

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. 26-09 A.

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

VIVIAN WEEKS,

Appellant/Respondent,

vs.

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

Agency/Petitioner.

This matter is before the Career Service Board on the Agency's Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Hearing Officer's Decision of July 20, 2009, as follows.

I. Factual Background

On October 16, 2009, Appellant was assigned to the DUI intake post. She and a male deputy were responsible for escorting a newly-arrived, intoxicated inmate into a holding cell. The inmate was uncooperative with the deputies and verbally abusive to Appellant: he leered, cursed, taunted and made sexual comments to her. After some time, Appellant and Deputy Rico obtained the inmate's compliance and he stopped resisting as he lay face down on the cell floor. Appellant was standing behind the inmate, between his outstretched legs. As she stepped over the inmate to leave the cell, she kicked him once. The inmate sustained no injury.

Sgt. Wynn had been observing the handling of the inmate and shortly after the incident he ordered Appellant to write a report concerning the inmate contact. Appellant submitted a written report claiming that she tripped over the inmate and denying that she had kicked him. Capt. Kopylov then convened an immediate meeting and ordered Appellant to attend. Sgt. Duffy agreed to act as Appellant's representative because her first choice for a representative was unavailable. The testimony was undisputed that Capt. Kopylov told Appellant that she would or could be fired for the incident. Appellant once again stated that she tripped over the inmate, but did not intentionally kick him.

Several months later, the Agency began an internal affairs investigation. Appellant was interviewed twice during the investigation and admitted that she had kicked the inmate and admitted that she did not tell Capt. Kopylov the truth. She made the same admissions at her pre-disciplinary meeting and apologized for her actions.

On March 23, 2009, the Agency terminated Appellant for her admitted misconduct. Following a career service hearing, the Hearing Officer modified the discipline to a 120 day suspension.

II. Findings

As the Hearing Officer noted, this is a somewhat unusual case in that Appellant did not challenge the essential facts of misconduct – kicking an inmate and lying about it. Rather, she challenged the degree of discipline imposed for her admitted misconduct. On appeal, this is also a difficult case because there is no bright-line rule – no composite of objective factors that would foreclose variations in interpretations – by which to measure the appropriate level of discipline in a given case.

Our career service rules provide a clear appellate standard for factual determinations: the Board may reverse the Hearing Officer’s findings of fact only if they are not supported by the evidence in the record and are clearly erroneous. C.S.R. 19-61 D. However, the Hearing Officer’s modification of discipline is not a factual finding, but a conclusion, and while we are not bound by that conclusion on appeal, we find it appropriate to consider that conclusion in relation to the factual findings upon which it rests. In so doing, we bear in mind that the Hearing Officer is not to “disturb the Agency’s determination of the severity of the discipline unless it is clearly excessive or based substantially on considerations that are not supported by a preponderance of the evidence.” *In re Vigil*, Appeal No. 110-05.

As a starting point, Deputy Manager Malatesta testified that the Agency does not maintain a zero tolerance toward violations of its use of force policy or for acts of dishonesty. Thus, kicking an inmate and/or lying about it do not automatically result in dismissal. Here, Deputy Manager Malatesta made her decision to terminate Appellant based upon the totality of all the factual circumstances that attended this incident, as she understood them. However, at the career service hearing, the totality of factual circumstances is determined by those facts which are proven, not simply presented, at the hearing.

The Agency relied on several aggravating factors: that Appellant either kicked or “stomped on” the inmate’s groin and that she was yelling, screaming and out of control. But the videotaped recording of the incident does not substantiate these claims. Because of the camera angle and the fact that the inmate was lying on his stomach, it is not clear whether the kick was aimed at the groin or the buttocks area. However, the video clearly supports the Hearing Officer’s findings of fact that the kick was delivered quickly, without force and without any indication of an intent to harm the inmate. Moreover, the video, as well as the testimony of Deputy Rico, support the Hearing Officer’s findings that Appellant did not “stomp on” the

inmate, nor was she cursing, screaming, or out of control. Thus, the aggravating factors relied upon by the Deputy Manager were not proven by the Agency at the hearing.¹

Another factor in Malatesta's decision to terminate was Appellant's delay in "coming clean." There is no question that Appellant immediately denied any wrongdoing and admitted her dishonesty later during the internal affairs investigation. However, the Hearing Officer found the circumstances surrounding the Agency's initial inquiries presented mitigating factors. Appellant testified that Kopylov repeatedly told her that she would or could be fired over the incident. Her representative, Sgt. Duffy, testified that Capt. Kopylov repeatedly and angrily told Appellant that she could be fired for the incident. Capt. Kopylov admitted making such statements. The meeting took place at a time when Appellant's first choice for a representative was not available and Appellant did not seek assistance from the employee union because Sgt. Wynn, her accuser, was the president of the union. During the meeting, Capt. Kopylov sat on the edge of his desk and Sgt. Wynn stood while Appellant and her representative remained seated below them. At the hearing, the Agency admitted that Appellant could have been disciplined for refusal to answer Capt. Kopylov's questions.

These factual findings do not excuse or justify Appellant's dishonesty immediately after the incident. They do, however, support the Hearing Officer's findings that Appellant reasonably feared that her termination over the incident was inevitable, that she panicked and she lied.

Further, the Hearing Officer relied upon the facts that Appellant readily admitted her misconduct during the internal affairs investigation and during the hearing. It is also within the Hearing Officer's province to judge the credibility of witnesses in making his factual findings. Here, he found Appellant's testimony that she recognized her mistakes and was willing to correct them to be credible and relevant for purposes of progressive discipline.

The Hearing Officer's findings, which are supported by the evidence in the record, established that the Agency's decision to terminate Appellant's employment was based substantially on considerations that were not supported by the preponderance of the evidence. That being the case, it fell to the Hearing Officer to determine the appropriate penalty, giving due consideration to both the principles of progressive discipline and the Agency's lack of a "zero tolerance" policy for the type of misconduct engaged in by the Appellant.

The Hearing Officer's decision to modify the discipline imposed by the Agency to a 120-day suspension is reasonable related to the totality of factual circumstances he found to be proven in this case, and on appeal, we find no grounds to change that decision.

¹ Malatesta also testified that Appellant was dishonest by denying that she screamed, cursed, or was otherwise out of control in her handling of the inmate.

III. ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Decision of July 20, 2009, is **AFFIRMED**.

SO ORDERED by the Board on December 3, 2009, and documented this 23rd day of December, 2009.

BY THE BOARD:

A handwritten signature in cursive script, appearing to read "Luis Toro", written over a horizontal line.

Luis Toro, Co-Chair

Board members concurring:

Nita Henry
Felicity O'Herron
Patti Klinge

Board member Tom Bonner dissents from this decision.

Dissenting Opinion – CSA Board Member Tom Bonner

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I believe that the Hearing Officer exceeded his authority and abused his discretion by modifying the discipline in the above referenced case. Likewise, the Career Service Board also erred in affirming the Hearing Officer's decision.

Both the Hearing Officer and the Board have minimal authority to modify discipline, specifically, the Hearing Officer and/or Board may only change the imposition of discipline when the discipline is clearly unreasonable and/or disproportionate. Here, the undisputed facts, as stipulated to by the appellant, show that the appellant's termination was both a reasonable and proportionate response to her manifestly improper conduct.

The appellant admits that she deliberately kicked a compliant inmate while he was lying face down on the floor of a cell and already restrained by another officer. But, appellant's transgressions were not limited to this incident of blatant misconduct. Rather, appellant proceeded to lie about the incident in response to her supervisor's inquiry. Appellant not only denied the incident, but concocted a false scenario stating she "tripped" over the inmate when exiting the cell. Two and one half months later, during the IAB investigation of the incident, she recanted that testimony and admitted to attacking the inmate. Yet, the majority appears to disregard appellant's patent dishonesty by chalking it up to her fear concerning possible termination resulting from the incident. Yet, such fear, however reasonable, does not excuse appellant's falsehoods and provides no basis to modify the agency's discipline.

For a Deputy, charged with the care and custody of inmates, the act of kicking a compliant inmate is, in and of itself, so egregious that it is reasonable cause for termination. When compounded by her false statements to her superiors when reporting the incident, the decision to terminate the Deputy is a reasonable result, and ought not be altered. The Hearing Officer expressly found that the aforementioned conduct was undisputed and violated CSA Rules 16-60B (Carelessness in performance); 16-60E (lying to superiors); 16-60I (Violations of rules and regulations, including Sheriff Department rules against use of force and departing from the truth); and 16-60Z (Conduct prejudicial to the City).

Although, by itself, this conduct would justify termination, the Hearing Officer also erred in failing to consider previous discipline as a settled matter in imposing discipline. The appellant had every right to exhaust all administrative remedies available through the grievance procedure in Career Service Rule 18, Dispute Resolution, at the time discipline was imposed, but in failing to do so., waived any rights to re-investigate and/or re-litigate these matters at some later date.

The appointing authority has nearly unfettered discretion in imposing the type and/or amount of discipline on employees who violate CSA rules. The only limitation on this authority is that the discipline be “reasonably related to the seriousness of the offense” (CSR16-20). Neither the Hearing Officer nor Board may substitute their judgment for that of City agencies, or calibrate each decision to what they think is a more “correct” level of discipline. Instead, the agency is the sole and final decision maker as long as the discipline imposed, as it was here, is both reasonable and proportionate.

Accordingly, I would affirm the agency’s decision to terminate appellant.



Tom Bonner, CSA Board Co-Chair

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **FINDINGS AND ORDER** on December 23, 2009, in the manner indicated below, to the following:

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Leon Duran