CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO
Appeal No. 56-13A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

EVERETT VONNER,

Petitioner/Appellant,

vs.

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

Respondent/Agency.

Appellant Everett Vonner (hereinafter "Appellant") is a Deputy with the Denver Sheriff's Department (hereinafter "Agency"). At all times relevant he was assigned to work in the Denver Sheriff Department's Accreditation Unit, which was responsible for gaining national accreditation for the Downtown Detention Center and the County Jail. Appellant's job included compiling and storing information necessary to prove that the Agency was meeting accreditation standards.

While the Unit had a shared computer drive for the storing of its information, management learned that Appellant was, instead, using a personal flash drive for his work (which, naturally, included city data and other information acquired, stored and used for accreditation purposes) and that he was using this flash drive at home as well. Appellant's supervisor, Major Marie Kielar, instructed Appellant on at least three occasions to cease this practice[1]. Appellant ignored these requests and when Kielar learned of Appellant's unwillingness to cease using his personal flash drive for work purposes, referred the matter to Internal Affairs ("IA").

During the course of the IA investigation, Appellant was interviewed by an IA sergeant. During that interview, Appellant was ordered to bring in the flash drive which contained the Agency's information. The IA sergeant clarified the order to Appellant and issued to Appellant a direct order to produce "the information on the thumb drive, not the thumb drive itself." Appellant refused to comply with the order, declaring that he would rather destroy the

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[1] Kielar's concerns about Appellant using a personal flash drive on both his work and home computers included the possibility of importing a virus from Appellant's home computer to city computers via the flash drive, the possible lack of back-up on the personal flash drive, the possible losing of the information of something happened to Appellant, and the possible loss of information should something happen to the flash drive.

information than produce it. For this act of insubordination, Appellant was issued a ten-day disciplinary suspension.[2]

Appellant appealed his suspension to a Hearing Officer. The Hearing Officer upheld the suspension. Appellant filed a timely Petition for Review. We affirm the Hearing Officer's upholding of the ten-day suspension.

Appellant argues that the Hearing Officer erred when he determined that Appellant violated Career Service Rules (specifically, CSR 16-60J and L) by failing to comply with a lawful order of a supervisor. Appellant claims that the order to turn over his personal flash drive was not a lawful order, relying on the U.S. Supreme Court case of *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492 (1987). Appellant's argument is unpersuasive on multiple levels.

First, *O'Connor v. Ortega* is a Fourth Amendment case concerning a search in the workplace, holding, *inter alia*, that "searches and seizures by government employers or supervisors of the private property of their employees ... are subject to the restraints of the Fourth Amendment." *Id*, 480 U.S. at 715. But in this case, there is no issue of a search or seizure of property having been conducted. The Agency did not seize Appellant's flash drive. Similarly, an agency search of Appellant's flash drive is also not at issue. And the Agency did not search any of its own property in which Appellant might have had a reasonable expectation of privacy, such as a locked desk, a drawer, cabinet or locker. Because there was no search and no seizure – of anything – Appellant's Fourth Amendment right to be free from unreasonable searches and seizures does not come into play.

What is at issue, however, is the reasonableness of the order given to Appellant to either produce his flash drive or to produce the city's information residing on that flash drive. But such an order is also not a seizure for Fourth Amendment purposes. In the case of *Gwynn v. City of Philadelphia*, 719 F.3d 295, 300 (3d Cir. 2013), the U.S. Court of Appeals for the Third Circuit noted that not:

> every order a police officer feels compelled to obey amounts to a seizure. Public employees, like their counterparts in the private sector, often must comply with orders issued by supervisors, and may suffer work-related consequences if they disobey. *See INS v. Delgado*, 466 U.S. 210, 218, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984) ("Ordinarily, when people are at work their freedom to move about has been meaningfully restricted ... by the workers' voluntary obligations to their employers."). This is especially true for police officers, who are part of a "paramilitary organization that must maintain the highest degree of discipline, confidentiality, efficiency, and espirit [sic] de corps among its officers, who are the first line of defense against lawlessness." Driebel, 298 F.3d at 638-39.[3] Officers are trained to obey orders from their superiors and may be subject to discipline if they fail to do so. *Id.* at 639.

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[2] This Board is shocked and dismayed at the fact that such a blatant act of insubordination, especially one occurring in a paramilitary organization, should be met with such a light response.

[3] *Driebel v. City of Milwaukee*, 298 F.3d 622, (7th Cir.2002).

> Characterizing work-related demands as seizures whenever an officer feels compelled to obey them would not further any interest protected by the Fourth Amendment, and it would significantly interfere with the effective management of police forces. *See Mendenhall*, 446 U.S. at 553–54, 100 S.Ct. 1870[4]....
> (citations omitted)

Of course, in the instant case, Appellant did not even feel compelled to obey the orders given to him to turn over the flash drive and to turn over the information on the flash drive.[5] It is plain, then, that it was not the order given to Appellant that was unreasonable, but rather, it was Appellant's refusal to obey that order based on an ill-imagined Fourth Amendment protection that was unreasonable.

We also find it curious that nowhere in Appellant's Brief to this Board does he address the undisputed fact that he was given a direct order to produce the Agency's information which he had placed on his personal flash drive[6]. Appellant, of course, cannot invoke any Fourth Amendment protection regarding any search or seizure of the City's information, since he would have no reasonable expectation of privacy in that information and the City has a right to protect its own property. *See, e.g., Francis v. Giacomelli*, 588 F.3d 186, 195 (4th Cir. 2009) ("it is readily recognizable that Baltimore City has an interest in protecting Baltimore City Police Department property ... , the complaint fails to allege any countervailing privacy interests that would outweigh the City's interests ...."); *Roberts v. Mentzer*, 2009 WL 1911687 (E.D.Pa. 2009) (employee has no reasonable expectation of privacy from his employer regarding his personnel records maintained by the employer). The Fourth Amendment does not provide shelter for Appellant's failure to obey the order produce the Agency's information which he placed on his personal flash drive.

We are also of the opinion that any direct order to produce Appellant's personal flash drive, knowing that it contained city information, did not violate Appellant's Fourth Amendment rights. In the case of *Westbrook v. City of Omaha*, 231 Fed.Appx. 519 (8th Cir. 2007), a citizen complained that Officer Westbrook had taken money from him. The City of Omaha ordered Westbrook to produce two days worth of his personal banking records. Westbrook claimed that this order amounted to an unreasonable search and seizure of his personal property. The Eight Circuit disagreed, finding:

> "Searches and seizures by government employers or supervisors of the private property of their employees ... are subject to the restraints of the Fourth Amendment." *O'Connor v. Ortega*, 480 U.S. 709, 715, 107 S.Ct. 1492, 94

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[4] *United States v. Mendenhall*, 446 U.S. 544 (1980).
[5] It is crystal clear from the record that if Appellant had turned over the requested City information on his flash drive he would not have been required to produce the flash drive itself.
[6] Appellant's brief deals solely with his refusal to produce the flash drive itself.

> L.Ed.2d 714 (1987); *see Lesher v. Reed.* 12 F.3d 148, 150–51 (8th Cir.1994) ("A government employer's seizure of property possessed by an employee is clearly subject to Fourth Amendment restraints"). Therefore, public employer intrusion on the constitutionally protected privacy interest of government employees ... for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable....
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> *O'Connor,* 480 U.S. at 725–26, 107 S.Ct. 1492. "The search will be permissible in its scope when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the [misconduct]' " *Id.* at 726, 107 S.Ct. 1492 (quoting *New Jersey v. T.L.O.,* 469 U.S. 325, 342, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985)) (alteration in original).
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> In this case, Omaha's intrusion began with a citizen complaint that Westbrook took money and wagered at a casino the next day, considered with his assertion of usually withdrawing money from an ATM before wagering. The scope of the intrusion was an order for two-days' record of Westbrook's banking, to which he complied. Under these circumstances, neither the inception nor the scope of intrusion was unreasonable. The investigation's purpose was to determine employee, work-related misconduct, and not criminal prosecution. ... (citations omitted)

231 Fed. Appx. at 522. In sum, when a search is motivated by a legitimate work-related purpose and the scope of the search is not excessive, the search is considered reasonable and not a violation of the Fourth Amendment. *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 764 (2010).

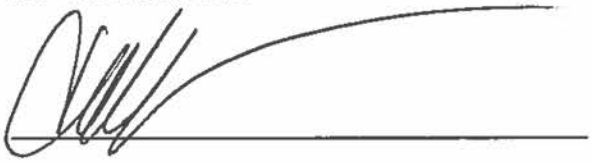
In the instant case, the Agency sought the flash drive because it knew that the flash drive contained city information. The Agency made it eminently clear to the Appellant that all it wanted from the flash drive was its own information. The inception of the demand for the flash drive was occasioned by the knowledge that Appellant had placed Agency information on the flash drive and that he was refusing to return the information to the Agency; plainly, a legitimate, work-related purpose. The scope of any intrusion into the privacy of Appellant would have been minimal – and actually non-existent, had he chosen to simply transfer the Agency's information off of his personal flash drive and onto a medium which could have been given to the Agency. The demands for the information and the flash drive were made as part of an investigation into workplace misconduct and were reasonable. There is no support for Appellant's claim that the order to surrender the flash drive or the Agency information he placed on it implicated, let alone violated, Appellant's Fourth Amendment rights.

The record demonstrates that Appellant was given plain, direct, reasonable orders and that he willfully disobeyed those orders. Nothing in the U.S. Constitution or case law

interpreting the Constitution permits Appellant to engage in such brazen insubordination. The Hearing Officer's decision is AFFIRMED.[7]

SO ORDERED by the Board on November 6, 2014. and documented this day of December. 2014.

BY THE BOARD:



Colleen Rea

Chair (or Co-Chair)

Board Members Concurring:

Patti Klinge

Gina Casias

Neil Peck

[7] Appellant, at page 5 of his brief argues that the Hearing Officer erred when he stated that if Appellant did not like the order he was given, he should have filed a grievance. We do not believe this issue was properly preserved for appeal, since it is mentioned in neither his Petition for Review nor in his Amended Petition for Review. Regardless, we find this issue to be irrelevant to our determination affirming the Hearing Officer's decision.