's certificate of delivery. 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
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.

I certify that on July 20, 2015, I delivered a correct copy of this Decision and Order to the following, via e-mail:

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