

DECISION AND ORDER

BRIDGET ANDREWS, 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 22, 2017 before Hearing Officer Valerie McNaughton. Appellant was represented by Steve Mandelaris, Esq. Assistant City Attorney Shelby Felton and Attorney Intern Ruthanne Goff appeared for the Agency. John Curry and Shannon Elwell testified for the Agency, and Appellant testified on her own behalf.

I. STATEMENT OF THE APPEAL

Appellant Bridget Andrews challenges her 14-day suspension imposed on Mar. 9, 2017 for carelessness and sleeping on duty. The parties stipulated to the admission of Agency Exhibits 1, 4 – 16, and Appellant Exhibits A – D. Exhibits 2, 3 and 18 were admitted at hearing.

II. FINDINGS OF FACT

Appellant began her employment on Jan. 4, 2016 upon her enrollment in the Agency's Sheriff's Academy. On Aug. 17, 2016, after completing a shift at the Denver County Jail, Appellant reported to the Denver Health Medical Center for a voluntary overtime shift, where she was assigned to guard a hospitalized prisoner from 2 am to 6 am. The prisoner had been seriously wounded after attempting to kill a police officer. [Curry, 2-4.] When Deputies John Curry and Sylvia Luna entered the hospital room to relieve Appellant at 5:40 am, Curry observed Appellant was asleep in a recliner. Curry noted at 5:53 am in the room logbook, "D/S (Deputy Sheriff) Curry, D/S Luna relieved D/S Andrews who is sleeping in MICU (Medical Intensive Care Unit) 246." The previous entry was at 5:10 am, noting "Nurse out of room." [Exh. 8-2.]

The Agency began an investigation, and proceeded to the disciplinary process on charges of neglect of duty and violating the Agency rule prohibiting sleeping on duty, RR-200.11. The disciplinary letter made the following findings about the circumstances: Curry told the investigators that on entering the room he did not immediately see Appellant, who was horizontal on a recliner with her legs up. He told Luna, "This is not a representation of what we do here at the hospital or on any post." He kicked Appellant's chair to wake her up. Appellant slowly opened her eyes and let out four screams while looking at him. She then said, "Oh, oops, I'm at Denver Health." Curry asked her, "What are you doing? This is not what we do. We do not sleep on post and we do not sleep with a firearm on." Appellant replied, "Oh, yes sir, yes sir. I'm sorry, I'm sorry." Curry told her, "You're relieved. You can go now." [Exh. 2-5.] Medical staff entered the room after the fourth scream and asked what was going on. Curry told them

everything was fine, but Curry testified that "it looked really bad." Luna told the Internal Affairs Bureau (IAB) that Appellant "appeared to be asleep." [Exhs. 2; 16-5.]

Appellant told the interviewers that the prisoner was on a breathing machine, and she was texting other deputies and watching television in the darkened room at the time in question. She did not recall being asleep, but said she did not see the deputies come in and may have closed her eyes. "I don't know if I just, you know, put my head down ... I'm literally just waiting for them to come in. I had stopped recording [in the logbook], I don't even know what my last record was". [Exh. 3-17, 3-18.] "Next thing I know [Curry] was standing in front of me and I was like, you know, startled ... And I know that he was yelling there's no sleeping on the job." [Exh. 3-11.] When asked at least three times if she was sleeping, Appellant told the IAB investigatory that she did not know. [Exh. 3-17, 3-20.]

Deputy Luna was asked by the investigator if Appellant was sleeping, and replied that she appeared to be. Luna confirmed that Appellant was curled up in the chair, perhaps to keep warm. After Curry kicked her chair, Appellant stood up, startled, and made a noise like "ahhhhh". Luna recalled that Curry talked to Appellant about being asleep in an armed post, and Appellant replied, "yes sir, yes sir." [Exh. 6-5.] Luna did not testify at the hearing.

At the contemplation of discipline meeting held on Feb. 16, 2017, Appellant stated she was not sleeping in a recliner, and in fact the seat was a pullout, "which I certainly did not [pull out]." [Exh. 13-4.] She was watching TV with her head in her hand. "Instead of a simple hello, D/S Curry decided to kick my chair ... I was not sleeping and affirmed 'no' at least three times when I was asked by the investigator." [Exh. 13-5.]

At hearing, Curry confirmed that he entered the hospital room with Luna and Kuko, his drug and contraband police dog. Curry observed Appellant sleeping on duty, as evidenced by her closed eyes, even breathing, and relaxed posture in a fetal position. He testified that the prisoner was sitting up, awake, and looking around, though his leg was on a long leg lead. [Curry, 9 am.] Curry watched Appellant for about a minute and a half from one or two feet away. He commented loudly to Luna, "[t]his is not what we do on post." He then kicked the bottom of Appellant's chair. Appellant did not react for 15 seconds, then screamed, "ahh – ahh – ahhh – AHHH!" Curry admitted he was "a bit in shock" himself. When medical staff responded to the scream by entering the room, Curry said, "'we're good'. ... I didn't want to advertise [the] awkward situation." He later advised the supervisor that Appellant should not be asked back for overtime assignments. [Curry, 9:07 am.] Curry sketched the hospital room, showing the shackled prisoner on the bed, and the seat used by Appellant four feet to the left of the prisoner's head. [Exh. 18.]

Appellant testified that Exh. 18 is by and large an accurate depiction of the room, but she added more details in red marker. They show that her chair was smaller than drawn by Curry, and that a short screen and medical equipment separated the chair from the bed. The logbook was on a table next to the bench under the window. Appellant recalled that the ventilator, TV, HVAC and medical equipment were making loud, deep noises. In response to Curry's statement that Appellant was lying prone on a recliner, she returned to the hospital and took photos of the chair she used that day, an extra-wide upholstered chair. [Exh. 15-3, 15-4.] Appellant also presented copies of her texting activities, which began at 3:59 am and ended at 5:31 am. [Exh. 9.]

Appellant recalled that she had packed all of her things up and was slouched to the right, cheek resting on her hand while glancing at the TV. She did not notice Curry and Luna enter the room. Appellant jumped straight up after Curry kicked her chair, and may have said, "yes sir". Appellant did not hear the nurses come in, but saw them when she looked up. When asked about her statements during the investigation that she did not recall whether she was sleeping, Appellant testified that she meant she did not remember if her eyes were closed. Appellant said she phrased it that way because she did not want to be perceived as lying about having her eyes closed. [Appellant, 1:22 pm.]

Decision-maker Civilian Review Administrator Shannon Elwell found that Appellant "was unconscious a mere few feet away from an inmate, in an unsecured area accessible to the public, and armed ... she only woke up once her chair was kicked for a second time, after which she was disoriented and screaming so much that medical staff responded." Elwell noted that sleeping on duty can be assigned Conduct Category C through F, depending on its seriousness and impact on operations. She assigned it to Category D based on her findings that the behavior posed a demonstrably serious risk to her own life and the safety of others in the hospital. Elwell noted that the last deputy to die in the line of duty was also guarding a hospitalized prisoner, "who overcame him and shot him with his own firearm." She found that sleeping while armed in a publicly accessible area interfered with the Agency's mission, and was substantially contrary to its guiding principles. Elwell imposed the aggravated penalty of a 14-day suspension based on the circumstances and Appellant's lack of candor during the investigation. [Exh. 16-6, 16-7.]

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 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).

A. VIOLATION OF DISCIPLINARY RULES

1. Carelessness, CSR 16-29 A. and Sleeping on Duty, § 16-29 L.; RR-200.11

This rule, a combination of previous CSR §§ 16-60 A and B, prohibits a failure to perform a known duty as well as poor performance of a duty. See In re Gutierrez, CSB 65-11, n1 (4/4/13); In re Galindo, CSA 39-08 (9/5/08). Elwell found that Appellant performed her duty to protect the inmate and the public carelessly, in that she allowed herself to fall asleep while in an armed post.

A preponderance of the evidence showed that Appellant was asleep when the other deputies entered the hospital room at about 5:40 am, the time Appellant expected to be relieved. [Appellant, 12:42 pm.] Appellant admits that she did not see or hear them enter, despite her prior log notes documenting all persons coming in and leaving the room. The room sketch shows that the door was in the line of sight of a person sitting in the chair. [Exh. 18.] Suspecting by her posture, closed eyes and even breathing that Appellant was asleep, Curry watched her for a minute, then kicked her chair. If Appellant had been awake, the kick would most likely have caused anger, not surprise and fear. Her first statement - "Oh, oops, I'm at Denver Health" - makes it very clear she was not alert at her post. At the time, Appellant did not deny Curry's accusation that she had been sleeping. After being relieved,

Appellant gathered her things and left, but forgot her water bottle and had to return for it. [Appellant, 12:51 pm.] Indeed, Appellant's texts show that as she left the hospital at 6:10 am, she declined an offer to get food with another deputy with the words, "Thanks so much but I'm out the door. Sooooo tired." [Exh. D-2.]

Appellant did not unconditionally deny she was sleeping until her testimony at the hearing, having repeatedly told the investigator two weeks after the incident that she did not recall whether she was sleeping. It is more likely that Appellant was motivated by the discipline to exaggerate facts in her favor at the hearing held a year after the event, than that the passage of time made her memory clearer. One sign of that exaggeration is that Appellant stated that if her eyes were closed, she "may have been meditating", a claim she did not make during the investigation. [Appellant, 1:39 pm.]

Appellant's actions in falling asleep for up to ten minutes – the time between her last text and her startled reaction to Curry's kick – constituted both carelessness in the performance of her duty to guard the prisoner, and violation of the departmental rule prohibiting sleeping at her post. Therefore, both Career Service Rules alleged in the disciplinary letter have been established.

IV. PENALTY DETERMINATION

CRA Shannon Elwell found that Appellant's action in sleeping instead of guarding a wakeful prisoner at a public hospital, and doing so with a loaded firearm, created a substantial risk to herself and others, contrary to the Agency's number one guiding principle of providing for the safety and security of inmates and the public. She also found the circumstances indicated that it interfered with the Department's professional image in that it was witnessed by the medical staff who responded to Appellant's scream, as well as Deputy Luna, who was being trained for work at the hospital post. Appellant was not alert enough to see Curry and Luna enter, and thus was not protecting the prisoner and public against harm. The evidence supports Elwell's application of Category D to the proven violations.

Next, Elwell analyzed whether the presumptive 10-day suspension should be mitigated or aggravated. While Appellant had no previous discipline, she was still a probationary employee with only a few months on the job. Elwell considered the high risk of endangerment to the public in aggravation, as well as Appellant's lack of candor during the investigation. Appellant at first stated she did not recall if she was sleeping. In later statements, she denied sleeping, and suggested that she was just resting her eyes and was alarmed by Curry's kick to her chair. However, Appellant's disoriented statements and actions indicate strongly that Appellant had been asleep. Given Appellant's short tenure, the CRA reasonably discounted her lack of discipline, and weighed more heavily the dangers inherent in the circumstances under which Appellant fell asleep: the close proximity of a dangerous prisoner and her service weapon in a hospital room accessible by the public. This context is in dramatic contrast to those of other sleeping on the job offenses, where deputies were asleep in a training class or a break room inside a secure facility. The decision as to the nature of the conduct and application of the aggravated penalty of a 14-day suspension are therefore supported by the record and are within the range of penalties that can be imposed by a reasonable administrator.

V. ORDER

Based on the foregoing findings and conclusions, it is ordered that the Agency action dated Mar. 9, 2017 is AFFIRMED.

DONE August 1, 2017.



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

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201 W. Colfax Avenue, Dept. 412, 4th Floor
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AND opposing parties or their representatives, if any.