

DECISION AND ORDER

RYAN BOSVELD, Appellant,

v.

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 November 30, 2016 before Hearing Officer Valerie McNaughton. Appellant appeared and was represented by Reid Elkus, Esq. and Zachary Wagner, Esq. of Elkus & Sisson, PC. Assistant City Attorney Natalia Ballinger appeared for the Agency. Tamatha Anding, Kelly Bruning and Shannon Elwell testified for the Agency, and Appellant testified on his own behalf.

I. STATEMENT OF THE APPEAL

Appellant Ryan Bosveld appeals the ten-day suspension imposed on Aug. 11, 2016 by the Denver Sheriff's Department. The parties stipulated to the admission of Agency Exhibits 1, 2, 5, 7 – 9, and Appellant Exhibit B. Appellant's Exhibits 3, 4, and 6 were admitted at the hearing.

II. FINDINGS OF FACT

Appellant has been employed with the Agency as a Deputy Sheriff since 2007. On Oct. 20, 2015, Denver Health Registered Nurse Tamatha Anding reported to her supervisor that on Oct. 19th she heard Appellant discussing an inmate's sentence with another inmate, and showing him the computer screen with that information. Anding also reported that two days before that, Appellant informed her he had told a suicidal inmate to "just die", with the remark, "[t]hat wasn't very professional, was it?"

The two matters were referred for an informal Internal Affairs investigation to Major Kelly Bruning, who reviewed the jail videos for the two dates and then interviewed Appellant. Appellant denied he ever told anyone in DSD custody to "just die." Appellant volunteered that he had made an inappropriate comment to another inmate at around the same time, out of frustration because the inmate "continually harassed him for his entire shift." Based on that admission, Major Bruning counseled Appellant about his judgment. As to Anding's report, Bruning noted that the Oct. 17th video showed "a casual exchange" between Appellant and Anding as they passed in the corridor, but concluded there was not enough evidence to sustain the allegations that Appellant had made the "just die" comment. [Exh. 8-1.]

Major Bruning next asked Appellant if he had shown and discussed confidential prisoner information with another inmate. Appellant admitted he has sometimes looked up inmate information on TAG to answer inmate questions. Major Bruning sustained that allegation, and instructed Appellant never to allow inmates to view anything in TAG other than booking information. Major Bruning documented the discussion in a memorandum as a disciplinary action for recording in Appellant's annual evaluation, known as a Performance Enhancement Program Report (PEPR). Both parties signed the memo on Jan. 13, 2016. [Exh. 8.]

On April 19, 2016, Tamatha Anding was interviewed by an Internal Affairs investigator regarding her Oct. 20th note to her supervisor. Anding told the investigator she was the charge nurse who supervised the nurses in 3 Medical. [Exh. 6-5.] On Oct. 17, 2015, Anding heard something as she was "starting to walk around the corner" into the psychiatric housing corridor with four cells for inmates classified as at risk of suicide. "[Appellant] sees me and he kind of starts giggling and he said, '[w]ell, that wasn't very professional, was it?'" When she asked what wasn't, he replied, "the inmate asked me what he should do ... I told him 'just die'. ... And I said, 'no, not really.'" She told the investigator she was concerned because "whether [the inmates] heard it or not, it was just not professional." When asked if she thought an inmate may have heard the comment, she replied, "[m]ay have." [Exh. 6-17, 6-18.] After the investigator played the jail video of the corridor's north view, Anding stated that Appellant made these remarks at 11:12:53. [Exhs. 6-21; 7-4.]

About a week later, the same investigator interviewed Deputy Bosveld under a Garrity advisement¹. Appellant was informed that the case had been changed to a formal investigation on Feb. 5, 2016 at the request of the Office of Independent Monitor (OIM). Appellant stated that the previous investigator, Sgt. Lightner, had already informed him of that fact. [Exh. 3-5.] When asked if he told an inmate to just die, Appellant stated it was "highly unlikely", since "[i]t's not in my personality to do that." [Exh. 3-6.] Appellant told the investigator that since he had been removed from 3 Medical about the same time, he assumed his removal was based on an incident with an inmate who had been harassing him during his shift by repeatedly saying, "go fuck yourself." Appellant said he "just snapped" and replied, "I'd rather fuck your mother." [Exh. 3-7, 3-28, 3-29.] Appellant also admitted he had allowed an inmate to look at a computer screen showing a County Court jail sentence on Oct. 19th, and said he did so because two inmates were discussing the maximum sentence for County Jail. [Exh. 3-21, 3-22.] When first asked about this incident, Appellant said he held his hand over the demographic information on the screen before showing the inmate. After the video was played, he admitted he had not. "I thought I covered [the identifying information] up." [Exhs. 3-23; 9- 2.]

After further management review of the incidents, Appellant was notified that discipline was being contemplated based on three allegations: the Oct. 17th "just die" comment, the Oct. 19th sharing of confidential sentencing information with an inmate, and Appellant's admission that he had told an inmate, "I'd rather fuck your mother." These were alleged to violate the rules against neglect of duty, carelessness, and

¹ A Garrity advisement informs employees being interviewed in internal or administrative investigations that they need not answer questions if their answers may tend to implicate them in a crime. Garrity v. New Jersey, 385 US. 493 (1967).

failure to maintain satisfactory work relationships. The letter also alleged violations of departmental rules regarding discourtesy, prohibited discussions with prisoners, and the handling of mentally ill inmates. [Exh. 1.]

At the contemplation of discipline meeting on July 21, 2016, Appellant presented the Jan. 13, 2016 discipline memo from Major Bruning, which sustained the confidentiality allegation, but rejected the “just die” charge. Appellant’s representative argued that Appellant should not be in jeopardy or punished twice for the same conduct. Appellant again stated that he would not have said “just die” to an inmate because it is not in his personality. [Exh. 4..]

After reviewing the entire investigative file, Civilian Review Administrator Shannon Elwell found that Appellant did tell a suicidal inmate to “just die”, most probably the inmate in cell 116, although she noted any inmate in the vicinity would be on suicide watch. The other allegations in the contemplation letter were removed from the discipline letter. Elwell determined that the proven allegation constituted neglect of Appellant’s duty to be courteous to inmates, in violation of CSR § 16-60 A² and departmental regulation RR-200.24. Elwell found the same conduct was also neglect of his duty to take reasonable precautions in handling mentally ill inmates, in violation of CSR § 16-60 A and departmental regulation RR-400.9. After determining that neither aggravation nor mitigation was appropriate, the Agency imposed the presumptive penalty of two days for the first violation, and ten days for the second. The penalties were run concurrently based on the fact that they arose out of the same incident. [Exh. 2-9.]

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 a ten-day suspension was within the range of discipline that can be imposed by a reasonable administrator under the circumstances. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

A violation of CSR § 16-60 A, neglect of duty, requires proof of a failure to perform a known duty; here, the duty to treat inmates with courtesy under RR-200.24. The Agency based this determination on its finding that Appellant told a suicidal inmate to “just die”. The same facts are the basis for the finding that Appellant failed to take reasonable precautions with mentally ill inmates, as required by RR-400.9.

The evidence on the sole factual issue is disputed. Nurse Anding did not hear Appellant say those words to an inmate. She testified that Appellant told her he said them when they passed in the hallway. A week after this occurred, Appellant was removed from the unit, an action Appellant attributed to his admittedly inappropriate comment to an inmate about the inmate’s mother. Appellant first learned of this allegation in January, 2016, upon returning to work after the birth of his second daughter. [Appellant, 1:09 pm.] At that time, Appellant denied he ever said those

² CSR Rule 16 was amended on Feb. 12, 2016. Since the events upon which the discipline was based occurred on Oct. 17, 2015, the former version of Rule 16 is applicable in this appeal. Am. Comp. Ins. Co. v. McBride, 107 P.3d 973, 977 (Colo.App.2004.)

words to an inmate, and added that it would not be in his character. [Exh. 3-32.] The fact that there were three months of significant intervening events makes his lack of memory about a short exchange with Nurse Anding believable.

Civilian Review Administrator Shannon Elwell found RN Anding more credible than Appellant on the basis that Anding made two allegations against Appellant: the "just die" comment, and the TAG violation. Elwell concluded that Anding would have no motive to lie as to one charge and tell the truth about the other. That is equally true of Appellant: he denied one inappropriate comment, admitted another, and volunteered a third. Elwell also reasoned that Anding had no motive to lie based on her expressed reluctance to report Appellant's acts, doing so only after witnessing the second event. While Anding hesitated to report the first event, she overcame her doubts three days later after witnessing Appellant showing a sentencing screen to an inmate. Anding testified that she has worked with Appellant since this series of events, and had experienced no negative reaction from him.

In any event, it is not Anding's credibility that is at issue. I find based on the video evidence summarized below that Anding truthfully reported Appellant's statement to her. However, the issue is not whether Appellant said "just die" to Anding, it is whether he said those words to a suicidal inmate. The jail videos provide the most reliable evidence on that issue. Cells 116 to 119 run south to north on the west side of the 3 Medical psychiatric hallway. They are all fitted with cameras showing the cell interiors. As detailed below, I can detect no signs from either the cell or hallway videos that Appellant spoke to any of the four inmates.

Cell 116 is located on the south end of the corridor. The video of that cell shows the back of a naked inmate crouched on the floor in front of his open door flap. The inmate gestured with his hand five times during the one-minute video. [Exh. 7-5.] The first time was at 11:12:38, as the video begins. At that precise time, another video shows Appellant walking by and looking into cell 118, six steps to the north of cell 117, and two cells away from 116. [Exh. 7-7.] Nurse Anding was not visible in the video of the intersecting hall to the west until five seconds after that time. [Exh. 7-6.] At the pace she was walking, Anding would have been a full ten steps away from the corner when Appellant was in front of cell 118. There is no evidence that what Anding heard was Appellant's voice, and there is some evidence that the noise level in this corridor was loud on most days. [Appellant, 1:08 pm.]

At 11:12:48, when the prisoner in 116 next raised his hand, Appellant was passing Nurse Anding at the other end of the hall. [Exh. 7-4.] The inmate seemed most animated between 11:13:00 and 11:13:28, changing his position and holding his left hand up three more times. At 11:13:00, the start of that animated period, Appellant was turning left at the far end of the corridor, around the same corner from which Anding had come. No one else was in the long hallway at the time. The inmate had apparently been talking to himself. The video evidence shows that Appellant was not within speaking distance of the inmate in 116 at the time Nurse Anding heard something.

The other cell videos confirm this timeline. As found above, Appellant was two cells to the north of 116 by the start of that cell's video. [Exh. 7-5, 7-7.] At 11:12:35, Appellant walked past 117 without any sign of talking to the inmate sitting on the bunk.

[Exh. 7-2.] At 11:23:38, Appellant passed the inmate in 118 who was looking at his food tray and pointing to items on it. [Exh. 7-8.] At 11:12:41, Appellant is seen walking past a sleeping inmate in 119. [Exh. 7-3.] When it is visible, Appellant's face is passive and his mouth is closed as he walks steadily down the hall.

In contrast, the videos clearly show that there was some type of exchange between Appellant and Nurse Anding. As they passed, Appellant turned and spoke to the nurse's retreating back. Anding has consistently said that Appellant seemed to be giggling as he spoke to her. Anding turned her head briefly toward Appellant but continued walking. [Exhs. 7-4, 7-6.] After getting no response from Anding, Appellant rounded the corner a few seconds later, with a smile on his face. [Exh. 7-6, 11:12:57.] Appellant testified that he sometimes jokes around with his co-workers. [Appellant, 1:08 pm.] The evidence indicates that Appellant made a tasteless joke in an effort to impress or amuse Nurse Anding. It does not prove Appellant made that same comment to an inmate. Almost a year ago, Major Bruning likewise found that there was "not enough evidence to prove or disprove whether this allegation occurred" after reviewing the video evidence. [Exh. 8-1.]

Finally, Anding's subsequent actions are strong evidence that she did not believe Appellant had told a suicidal inmate to "just die". Anding kept walking, made her own note on the cell 117 log, and retraced her steps up the corridor without looking into cell 116 or any other cell in order to check that the inmates were safe. She "put it in the back of my head and then when this other incident came up ... I figured I should probably let someone know." [Exh. 6-18.] As the charge nurse over a unit of psychiatric inmates, her lack of action demonstrates that Anding did not believe Appellant had actually said those words to an inmate. Based on all of the evidence, the Agency failed to meet its burden to prove that Appellant said "just die" to a prisoner on Oct. 17, 2015.

At the hearing, the decision-maker was asked during cross-examination, "[i]f Appellant was joking with Anding, and if he never said the offending comment to a suicidal inmate, there would be no violation of 400.9?" Elwell replied, "[i]f he never made the comment to an inmate, I suppose that would be true." [Elwell, 11:07 am.] In the absence of proof by a preponderance of the evidence that Appellant told an inmate to "just die", the Agency did not establish its asserted rule violations.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the ten-day suspension imposed on Aug. 11, 2016 is reversed.

Dated this 8th day of December, 2016.



Valerie McNaughton
Career Service Hearing Officer