

DECISION MODIFYING TWO-DAY SUSPENSION TO A WRITTEN REPRIMAND

DEREK BORREGO, Appellant,

v.

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

I. INTRODUCTION

Appellant appeals his two-day suspension imposed by his employer, the Department of Safety, Denver Sheriff Department (Agency), assessed on May 30, 2018, for violations of specified Career Service Rules (CSRs). Appellant acknowledged he was in breach of all rules specified below and waived his right to contest any fact establishing those violations as provided in the Agency's notice of discipline, except as related to the degree of discipline. [Order dated August 14, 2018]. Pursuant to CSR 20-54, the parties waived hearing and submitted briefs regarding the appropriate degree of discipline. The parties stipulated to the admission of Agency exhibits I.a. – 1.s., and Appellant exhibits A-C. [Parties' Joint List of Stipulated Exhibits, filed 9/24/18]. Zachary Wagner, Esq. and Patrick Welsh, Esq. of the law firm Elkus & Sisson P.C., filed opening and reply briefs on behalf of the Appellant. Assistant City Attorney Richard Stubbs filed a responsive brief for the Agency.

II. ISSUES

The only issues presented for this appeal were whether the Agency's application of the Agency's disciplinary matrix in assessing discipline was clearly erroneous and, if so, whether the assessment of a two-day suspension was clearly erroneous. CSR 20-56 A.

III. FINDINGS

I adopt the following findings as derived from the Agency's notice of discipline. [Exh. C].

The Appellant, Deputy Derek Borrego, has been an Agency deputy since 2013. Agency rules and orders prohibit taking any food from the Officer's Mess, [Exh. 1m-3 at §6.A.6.] and prohibit providing any food to inmates without the express permission of a supervisor. [Exh. C-7].

Borrego acknowledged that security video on August 20, 2017 showed him removing food from his pants pocket, placing the items on the officer's desk in the inmate residential pod he was supervising, and allowing inmates to take the food while he watched. [Exh. 1.r (207) at 18:06:30-18:18:41]. Borrego acknowledged his removal of food from the Officer's Mess and providing it to inmates violated policy. Borrego's acknowledgments constitute violations of CSR 16-29 R. as it pertains to the following Agency Order and Rule.

DSD Department Order (DO) 3600.2I at 6.A.6. "Employees will not be allowed to remove any food items from the O.M."

DSD Rule and Regulation (RR) 400.12 – Prohibited Transactions with Prisoners. Deputy sheriffs and employees shall not give or loan to a prisoner any unauthorized item ... without express permission from a supervisor.

Following a notice in contemplation of discipline, the Agency convened a pre-disciplinary meeting attended by Borrego and his attorney. Following the meeting, the Agency assessed a written reprimand for Borrego's violation of DO 3600.2I at 6.a., (for removing food from the Officer's Mess) and a concurrent two-day suspension for his violation of RR 400.12 (for giving food to inmates). In his opening and reply briefs, Appellant addressed only the RR 400.12 violation, effectively waiving any challenge to the level of discipline imposed for the violation of DO 3600.2I.

IV. ANALYSIS – DEGREE OF DISCIPLINE

A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction of this direct appeal of a suspension pursuant to CSR 20-20 A.2. The Hearing Officer is required to affirm the discipline assessed by the Agency if the Appellant fails his burden of proof.

B. Burden and Standard of Proof

Appellant bears the burden to prove his discipline was clearly erroneous. CSR 20-56 A.¹ Discipline is clearly erroneous: (1) when the decision maker's assessment, even while supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole; or (2) when the decision maker failed to follow its disciplinary matrix and, absent such failure, a lesser discipline or no discipline would have resulted; or (3) if the decision maker exceeded his authority. [CSR 20-56 B.1.i.-iii].

In view of Borrego's acknowledgement that he violated all rules alleged by the Agency in its notice of discipline, there remains no dispute regarding (1), whether finding the above-cited rule violations was contrary to what a reasonable person would conclude from the record as a whole; nor does the Appellant dispute the authority of the decision maker under (3). What remains to decide here is the question raised under (2), whether the decision maker followed the Agency's disciplinary matrix and, if so, whether a lesser discipline would have followed pursuant to the matrix.

C. Appellant's claims that the Agency failed to follow its disciplinary matrix

Borrego appears to advance three sub-claims alleging the Agency failed to follow its disciplinary matrix.²

¹ Normally, Appellant would also be obligated to prove the Agency's determination of rule violations was clearly erroneous. Since Appellant confessed to all alleged violations, the only remaining issue (thus the only remaining burden of proof) concerns the degree of discipline.

² Borrego's brief states two categories of claims, but a review of the explanation under each claim revealed an overlap of three claims: (1) Incorrect category of wrongdoing assessed; (2) improper consideration of mitigation and; (3) excessive discipline.

1. Agency's selection of the category of wrongdoing.

Borrego alleges the decision maker selected a category of wrongdoing for the violation of RR 400.12 that was clearly excessive. The range category for each violation is established by the matrix. [Exh. B-86 through B-92]. RR 400.12 falls into a possible range of categories from A-F. The decision maker, Civilian Review Administrator Alfredo Hernandez, determined Borrego's misconduct under RR 400.12 fell under Category C., which defines conduct as having "a pronounced negative impact on the operations or professional image of the department, or on relationships with other deputy sheriffs, employees, agencies, or the public."

Borrego first claims "no analysis of the eleven factors enumerated in section 15 was done" by Hernandez before selecting Category C. [Appellant Opening Brief p. 3]. Section 15.0 of the matrix states the decision maker should consider the following non-exclusive 11 questions to determine the category of wrongdoing. [Exh. B-25 at §15.1].

a. What is the general nature of the misconduct? Hernandez amply set forth the general nature of the misconduct in the Agency's notice of discipline. [Exh. C at 4 through 7].

b. How does the misconduct relate to the stated mission, vision and guiding principles of the Department? The Agency's notice of discipline stated:

The following factors were considered in determining the conduct category... how this conduct related to the stated mission, vision and guiding principles of the Department and how this misconduct impacted operations and image of the Department. Deputy Borrego's conduct had a pronounced negative impact on the operations or professional image of the department. As such, this is a category C violation."

[Exh. C-6, C-7].

These conclusory statements lack minimal analysis from which the basis for the conclusion may be evaluated. First, the notice of discipline did not identify a mission, vision or guiding principle. The Agency's explanation in its responsive brief claimed the Agency's vision was impacted because giving food "to some but not all inmates does not assist DSD in 'being a model law enforcement agency.'" I assume the reference was to a mission, vision or guiding principle, but again, none was identified in the brief. More importantly, none was identified in the notice of discipline. In addition, this statement fails to identify any, leave alone a pronounced, negative impact Borrego's actions had on this unspecified Agency mission/vision/guiding principle.

c. How does the misconduct impact the operations and image of the Department and its relationship with other agencies or the community? The Agency's statement, immediately above, also failed to identify how Borrego's reward of food to inmates had a pronounced negative impact on operations or professional image of the department. In its responsive brief the Agency backfills the void, claiming that, by providing extra food to some inmates, Borrego "could make the jail a less safe and secure facility for the inmates or deputies if some inmates believe they are not being treated the same as other inmates." [Agency Brief p.6]. The Agency failed to provide a basis for this speculation, with citation, data, or even anecdotal evidence.³ With similarly gauzy effect, the Agency floated the idea that Borrego's concealing food he passed to inmates "could easily be perceived as favoritism and not providing justice for all." [Id. at 6-7]. Finally, the Agency offered that (1) "Borrego's misconduct

³ These are examples and not a limit to the ways the Agency might have provided some basis to adopt its conjecture.

impacted the professional image of the Department in that he indicated he did not know it was wrong or a rule violation to provide food from the Officers' Mess to inmates," and (2) "he was acting in a secretive fashion." [Agency's Answer Brief p. 8]. While speculative harm can be sufficient to justify discipline, more is required than conclusory statements and fugitive proofs.

d. What is the actual and demonstrable harm or risk of harm involved? The Agency's notice of discipline failed to address this factor. As noted above, the Agency offered only baldly speculative and conclusory statements.

e. Does the misconduct involve an actual and demonstrable impact on deputy, employee or public safety, or a demonstrable serious risk to deputy employee or public safety? As noted above, the only harm to safety alleged in the Agency's notice of discipline was highly speculative, not supported by any stipulated evidence, and therefore was not "actual and demonstrable" harm or risk. There was no indication the decision maker asked the remaining questions it should have considered, including:

f. Did the violation result in actual injury to a deputy, employee or a member of the public? If so, what is the extent of the injury?

g. Does the misconduct involve unethical behavior or a serious abuse or misuse of authority?

h. Did the misconduct foreseeably result in death or serious bodily injury?

i. Does the misconduct constitute a failure to adhere to any condition of employment required by contract or mandated by law? (This factor is inapplicable here).

j. Is there a Rule and Regulation which has a pre-determined conduct category which addresses similar misconduct that gives any guidance?

k. Has there been a previous case decided after the implementation of these Conduct Principles and Disciplinary Guidelines that gives guidance to the appropriateness of the conduct category to be chosen?⁴

[Exh. B-25, B-26].

The Agency's failure to consider these factors - which its matrix deems "a necessary first step" [Exh. B-25] to determine the appropriate conduct category - is clearly erroneous.⁵

The next question is whether the stipulated evidence leads to a different conclusion regarding the conduct category assigned to Borrego's misconduct. Leaving aside conclusory statements and unsupported conjecture by the Agency, what remains are the following circumstances that relate to the selection of a conduct category.

⁴ The Agency's addition of negative effects in its brief, including listing the guiding principles Borrego's conduct violated, (Honesty, Respect, Fairness, Teamwork, Judgment, Personal leadership, Integrity, Accountability, Professionalism), cannot substitute for the failure to specify those bases in its notice of discipline.

⁵ While the Agency might argue it is obligated only consider and not to state its conclusions from these questions, that approach fails to create a nominal record from which an appellant may attempt to meet his burden of proof to challenge whether the Agency's election was "fair and rational." [Exh B-20 at §11.1]. Transparency about the decision-maker's evaluation of conduct under the matrix is a question of fairness. "At each level of review the reviewer must document his/her findings and the reasons/rationales for those findings in accordance with these Conduct Principles and Disciplinary guidelines..." [Exh. B-20 at §10.17]. The decision maker failed to meet this requirement here.

- The general nature of Borrego's misconduct was minor: taking food he should not have taken [See In re Lacombe, CSB 56-14A at 3-4 (7/16/15)(finding that taking leftover food was a *de minimus* violation meriting a written reprimand)]; and, somewhat more significantly, but still with minor consequences, giving that food to reward good inmate behavior..
- Actual and demonstrable harm was minimal or non-existent. [See In re Leyba, CSB 59-14A (2/4/16)].
- No injury occurred.
- While the Agency's notice of discipline inferred other, more egregious, wrongdoing may have occurred, specifically, giving a cell phone to an inmate, the Agency acknowledged this reference was a red herring. "[T]he transfer of a cell phone cannot be verified." [Exh. C-7].
- The bases for the Agency's determination of the conduct categories were entirely conclusory.

A reasonable person would not conclude the Agency followed its disciplinary matrix in identifying the appropriate conduct category which relates to Borrego's admitted wrongdoing. The only evidence in this case stipulated by the parties also failed to establish that Borrego's admitted wrongdoing had "a pronounced negative impact on the operations or professional image of the department, or on relationships with other deputy sheriffs, employees, agencies, or the public;" nor did the stipulated evidence establish Borrego's misconduct had more than a minimal negative impact on the operations or professional image of the department, or that it negatively impacted relationships with other deputy sheriffs, employees, agencies or the public. [See Exh. B-88]. Consequently, Borrego met his burden to prove the Agency's election of Conduct Category C was clearly erroneous. [See In re Jackson, CSA 42-16 at 11-13 (11/21/16), *aff'd In re Jackson*, CSB 42-16A (6/15/17); see also In re Ford, CSB 48-14 A (12/17/15) (holding that merely "reciting the magic words" is not sufficient to place a violation into any potential conduct category); In re Wilson, CSA 38-17 at 17 (12/8/17); In re Singleton, CSA 17-15 at 11 (7/20/15)].

As it relates to wrongdoing under RR 400.12, the stipulated evidence established only that Borrego's wrongdoing had "a minimal negative impact on the operations or professional image of the Department," a Category A violation. As Borrego had no prior discipline, the matrix requires setting the discipline level for his violation at "one," with a presumptive penalty of an oral reprimand. [Exh. B-86].

2. Mitigation under the DSD Discipline Matrix.

After determining the proper conduct categories and associated ranges of discipline for all misconduct, the decision maker is tasked with weighing mitigating and aggravating factors before settling on the specific discipline. [Exh. B-29 et seq.].

Mitigation includes, but is not limited, to the following circumstances:

- willingness to accept responsibility and acknowledge wrongdoing;
- circumstances under which the rule was violated;
- the culpable mental state of the deputy in the commission of the violation;
- complimentary history, including awards, commendations and positive public recognition;
- if minimal, the severity of the current offense and the lack of or minimal nature of any consequences cause by the current offense;

- o prior work history, such as positive evaluations and/or work performance, or voluntary advanced, job-related training; or
- o minimal or lack of prior disciplinary history relative to the deputy's years of service.

[Exh. B-30 at §19.6].

The parties agreed Borrego accepted responsibility, was candid about his wrongdoing, and ceased the practice of providing extra food to inmates. He stated, and the Agency did not contradict, that his intent was to reward good inmate behavior. As stated above, there were no significant negative consequences to Borrego's providing food to some inmates. He has been with the Agency for five years and his performance always met or exceeded expectations. He had no prior discipline. These factors indicate mitigating factors were present and should be applied.

Next, aggravating factors, or the lack thereof, should also be considered in arriving at the specific degree of discipline. The matrix lists fourteen non-exclusive factors. [Exh. B-30, B-31 at §19.8, 19.9].

The Agency stated it found two aggravating factors: Borrego introduced prohibited items into the pod and he initially insisted he did not know it was wrong to do so. First, the matrix repeatedly makes clear that a restatement of the conduct as applied to the category of wrongdoing is not an aggravating factor.

In determining mitigating and aggravating factors, care should be used to ensure that a potentially mitigating or aggravating factor has not already been taken into consideration in the definition of the specific conduct category into which the violation falls, or the definition/elements of the specific violation which has been sustained."

[Exh. B-29 at §19.4] and;

The question any reviewer should contemplate is: Are there any factors not already taken into consideration in the conduct category or the definition of the specific violation that might justify increasing the disciplinary sanction above the presumptive penalty?

[Exh. B-31 at §19.10].

The first allegedly aggravating factor cited by the agency was a mere restatement of conduct category definitions. As such it does not constitute an aggravating factor as described in the matrix.

Moreover, Borrego's introduction of contraband into the pod he supervised was already considered entirely within the description of RR 400.12. "Deputy sheriffs and employees shall not give or loan to a prisoner any unauthorized item ..." and within the descriptions of conduct in categories A-C ("Conduct that has a (minimal/more than a minimal/pronounced) negative impact on the operations or professional image of the Department." Consequently, the Agency's claim of aggravation does not comport with its matrix, and does not otherwise constitute an aggravating factor.

The Agency next claimed it was an aggravating factor that Borrego initially insisted he did not know giving food to inmates was wrong. On its face, there is nothing aggravating about Borrego's claim. The Agency repeated inferred Borrego's claim was deceitful, yet the Agency

did not allege deceit, dishonesty or any other form of lack of candor. This is another improper red herring. [See In re Rocha, CSB 19-16A at 7 (7/6/17); see also In re Leslie, CSA 10-11, 20 (12/5/11)].⁶ Further, the Agency commended Borrego's "candor during the investigation when reviewing the video and his ultimate acknowledgment of violation of the policy."

I will not impute any lack of candor to Borrego, either initially or otherwise, when the only facts stipulated by the parties were contained within the four corners of the notice of discipline, and no deceit was alleged therein. The Agency's only direct references to Borrego's candor were positive, including (1) during the IAB investigation, Borrego admitted he took food from the officer's mess and gave it to inmates as a reward for good work [Agency Answer Brief pp 3-4]; (2) during the contemplation of discipline Borrego admitted the same taking and giving food, and admitted those actions violated RR 400.12. [Id. at p.4].

Despite acknowledging Borrego's candor, the Agency announced "[i]t is noteworthy that, despite admitting that he had violated the policy, Borrego refused to acknowledge that he had done anything wrong. He claimed that he did not know there was anything wrong with giving inmates food as a reward." [Id.]. Stepping around an accusation is insufficient to identify or establish it. In the absence of accusing Borrego of deception or lack of candor, all that remains is Borrego's reasonable claim within the Agency's disciplinary letter, that he did not know his action was wrong and once he learned it was, fully acknowledged those violations.

Based on the absence of any basis to aggravate Borrego's penalty, what remains is his positive work history, the minor violations he acknowledged, his candor, and the absence of any reasonably likely injury or harm to the Agency, or others. Nonetheless, the presence of mitigating factors, alone, "does not guarantee or require that a mitigated penalty be imposed." [In re Gajarszki et al, CSB 30-17A, 32-17A, & 33-17A, 3 (10/18/18)]. The imposition of a presumptive penalty here was within the discretion of a reasonable and prudent administrator.⁷

3. Agency's selection of a two-day suspension under the matrix.

Borrego met his burden to prove the Agency's election of the conduct category was clearly excessive. Thus, under the Agency's matrix, a two-day suspension was clearly excessive.

The penalty level for a first-time violation of a Conduct Category B violation⁸ is "two," [Exh. B-88, B-86], where the Penalty Table calls for a presumptive penalty of a written reprimand. A written reprimand comports with what a reasonable person would conclude from the evidence as a whole, and is also consistent with the purposes of discipline outlined in CSR 16-41. While the record may have supported a mitigated penalty, the totality of circumstances here are not so compelling or overwhelming as to render the decision-maker's choice clearly erroneous. [Gajarszki et al, p.2].

⁶ "[T]he Hearing Officer, as we do, had concerns about the Agency imposing a penalty on Appellant, essentially, for lying, when at the same time the Agency lacked the courage of its convictions to actually charge the Appellant with lying... inserting additional punishment for dishonesty has the effect of punishing Appellant for misconduct in a fashion that gives her less of a meaningful opportunity to contest allegations that she was not being truthful in her statements." Rocha, p.7.

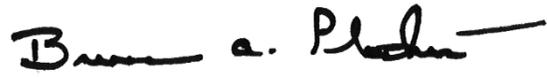
⁷ Even if the circumstances required a mitigated penalty, the Hearing Office lacks jurisdiction to assess an oral reprimand. The penalties available to an agency's decision maker are those enumerated at CSR 16-42 B.: a written reprimand; suspension without pay or involuntary temporary reduction of pay; involuntary demotion; and dismissal. An appeal to the Hearing Office of those penalties may result only in affirming, modifying, or reversing the penalty assessed among those options. Since the assessment of an oral reprimand was not an available option to the decision maker under the Career Service Rules, then the hearing officer is without authority to affirm, modify or reverse it. Accordingly, the maximum modification of discipline available to a hearing officer is a written reprimand.

⁸ As a reminder, Borrego did not contest the category determination for taking food from the officer's mess, under DO 3600.2I at 6.A.6., which the decision maker deemed a Conduct Category B violation. Since the violation under RR 400.12 is found to be a Conduct Category A violation, and the matrix requires assessing penalties concurrently for the same incident [Exh. B-44 at §32.8], the final determination must be made under Conduct Category B.

V. ORDER

The Agency's assessment of a two-day suspension is modified to a written reprimand.

DONE October 22, 2018.



Bruce A. Plotkin
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 § 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery, below. 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.