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

Consolidated Appeals No. 25-17A and 26-17A (On Remand)

DECISION AND ORDER ON PENALTY DETERMINATION

IN THE MATTER OF THE APPEALS OF:

CARLOS HERNANDEZ and BRET GAREGNANI,
Appellants-Respondents,

vs.

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

Denver Deputy Sheriffs Carlos Hernandez and Bret Garegnani (Appellants) were issued 10-day and 16-day disciplinary suspensions, respectively, for violations of the Denver Sheriff Department's (Agency) Use of Force Policy in connection with their interactions with an inmate, Michael Marshall. The Deputies appealed their suspensions to a Hearing Officer who determined they had committed no rules violations.

The Agency appealed the Hearing Officer's decision to this Board which reversed the Hearing Officer, finding that under the record developed at hearing, the Appellants had violated the Agency's Use of Force Policy. The Board then remanded this matter back to the Hearing Officer to conduct further proceedings on the issue of the appropriateness of the penalties imposed against Appellants by the Agency.

On remand, the Hearing Officer upheld the Agency's originally imposed 10-day suspension against Appellant Hernandez, as well as the 16-day suspension originally imposed against Appellant Garegnani. Appellants have appealed the Hearing Officer's decision to the Board.[1] The Board AFFIRMS the Hearing Officer's decision as to both Appellants.

Appellants first argue that the Hearing Officer erred when finding that their violation of RR-300.19.1 was properly classified as a Matrix Category D offense. We do not believe that this was what the Hearing Officer did.

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[11] In the Petition for Review filed by Appellants, counsel for the deputies list as Parties to the Appeal: "a. Appellant, Carlos Hernandez; and b. Appellant, Carlos Hernandez," as well as counsel and the Agency and its representative. We will assume the listing of Hernandez twice and the absence of Deputy Garegnani being listed as a party to the appeal was an oversight and that Deputy Garegnani is, in fact, a party to this appeal.

Appellants were found to have violated two internal rules, one of which was a general rule and one of which was more specific; that is, Appellants were found to have violated RR-300.19.1. which prohibits disobedience of rules (general), as applied to RR-300.22 which prohibits the use of inappropriate force (more specific). RR-300.19.1 can be classified within the Matrix anywhere from a Category A offense (lowest level of severity) to a Category F offense (highest level of severity). Violations of RR-300.22, however, are classified within the Matrix as a minimum of a Category D offense.

The Hearing Officer properly noted that the punishments for both violations would be served concurrently. It appears to us that what the Hearing Officer did was to determine that there was no need for him to make a separate penalty determination regarding the RR-300.19.1 violation because the penalty assessed against Appellants could be no less than the penalty assessed against them for the RR-300.22 violation, that is, a minimum of a Matrix Category D assessment. This, of course, was correct.[2]

Accordingly, even if the Hearing Officer erred and could have or should have reduced the Category determination for the RR-300.19.1 violation to a Matrix Category A, as suggested by Appellants, they still would be required to serve the suspensions issued under the more serious Category D determination for their use of inappropriate force in violation of RR-300.22. Consequently, while we do not believe the Hearing Officer erred in his conclusions, to the extent he did, it was harmless error as said error would not affect the punishment actually required to be served by the Appellants. [3]

Appellants next take issue with the Hearing Officer's use of Career Service Rule 20-56 in determining the appropriateness of the assessed penalties. Appellants claim this was error because this rule was not in effect when the case first originated and that

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[2] The Agency, in its brief, urged us to hold that the Appellants' waived this argument by failing to bring it before the Hearing Officer. We need not do this. At the original hearing, Appellants claimed they were innocent of any misconduct whatsoever. We do not believe they were required, nor would we have expected them, to adduce evidence of the appropriateness of any given punishment should they ultimately fail to prevail in their defense of the charges. Consequently, we do not believe Appellants should be penalized for failing to adduce evidence regarding an appropriate punishment at hearing, other than evidence tending to prove that no punishment would be appropriate or that the process in reaching the punishment decision, in and of itself, was flawed. It should not go unnoticed, however, that this matter was remanded back to the Hearing Officer for further proceedings and that the Appellants, therefore, were given an opportunity to create a record in support of their argument that the RR-300.19.1 violation should have been assessed as a Matrix Category A violation. There is no evidence in the record that Appellants attempted to avail themselves of this opportunity.

[3] While we believe the Hearing Officer reached the proper conclusions, we do not believe his analysis was pristine. For example, in analyzing the criteria set out for Category D violations, the Hearing Officer noted that the Agency failed to make a connection to, nor was it apparent, how Appellant's conduct was substantially contrary to or substantially interfered with the Agency's Mission. But part of the Agency's mission, as noted by the Hearing Officer, is to operate its facilities in a safe, humane, and efficient way. Given that the Appellants were found to have engaged in applying gratuitous and unnecessary uses of force against an inmate, we believe it apparent that said misconduct was neither safe for the inmate, humane towards the inmate, nor efficient, since it was deemed to be unnecessary.

the Hearing Officer instead should have used Rule 19 which was applicable to the case at its onset. We hold the Hearing Officer's application of this rule to be proper.

The rule is procedural. As such, it could be applied here regardless of the fact that it differs from the procedural rule that was in effect and applicable at the time the matter began. *See, e.g.*, *Landgraf v. USI Film Prods.,* 511 .S. 244, 269 (1994)[4]; *Abromeit v. Denver Career Service Bd.*, 140 P.3d 44 at 50 (Colo.App. 2005).[5] The Hearing Officer was vested with the discretion to use the procedural rule he believed to be applicable at the time of his latest consideration of the case.

Even if the Hearing Officer's use of Rule 20-56 was improper, we would find this error to be harmless. That is because under Rule 19, which was in effect at the onset of this case, was applicable, the Hearing Officer would have been compelled to uphold any level of discipline imposed that was within the range of alternatives available to a reasonable and prudent administrator and that was not imposed arbitrarily, without record evidence, or was clearly excessive.

We believe the record supports a finding that the disciplines imposed by the CRA and upheld by the Hearing Officer were reasonable, supported by record evidence, and neither arbitrary nor excessive. Consequently, regardless of the standard used by the Hearing Officer, the record demonstrates that he did not err in upholding the disciplines imposed on Appellants by the CRA.

Appellants next claim that the Hearing Officer erred by misinterpreting and misapplying the Agency's disciplinary matrix by accepting and using the findings and conclusions reached by this Board in its decision to reverse the original Hearing Officer's decision in this matter. We find this argument to be bordering on the absurd.

The Hearing Officer noted at page 1, note 1 of his decision that "the entirety of the [Board's original] Decision and Order is binding on the Hearing Officer… ." Indeed, it is. Our prior decision in this matter creates what is essentially the law of the case and the Hearing Officer properly accepted and incorporated into his decision the findings and conclusions reached by the Board, and, in fact, was without authority to act otherwise.

Finally, Appellants argue that the Civilian Review Administrator did not properly consider mitigating factors when choosing the discipline to be imposed and that the Hearing Officer, therefore, erred by giving "the examination of mitigating actors short

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[4] "[T]he pertinent inquiry is whether enactment of a new provision 'attached new legal consequences to events completed before its enactment.' … When a statute imposes new burdens on a party, a presumption arises that such statute should not apply retroactively. Changes in procedure, however, usually do not impose a new burden on the parties. '[R]ules of procedure regulate secondary conduct rather than primary conduct.' …. Thus, institution of a new procedural rule, after the conduct giving rise to the suit, does not make application of the rule retroactive."

[5] "[T] to the extent that the Board's rulemaking is procedural or remedial, its retroactive application will be permitted."

shrift."[6] This argument, however, fails to provide grounds for overturning the Hearing Officer's decision.

CSR Rule 20-56(1)(a) prohibits the Hearing Officer from substituting his judgment for that of the CRA in the imposition of discipline. Appellant's claim that the CRA did not give sufficient weight to mitigating facts strikes us as essentially asking the Hearing Officer to do just that; substitute his judgment for that of the CRA and find that mitigation should be given more weight than it was accorded by the CRA.

To the extent that we find the level punishment imposed by the CRA to be both supported by record evidence and reasonable in its severity,[7] we find the Hearing Officer did not err in refusing to reassess mitigating factors in the manner suggested by Appellants. [8]

For all of these reasons, the Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on January 16, 2020, and documented this 21st day of May 2020.

BY THE BOARD:

Neil Peck

Neil Peck, Co-Chair

Board Members Concurring: Karen DuWaldt, David Hayes, LaNee Reynolds

[6] Appellants' brief, p. 9, Section III.

[7] We also see no record evidence that the CRA, acting at the behest of the EDOS failed to follow Departmental guidelines, rules or regulations; applicable matrix guidelines; or that she otherwise exceeded her authority.

[8] Our analysis would be essentially the same had the Hearing Officer used Rule 19. And we would not be in a position to re-weigh the evidence absent a finding of compelling and overwhelming evidence tending to prove the Hearing Officer's decision to be clearly erroneous, which we do not find to be the case here.

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **DECISION AND ORDER** on May 21, 2020, in the manner indicated below, to the following:

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