CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 26-19

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

THOMAS TRUJILLO, Appellant-Petitioner**,**

v.

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

Inmate ZJ was brought to the medical station in pod 3D of Denver's Downtown Detention Center (DDC) by Denver Deputy Sheriff Losciale to receive some medical attention from the nurse stationed there. There nurse was unavailable so Losciale had ZJ sit on a bench to wait for the nurse. Deputy Thomas Trujillo (Appellant), working in the 3D pod, asked Losciale about ZJ, and asked ZJ how he was doing. Losciale left the area with ZJ still waiting for the nurse. Appellant also needed to leave to area to conduct rounds, so rather than leave ZJ unattended, he locked him in a vacant cell.

A little later, as Appellant was walking past the cell where he had placed ZJ, the prisoner demanded to know why he was locked up since, he claimed, he was supposed to be released. Appellant advised ZJ that he did not know but would seek out the answer to his question. This did not satisfy ZJ and, as a result, ZJ escalated the conversation and started violently punching at the cell window, using a closed fist and striking the window at a level that would have approximated where Appellant's head would be, but for their physical separation created by the closed cell door. Appellant then opened the cell door and promptly got into a fight with inmate ZJ, which necessitated five other deputies to respond to the commotion, disrupting the operations of the unit.

Deputy Losciale witnessed (and was forced to participate in) the incident and eventually complained that Appellant had used inappropriate force on inmate ZJ. As a result of this complaint, the Denver Sheriff Department (Agency) initiated an investigation into Appellant's conduct.

Ultimately, the Agency determined that Appellant's conduct, in failing to notify his Sergeant that he had a hostile inmate, amounted to poor judgment in violation of Agency regulation RR-200.19 which requires Deputies and other employees to use

sound judgment and discretion in the performance of their duties. The Agency concluded that Appellant's exercise of judgment and discretion was poor because there was an unwritten custom or practice of notifying a Sergeant when there was a hostile inmate[1] The Agency issued Appellant a thirty-day suspension for this exercise of poor judgment.

Appellant appealed his suspension to a Hearing Officer. The Hearing Officer upheld the discipline issued by the Agency. Appellant then appealed the Hearing Officer's decision to this Board. We AFFIRM the Hearing Officer's decision.

Appellant first argues that upholding discipline based on the violation of an informal rule sets bad policy precedent because formal written rules are better, in that they provide for more transparency, and are less subject to varying interpretations, making them fairer to everyone and more susceptible to consistent interpretation. All these things may be true in the abstract, but in this situation, even if they are true, they do not warrant reversal of the Hearing Officer' decision.

First, we note that specifically, Appellant was disciplined for violating a written rule, not an informal, unwritten rule, and that said written rule required Appellant to exercise sound judgment and discretion in the performance of his duties. We could hardly expect such a rule, which is reasonable on its face, to even attempt to specify in writing, every specific exercise of judgment or discretion that could possibly violate this provision.

In this case, the Agency determined that this written rule had been violated, and that Appellant had failed to exercise sound judgment and discretion, because Appellant's conduct was not in conformance with the well-known custom and practice requiring the presence of notifying a Sergeant when there was a hostile inmate.

There is nothing unfair about this. We see nothing in the record indicating that Appellant was unaware of this practice and the record, in fact, indicates that he was aware of it. Similarly, we see nothing in the record indicating that Appellant believed or found the terms of the unwritten requirement to be vague or otherwise unclear to the extent that he could not have conformed his conduct to meet the requirements demanded by the practice.

Further, we see no evidence in the record indicating that the Agency has applied or enforced this unwritten requirement inconsistently, unfairly or in any way arbitrarily and see no evidence in the record leading us to believe that should we uphold this discipline, the Agency will embark on such a path. Neither the Agency's enforcement of its rule, nor the Hearing Officer's decision upholding that enforcement, create any improper precedent or policy.[2]

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[1] See Hearing Officer's decision, page 1, note 2, stipulation of the parties.

[2] Appellant ends this portion of his argument with the claim that disciplining him "based on Hearing Officers' independent interpretations of 'sound judgment' will inevitably produce inconsistent results and forecloses

Appellant next claims that the Hearing Officer erred by misinterpreting the stipulation entered into by the parties concerning the unwritten rule requiring that a sergeant be called when there is a hostile inmate. Getting further into Appellant' argument though, it becomes clear that it does not raise a matter of interpretation, but of sufficiency of facts.

Specifically, Appellant argues that the Hearing Officer had insufficient evidence with which to conclude that the inmate ZJ was hostile when Appellant decided to open his cell door without notifying the sergeant on duty. But we believe the video evidence alone was sufficient for the Hearing Officer to properly draw the reasonable inference that inmate ZJ was, in fact, hostile. The fact that Appellant believes there was evidence in the record from which the Hearing Officer could have concluded differently does not make the Hearing Officer's findings clearly erroneous.

Finally, Appellant urges us to modify the penalty imposed because the Hearing Officer improperly permitted the Agency to consider "failure to accept responsibility" as an aggravating factor when determining the appropriate penalty to be imposed. Specifically, Appellant argues that while the Agency's Disciplinary Handbook lists *acceptance of responsibility* as a mitigating factor, it does not list *failure to accept responsibility* as an aggravating factor.

While this statement is factually accurate, it does not mean that the Agency's disciplinary decision maker, its Civilian Review Administrator, violated the terms of the Handbook in considering Appellant's failure to accept responsibility as an aggravating factor.

The Handbook, in its Section 19.9 lists 14 circumstances that can be considered as aggravating factors within confines of disciplinary determinations in the Matrix. That list of 14 circumstances, however, is prefaced with the statement, "Aggravating circumstances may include, but are not limited to…." And Section 19.10 of the Handbook further explains, "[t]he above potential aggravators are intended as a guide only. It is impossible to list all the circumstances which might be considered aggravating in a particular case."

The Handbook is clear. The list of aggravators was not intended to be the sole and exclusive factors that a CRA could consider in determining whether a penalty should be aggravated.

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reliable notice of what is punishable under Rule 200.19." Obviously, we disagree. First, the argument is nothing but rank speculation, and, as mentioned above, there is nothing in the record indicating that these speculative outcomes are likely to occur. Second, and maybe more importantly, Appellant misapprehends what actually happened at hearing. The Hearing Officer did not provide an independent interpretation of what constituted "sound judgment." Rather, the Agency interpreted its own regulation, and Appellant failed to prove to the Hearing Officer's satisfaction, that is, by a preponderance of the evidence, that the Agency's interpretation of its regulation was clearly erroneous. To that extent, we believe the record demonstrates that neither the Agency nor the Hearing Officer misinterpreted RR 200.19.

And while Appellant is correct in his assertion that the Handbook also notes that the absence of mitigating factors should not be considered aggravating, the record reflects that the CRA did not impose an aggravated penalty. The thirty-suspended day penalty imposed by the CRA on Appellant, was, per the terms of the Agency's Disciplinary Matrix, the presumptive penalty – not an aggravated penalty.

We also decline Appellant's suggestion to find, independently, that the CRA should have imposed a mitigated penalty. Nothing in the Disciplinary Matrix guarantees the imposition of a mitigated penalty, even if Appellant firmly believes the equities to be in his favor.

We cannot find from this record that the Agency's CRA violated the Matrix or otherwise abused his discretion in imposing a Matrix-presumptive penalty on Appellant; and we can find no error in the Hearing Officer's decision to uphold the imposition of that presumptive penalty.

The Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on February 20, 2020, and documented this 21st day of May 2020.

BY THE BOARD:

Neil Peck

Neil Peck, Co-Chair

Board Members Concurring: Karen DuWaldt, Patricia Barela Rivera, David Hayes, LaNee Reynolds

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **DECISION AND ORDER** on May 21, 2020, in the manner indicated below, to the following:

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/s/ George Branchaud
on behalf of the Career Service Board