

DECISION AFFIRMING TERMINATIONS

TIMOTHY APPLIGATE, and
JUSTIN TOMSICK, Appellants

v.

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

I. INTRODUCTION

Appellants appeal the termination of their employment with the Denver Sheriff's Department (Agency) for alleged violations of specified Career Service Rules and Agency regulations. The appeals were consolidated for hearing. The hearing was conducted by Bruce A. Plotkin, Hearing Officer, on January 16 and 17, 2018. The Agency was represented by Assistant City Attorneys Rick Stubbs and Ashley Kelliher. Appellants were represented by Reid Elkus, Esq. and Zack Wagner, of the law firm Elkus & Sisson, P.C. Agency exhibits 1 – 5 and 7 – 18 were admitted as were Appellants' exhibits A – B, H, and S. The Agency stipulated to the authenticity of exhibits G, K – M, and O – R. The following witnesses testified for the Agency: former Sergeant Robert Petrie; Captain Chris Brown; Major Kelly Bruning; and Acting Civilian Review Administrator Luis Lipchak. Each Appellant testified on his own behalf. Appellants also called: Sheriff Patrick Firman; Security Specialist Alexandra Nicole Abeyta; Security Specialist Kimberly Stone; Security Specialist Yvette Medina; Medical Technician Antonia Garcia; and Deputy Jesus Granados.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellants violated any of the following Career Service Rules: 16-29 A., D., or R.;
- B. if either Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to terminate his employment was within the range of discipline available to a reasonable administrator, as measured by the factors contained in CSR 16-41.

III. FINDINGS

Appellants Timothy Applegate and Justin Tomsick were officers in the Agency for 12 and 7 years, respectively. At the time of the incident underlying this appeal, both were sergeants. They were obligated, as acknowledged by both Appellants, to be familiar with, and enforce, Agency rules and executive orders, including Executive Order 94, which requires the testing of any subordinate who is reasonably suspected to be impaired by alcohol or drugs, whether illegal or legal. [Exh. 17-2; Tomsick cross-exam; Applegate cross-exam].

On November 22, 2016, Security Specialist Hammond was assigned to work in a control center in the Downtown Detention Center. He approached his supervisor, Sgt. Robert Petrie, asking to be relieved because he felt unwell. Petrie knew Hammond had ongoing issues with adverse reactions to cancer treatment. Hammond sat in a chair and told Petrie he was dizzy and light-headed.

Petrie contacted Applegate to bring a nurse to his office. When Applegate and Medical Technician Garcia arrived, Petrie told them Hammond was on medication for cancer treatment and was having an adverse reaction to his medication. Applegate later described Hammond as "looking like he was out of it." Garcia checked Hammond's vital signs and found them to be "perfect." She found no indicia that he was under the influence of drugs or alcohol, although she observed he was "bobble-headed" and observed Hammond's eyes rolling back. [Garcia testimony].

While Garcia checked Hammond, Sheriff Patrick Firman happened by. He stopped in and spoke to Hammond, then said "Let's just make sure we take care of him, and get him home safely," then left the office. Firman did not observe any indicia of alcohol consumption. [Firman testimony at 10:40:10; see also Exh. 4-5].

Applegate contacted Tomsick in the Emergency Response Unit to determine if any staff was available to drive Hammond home. Tomsick accompanied Hammond to retrieve personal items. In the elevator area, Hammond swayed and leaned heavily against a wall. While they waited for an elevator, Applegate arrived, and Tomsick asked him to assist because Hammond was so unstable. [Exh. 4-11]. The three entered an elevator. In that confined space, both Appellants smelled something resembling alcohol.

When they arrived at the first floor, as they waited for the sliding security door to open, Hammond swayed and braced himself. Then, as they walked through the corridor, Hammond steadied himself with a hand on the corridor wall as they walked. A short time later, he fell into the wall. Tomsick described Hammond as "definitely unstable," and "wobbling all over the place." [Exh. 4-11]. As they walked to the car port, Applegate placed his hand behind the unsteady Hammond to catch him if he fell. Tomsick asked a deputy to drive Hammond home because "he was in no position to drive." [Exh. 3-4].

Applegate and Tomsick then approached Sgt. Petrie to talk privately. They went into a storage room and closed the door to discuss whether Hammond may have been drunk. Security video silently recorded the meeting. Applegate told Petrie that Hammond had been drinking [Petrie testimony] and made a sign associated with drinking alcohol. [Exh. 15 at 8:37:20]. Applegate told Petrie "we smelled alcohol" or "he was drinking." They discussed whether to have Hammond brought back for testing, but since Hammond was already home, he was not recalled for reasonable suspicion testing since he could have claimed he drank only after returning home.

During the ensuing investigation to determine whether Applegate and Tomsick violated Agency policy and Executive Orders in failing to order Hammond to submit to drug and alcohol testing, both Appellants repeatedly denied they suspected Hammond had been drinking alcohol, and referred repeatedly to Hammond's unsteadiness based on his chemotherapy.

¹ While the quotation appears in Applegate's IA interview, I attribute it to Tomsick since Applegate was quoting "them," referring to Tomsick and the two Emergency Response Unit (ERU) deputies who ended up driving Hammond and his car home. Of those three, only Tomsick had contact with Hammond before Tomsick and Applegate, accompanying Hammond, met the two deputies in the car port. Thus, only Tomsick would have been in a position to posit Hammond was in no condition to drive.

Separate contemplation of discipline meetings were convened on July 12, 2017 for the Appellants, each of whom attended with legal counsel. The Agency served its notice of termination on Applegate August 1, 2017 [Exh. 1], followed by service of its notice of termination on Tomsick August 7, 2017. [Exh. 2]. Both filed timely appeals.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR 19-10 A.1.a., as the direct appeals of terminations. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove the Appellants violated one or more cited sections of the Career Service Rules, and to prove its decision to terminate their employment complied with CSR 16-41. The standard by which the Agency must prove its claims is a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-29 A. Neglect of duty.

To sustain a violation under CSR 16-29 A., the Agency must establish the Appellants failed to perform a known duty. In re Gomez, CSA 02-12 (5/14/12), *citing* In re Abbey, CSA 99-09, 6 (8/9/10). The Agency claimed Appellants violated this rule by failing their duties under other rules. The decision-maker testified Appellants violated their duty not to commit a deceptive act, [Lipchak testimony], and they failed their duty to require reasonable suspicion testing of Hammond. When the only basis for a violation under this rule is to implicate the duty under another, more specific rule, no violation may be found hereunder. To do otherwise would impermissibly double each Agency claim. [In re Gordon, CSA 10-14, 2 (11/28/14); see also In re Wright, CSA 40-14, 7 (11/17/14)].

2. CSR 16-29 R. Conduct which violates the Career Service Rules, the City Charter, the Denver Revised Municipal Code, Executive Orders, written departmental or agency regulations, policies or rules, or any other applicable legal authority.

As it pertains to:

Denver Sheriff Departmental Rules and Regulations

RR 300.19.1. Disobedience of Rule. Deputy sheriffs and employees shall not violate any lawful Departmental rule, duty, procedure, policy, directive, instruction, order (including Mayor's Executive Orders), or Operations Manual section.

As it pertains to:

Executive Order 94 City and County of Denver Employees Alcohol and Drug Policy:

I. PROHIBITIONS FOR ALL CITY EMPLOYEES INCLUDING CLASSIFIED MEMBERS OF POLICE AND FIRE DEPARTMENTS.

A. Alcohol. Employees are prohibited from consuming, being under the influence of, or impaired by alcohol while performing city business, while driving a city vehicle or while on city property.

B. Legal Drugs.

2. Employees who work in positions operating vehicles or dangerous equipment or positions affecting the health or safety of co-workers or the public are prohibited from consuming, being under the influence of, subject to the effects or impaired by legal obtained prescription drugs while performing city business.

A City employee is in violation of this portion of E.O. 94 if he is under the influence of a legally-obtained prescription drug while working. This provision does not assess liability for a supervisor who fails to conduct reasonable suspicion testing of such impaired employee. No violation against either Appellant is established hereunder.

II. DRUG AND ALCHOL TESTING

B. Reasonable Suspicion Testing

1. When a supervisor has reasonable suspicion that any employee is in violation of this policy, after taking appropriate safety measure, i.e. removing the employee from any situation which may pose a safety risk to the employee, co-worker or the public, the supervisor shall immediately consult with his/her Human Resource Specialist, Safety Officer or the City Attorney's Office to determine further actions. However, if immediate consultation is not possible, it is the responsibility of the supervisor to promptly initiate alcohol and drug testing.

a. Alcohol... Escort the employee to the testing site as soon as possible. However, if the supervisor is unable to escort the employee, the supervisor should have another individual escort the employee for testing.

b. Legal Drugs. Escort the employee to the evaluation site as soon as possible. However, if the supervisor is unable to escort the employee, the supervisor should have another individual escort the employee for testing.

D.O. 2035.1B –Drug-Free Workplace

1. Purpose: the purpose of this order is to provide general guidelines to establish and enforce an alcohol and drug-free workplace program to ensure the safety of all employees, inmates and the public.

...

6. Testing and Treatment:

A. Reasonable Suspicion Testing: When a supervisor has reasonable suspicion that an employee is in violation of this policy or Executive Order 94, after taking the appropriate safety measures, the supervisor should immediately consult with an appropriate member of the Department's personnel staff in Internal Affairs or with the City attorney's Office to determine further actions. However, if immediate consultation is not possible, it is the responsibility of the supervisor to initiate drug and alcohol testing.

The decision to test an employee must be based on reasonable belief that the employee is using, under the influence, subject to the effects of or impaired by a prohibited drug or alcohol. The supervisor's basis for this reasonable belief shall be specific, such as, but not limited to, observing changes concerning the appearance, behavior, speech or body odors of the employee.

If a supervisor has reasonable suspicion that an employee is under the influence of drugs or alcohol, he/she shall have the employee escorted by the Internal Affairs Officer to the Occupational Health and Safety Clinic at Denver Health Medical Center or at Denver International Airport for testing as soon as practical.

The above provisions, Executive Order 94, and D.O. 2035 1.B., place an affirmative obligation on supervisors who reasonably suspect, or should suspect, that a subordinate may be impaired by drugs or alcohol, to make certain notifications and to order such subordinate to submit to drug and alcohol testing. Indicia giving rise to reasonable suspicion testing must be specific, contemporaneous and articulable observations which include, but are not limited to, the subordinate's appearance, behavior, speech, or body odors.

The purpose behind these rules is evident, particularly in the context of Denver's jails. Hammond's duties as security specialist, including the operation of elevators, security doors, and monitoring inmate movements required him to be alert to potential safety and security issues. It is not difficult to imagine the dangers posed to co-workers and to inmates by someone whose duty it is to monitor inmates while his eyes roll back in his head, while he cannot hold himself up, or while he struggles to remain alert.

Both Appellants claimed they were largely untrained in, and unfamiliar with, Agency D.O. 2035.1H., and Executive Order 94, regarding drug and alcohol use and testing. The evidence tended to support their claim. Regardless, under D.O. 2035 1 H., each employee is responsible to be familiar with that order. [Exh. H-5 at #9]. "It is the responsibility of each employee and supervisor to be familiar with this policy, Executive Order 94, and to abide by the drug-free requirements of the City and County of Denver and the Denver Sheriff Department (DSD)."

In addition, the Career Service Board determined even if rules are not well-communicated, every officer is responsible to be familiar with them and to implement them. "Lack of training or lack of recent training does not relieve employees of their obligation to know the rules and act in accordance with them." In re Shelley and Martinez, CSB 30-13A & 32-13A, 2 (12/9/14). For these reasons, this defense of lack of training fails.

Next, Appellants argued Hammond did not display indicia of alcohol impairment. This argument is misplaced. Indicia of impairment, whether from alcohol, illegal drugs, or legal drugs all require the same proactive responses by supervisors. [Exh. 17-5 through 17-7]. Hammond's actions, affect and smell all provided ample indicia of impairment, regardless of chemical origin. [Exh. 3-4; Exh. 9 at 8:26:30; Exh. 11 at 8:28:48-8:28:56; Exh. 13 at 8:31:22; Exh. 3-28; Exh. 4-14].

Appellants also argued that since many others had contact with Hammond the same day and none suspected he was impaired, it was unreasonable for them to suspect Hammond was impaired in a way that suggested reasonable suspicion testing was required. The issue, however, is not if others had a reasonable suspicion to test Hammond, but whether Appellants did. For reasons noted above, Appellants had ample indicia of impairment to require reasonable suspicion testing of Hammond.

Moreover, it is more likely than not that both Appellants reasonably suspected Hammond had been drinking alcohol because: (1) they asked to meet Petrie in secret regarding Hammonds; (2) Applegate, in direct view of Petrie, demonstrated a well-recognized sign of drinking alcohol, (3) Applegate demonstrated Hammond's drunken-like staggering; (4) both Appellants acknowledged "someone," meaning one of them or Petrie, brought up the subject of alcohol; and (5), most convincingly, Petrie consistently recalled both Appellants indicated they believed Hammond had been drinking alcohol, and Petrie's testimony was not rebutted.

In view of these observations and conclusions, both Appellants understood their obligations under Agency DO 2035.1B and E.O. 94. They both observed that Hammond was impaired. Under both Agency rule and executive order, they were obligated to order Hammond to submit to mandatory testing and to make required notifications. Their failure to do so violated D.O. 20351B and E.O. 94 and therefore violated CSR 16-29 R.

RR 200.4.2. Commission of a Deceptive Act. In connection with any investigation or any judicial or administrative proceeding, deputy sheriffs and employees shall not willfully, intentionally, or knowingly commit a materially deceptive act, including but not limited to departing from the truth verbally, making a false report or intentionally omitting information.

A violation of the Career Service rule analogous to this rule, occurs when an employee makes any knowing misrepresentation within the employment context. In re Redacted, CSA 57-11, p. 5 (5/31/12), citing In re Mounjim, CSB 87-07, p. 5 (1/8/09). The Agency prohibition applies, more restrictively, during the course of an official proceeding, but adds willfulness and intent to its standard of proof.

The context for the Agency's claim under these prohibitions is its IA investigation of both Appellants, placing its claim within the scope of both prohibitions. The issue is whether the Appellants engaged in a materially deceptive act during that investigation. The Agency claimed they lied to the IA investigators concerning whether they suspected Hammond was alcohol-impaired.

Applegate repeatedly told his IA interviewer he and Tomsick smelled something on Hammond but took great pains to state emphasize the "something" was not alcohol. [Exh. 3-5, 3-7; 3-10, 3-14, 3-15, 3-18, 3-19, 3-20, 3-26, 3-27]. Tomsick also denied perceiving any alcohol use by Hammond. [Exh. 4-8], even while acknowledging Hammond seemed confused and forgetful [Exh. 4-8]. However, as found above, Petrie distinctly recalled both Applegate and Tomsick stated they smelled alcohol on Hammond. [Petrie testimony; Exh. 5-3, 5-4, 5-5, 5-17]. Consistent with Petrie's testimony, Applegate made a gesture widely-regarded as that of drinking alcohol [Exh. 15 at 8:37:20]. He also demonstrated behavior widely regarded as being drunk, feigning Hammond's stumbling. [Id at 8:37:44]. Applegate's response, that he made the gestures only in response to "someone" mentioning alcohol was not persuasive, as it would have been an exceedingly odd reaction to pantomime Petrie or Tomsick's mention of alcohol, especially followed by another demonstration of the same condition. Even accepting Applegate's unlikely demonstration of what someone else said, he failed to rebut Petrie's unwavering recollection that both Applegate and Tomsick specifically referred to Hammond's use of alcohol. [Petrie testimony].

Tomsick insisted he was always truthful, not deceptive, and attributed any inconsistencies in his recollection to the passage of time. Certainly memory is imperfect and becomes more so over time. However, when Tomsick spoke with the IA interviewer, he changed his responses significantly and repeatedly within minutes. Tomsick alternatively recalled to the IA interviewer "Petrie, I believe, asked if we had smelled any alcohol which I said no," [Exh. 4-13], and "Petrie... asked if we smelled anything. I said, no, I didn't smell alcohol." [Exh. 4-17], then "somebody said

alcohol," [Id], and "like I said, who actually made the statement of smelling alcohol, I have no idea who that is," [Id], followed almost immediately by "I'm almost positive it was Petrie that asked if we smelled alcohol," [Exh. 4-18], then "who made that statement, I don't know," [Exh. 4-19], and "at some point, apparently somebody had made the allegation of suspecting alcohol." [Exh. 4-20; see also Exh. 4-23].² At Tomsick's contemplation of discipline meeting, six months later, and also one year later at hearing, Tomsick consistently recalled it was Petrie who first mentioned Hammond's use of alcohol. [Exh. 7-4 (statement by Tomsick's attorney)].

Petrie's firm and consistent recollection that Applegate and Tomsick both indicated they suspected Hammond had been drinking alcohol was not impeached or rebutted. Based on Petrie's unimpeached recollection, along with Appellants' inconsistent statements, the Agency proved both violated and CSR 16-29 R., via RR 200.4.2.

3. CSR 16-29 D. Any act of dishonesty which may include but it not limited to, lying, or improperly altering or falsifying records, examination answers, or work hours.

The same evidence which established a violation of RR 200.4.2, above, also establishes a violation of CSR 16-29 D. Both made knowing representations during the course of their IA interviews.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-41.

A. Seriousness of the proven offenses

The dismissal of these employees was not based on their hesitation and ultimate decision not to test a subordinate who was displaying indicia of impairment. They were dismissed for their departures from the truth and knowing misrepresentations during the course of an Internal Affairs investigation, and continuing through hearing in violation of RR 200.4.2 and CSR 16-29 D. [Lipchak testimony].

The Agency has repeatedly affirmed the criticality of honesty in its officers. They are empowered with physical control over others' lives, well-being, and are even empowered to use deadly force and other less-deadly uses of force. In exchange, the Agency requires complete transparency of motives and reasons for deputies' actions in order to retain the confidence of the public it serves. Dishonesty undermines that confidence. Accordingly, the Agency does not brook any dishonesty during an official investigation, and termination of employment is all but assured for those who knowingly, intentionally or willfully omit or misstate facts, motives or reasons. [See In re Gale, CSA 2-15 (11/23/15), *aff'd In re Gale*, CSB 2-15A (7/21/16); In re Steckman, CSA 30-15 (6/30/16), *aff'd In re Steckman*, CSB 30-15A (1/19/17); In re Roybal, CSA 47-15 (4/22/16), *aff'd In re Roybal*, CSB 47-15A (10/6/16); In re Roybal, CSA 44-16 (10/3/16), *aff'd In re Roybal*, CSB 44-16A (5/18/17); *but contrast In re Lewis*, CSA 51-14 (3/19/15), *aff'd In re Lewis*, CSB 51-14A (11/5/15)].

The Agency's disciplinary matrix, [Exh. 16-57], reflects its zero-tolerance policy when it comes to material dishonesty during the course of an investigation. The presumptive penalty is dismissal. [Exh. 16-58]. Under the circumstances of this case, including the importance of honesty during the course of an internal investigation within the Sheriff's Department, the

² Exhibits 3-5 and 7 were not in evidence at this point, but no objection was raised during or after extensive references to their contents, nor was there a motion to strike that evidence. Consequently, 3-5 and 7 are deemed admitted.

Agency's decision to assess the presumptive penalty of termination for Appellants' violation of RR 200.4.2, and CSR 16-29 D. was within the range of alternatives available to a reasonable and prudent administrator. [In re Economakos, CSB 28-13A, 2 (3/24/14)].

B. Prior Record

Both Appellants had excellent employment records. But for their dishonesty during the course of an investigation, it is likely the Agency would have assessed a lesser discipline. [See Lipcheck testimony; see *also* Agency opening and closing statements].

C. Likelihood of Reform

In view of the Agency's reasonable loss of confidence in those who make material misstatements or omissions during the course of an official investigation, this element carries little weight.

VI. ORDER

The Agency's termination of Appellant Applegate's employment on August 1, 2017, is AFFIRMED.

The Agency's termination of Appellant Tomsick's employment on August 7, 2017, is AFFIRMED.

DONE March 5, 2018.



Bruce Plotkin, Hearing Officer
Career Service Hearing Office

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 § 21-20 et seq., within fourteen 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, Dept. 412, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org

AND opposing parties or their representatives, if any