

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal Nos. A012-18 and A014-18

**DECISION AFFIRMING DISCIPLINE OF APPELLANT DEMELLO AND MODIFYING
THE DISCIPLINE OF APPELLANT FAZIO**

IN THE MATTER OF THE APPEAL OF:

DONALD DEMELLO and LEONARD FAZIO, Appellants,

v.

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

I. INTRODUCTION

In this consolidated appeal, Appellant Deputy Donald DeMello and Appellant Deputy Leonard Fazio appeal their respective ten-day and four-day suspensions for alleged violations of Career Service Rule (CSR) 16-29 R. by the Department of Safety, Denver Sheriff's Department (Agency). On May 21, 2019, Hearing Officer Federico C. Alvarez conducted a hearing to determine the propriety of the Agency's discipline of Deputies DeMello and Fazio (Appellants). Deputy DeMello was represented by Mallory A. Revel, Esq. and Steve J. Wienczkowski, Esq., of the law firm of Foster, Graham, Milstein & Calisher, LLP; Deputy Fazio was represented by Zachary D. Wagner, Esq. of the law firm of Elkus & Sisson, PC; and the Agency was represented by Assistant City Attorneys Charles Mitchell and Rachelle E. Hill.

The Hearing Officer received into evidence exhibits 1, 2, 6 through 18, and 20 through 32 into evidence. Appellants called the following witnesses to testify: Sergeant James Sanford, Deputy DeMello, Deputy Raul Bojorquez, and Deputy Fazio. The Agency called Civilian Review Administrator Alfredo Hernandez (CRA Hernandez) and Sergeant James Sanford.

II. ISSUES

A. Whether Deputy DeMello violated CSR 16-29 R. as it pertains to the affiliated Agency Rules and Regulations. CSR 16-29 R. states:

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. When citing this subsection, a department or agency must cite the specific regulation, policy or rule the employee has violated.

The Agency alleges that Deputy DeMello's conduct violated CSR 16-29 R., as it pertains to: RR-300.19.1 – Disobedience of Rule: as it pertains to (1) Van Cise – Simonet Detention Center Housing Post Order, V. Rounds; (2) RR-400.8.2 – Failure to Make Required Rounds; and (3) RR-200.3 – Accurate Reporting.

B. Whether Deputy Fazio violated CSR 16-29 R. as it pertains to: RR-300.19.1 – Disobedience of Rule: as it pertains to Van Cise – Simonet Detention Center Housing Post Order, V. Rounds and RR-400.8.2 – Failure to Make Required Rounds.

The Agency alleges that Deputy Fazio's conduct violated CSR 16-29 R., as it pertains to: RR-300.19.1 – Disobedience of Rule: as it pertains to (1) Van Cise – Simonet Detention Center Housing Post Order, V. Rounds; and (2) RR-400.8.2 – Failure to Make Required Rounds.

C. If the Appellants violated CSR 16-29 R., whether the Agency's discipline of them conformed to CSR 16-41's Purpose of Discipline.

RR 200.3 Accurate Reporting, states, "Deputy sheriffs and employees shall submit an accurate and complete written or oral report where one is required or when ordered to do so."

RR 400.8.2 Failure to Make Required Rounds, states, "Deputy sheriffs shall not willfully or negligently fail to make their required rounds."

Housing Post Order V. ROUNDS (Revised March 8, 2011), states in relevant part:

The Housing Officer shall be responsible for completing a round when they begin their shift and at least two rounds every hour. Each round should be completed so inmates cannot easily predict when the round is going to be made, and should not be more than thirty minutes apart from each other.

When making rounds, the officer shall use the Hand Held Scanner to scan the bar codes in their area of responsibility to electronically record that a round has been satisfactorily completed. Each round shall also be recorded on the "Rounds Log" within the JMS.

When making rounds, the Housing Officer shall be alert to the health and well-being of all inmates, and check the condition of the Housing Unit to ensure:

1. Lights are not covered
2. Windows are not covered
3. Bedding is not arranged so that it impedes the officers ability to see the inmate when the officer looks into the Unit ...

III. FINDINGS

On December 17, 2016, Appellants were assigned to the 2D pod, a special management pod at the Downtown Detention Center (DDC) that houses 48 inmates. Inmates are housed in the 2D pod due to characteristics warranting special housing, including violent tendencies, mental health issues, and those that should be segregated from the general inmate population. [Exhibit 32 – Departmental Order 4430.1C re: Special Management]. These inmates remain in their cells for 23 hours daily, with one inmate from each side of the pod getting one hour of free time simultaneously.

Throughout that day, inmates in the 2D pod were belligerent and disruptive, making it especially challenging for Appellants. Around noon, one inmate attempted suicide by trying to tie a sheet around his neck and had to be restrained in a chair, requiring attention until about 3:00 p.m. Around 4:55 p.m., some inmates began to flood the 2D pod by clogging and flushing their toilets. Another inmate broke a window. Another inmate broke a battery and got battery acid on himself. Appellants attributed these actions by the inmates to their ingesting “hooch,” which they could smell. Appellants notified Sergeant Sanford of the incidents initiated by the inmates.

Due to the delay caused by the inmate’s actions, Appellants had required the inmates to stand to the back of their cells to receive their dinner. Appellants understood that the inmates were disgruntled about the delay and planned to force the flaps in the cell doors to remain open when receiving dinner. If successful, the inmates could attempt to assault Appellants through the flaps. All of these actions added to the sense of disorder and Appellants did not serve the 4:30 dinner to the inmates until 6:00 to 6:30 p.m. Due to the delayed meal, some inmates reacted to the delays by covering their windows with toilet paper, violating DDC protocol for inmates. Appellants convinced all but inmate SH to remove the window coverings in about one hour. Around 9:00 p.m. the inmates generally settled down, although some flood water remained and at 9:30, the lights were turned out. Appellants proffered that the disorder flared up on the 101 side of the 2D pod as inmates settled down on the 102 side, but they presented no evidence to support their assertion, which is thus unconvincing.

Inmate SH had been more problematic than the other inmates. He had: (1) a prior history of threatening Deputies, (2) been threatening to Appellants, (3) been cursing Appellants “fuck you” and “fuck off” when they communicated with him, and (4) been inviting them into his cell to assault and injure them. He was in custody due to a charge of attempted murder on a Denver Police Officer and had also covered the window of his cell. From 3:00 to 4:30 he was belligerent, which Appellants attributed to his drinking hooch. Appellants reported inmate SH specifically to Sergeant Sanford. He ordered them to defer removal of the window covering on inmate SH’s cell due to the level of unrest in the pod and the low staffing at the time. However, Appellants were to knock on the window of inmate SH’s cell during their rounds and get a verbal response from him. If he failed to respond, they were to report it immediately to Sergeant Sanford.

Shortly after his shift ended at 10:00 p.m., Deputy DeMello made a round in which SH failed to respond verbally. He informed Sergeant Sanford of SH’s silence, who then

ordered the entry into inmate SH's cell to remove the window coverings. Deputy DeMello believed that inmate SH may have been asleep which made it an opportune time to enter the cell. At 10:10 p.m., Deputy DeMello entered inmate SH's cell and found him unconscious, naked, and face down in a pool of blood. Inmate SH had cut his throat with a piece of safety razor. Deputy DeMello had Deputy Fazio turn on the lights and called for emergency medical assistance. They all began attending to inmate SH, who regained consciousness and became combative throughout the remainder of the incident, invoking a right to die. He kicked a nurse in the knee during his struggles. Deputy DeMello simultaneously applied pressure to inmate SH's wound on the neck and restrained him so the medical staff could treat him. Inmate SH was transported to the hospital and ultimately recovered fully.

Several videos of the 102 side of 2D pod of from 9:00 to 10:00 p.m. showed that Appellants did not execute the duties required during a round, at least of several cells in it. Exhibit 7 shows the first tier floor of the 2D pod and that Appellants did not approach some cells on both tiers of the left side of the pod to execute the duties required during a round. Exhibit 8 shows the sally port area and the officer's desk adjoining the 101 and 102 sides of the 2D pod. Deputy DeMello mostly worked on the computer on the desk during this time. Deputy Fazio attended to other tasks in this area and left it for short periods of time but never long enough to make a round. Appellants estimated that rounds took from 5 to 10 minutes, while Deputy DeMello had estimated rounds at 20 minutes during the chaos. Exhibit 9 shows the cell in which SH was incarcerated and its adjoining two cells, on which neither Appellant executed the duties required during a round during this time. Neither Appellant was "goofing off" but the Agency did not accuse them of doing so. Thus, from the last round at 8:58 and until Deputy DeMello encountered SH at 10:10, a 72-minute period, Appellants made no rounds in violation of the requisite two rounds each hour.

Deputy DeMello recorded that Appellants made "visual" rounds at 9:05 and 9:30 p.m., which neither Appellant made, as evidenced by Exhibits 7, 8 and 9. Since Appellants failed to make these rounds, they also failed to use the Hand Held Scanner, the electronic round tracker referred to as a PIPE, at these times.

Sergeant Sanford, acting supervisor on December 17, 2016, testified that the making of rounds is a priority during any chaotic time, since this is when an inmate may be more inclined to violate rules. He also testified inmates are more susceptible to suicide attempts around holidays. In fact, after SH's suicide attempt, the Captain on duty ordered rounds every 15 minutes.

On December 17, 2016, Deputy Fazio was working while still on his one-year probationary period, which would end on January 3, 2017. He had been assigned to the 2D pod for approximately two months as of December 17, 2016, when he had also been assigned to it for four hours and was relieved at 4:00 p.m. He was then assigned to the 2F pod, but Sergeant Sanford reassigned him to 2D pod again due to the inmates' troublesome activity.

On December 17, 2017, the Agency notified Deputy DeMello of its contemplation of discipline against him based on the December 17, 2016 incident and scheduled his

contemplation of discipline meeting for February 8, 2018. On December 20, 2017, the Agency notified Deputy Fazio of its contemplation of discipline against him for the same incident and scheduled his meeting after Deputy DeMello's meeting.

1. Agency's DeMello Analysis

The Agency concluded that, pursuant to its Discipline Matrix, Deputy DeMello's RR 400.8.2 Failure to Make Required Rounds¹ violation constituted Conduct Category D:

Conduct that is substantially contrary to the guiding principles of the Department or that substantially interferes with its mission, operations or professional image, or that involves a demonstrable serious risk to deputy sheriff, employee or public safety.

His presumptive penalty for this Level 5 violation is a ten-day suspension.

The Agency concluded that, pursuant to its Discipline Matrix, Deputy DeMello's RR 300.19.1 Housing Post Order, V violation constituted Conduct Category C:

Conduct that has 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.

Because Deputy DeMello had a prior, applicable discipline in a five-year span, his penalty level for this violation increased to Level 4, with a presumptive three-day suspension.

The Agency concluded that, pursuant to its Discipline Matrix, Deputy DeMello's RR 200.3 Accurate Reporting violation constituted Conduct Category B:

Conduct that has 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.

Because Deputy DeMello had a prior, applicable discipline in a four-year span, his penalty level for this violation increased to a Level 3, with a presumptive two-day suspension.

2. Agency's Fazio's Analysis

The Agency concluded that, pursuant to its Discipline Matrix, Deputy Fazio's RR 400.8.2 Failure to Make Required Rounds violation constituted Conduct Category D, described above, a presumptive penalty of a four to a six-day suspension.

¹ The RRs are affiliated within a range of Conduct Categories from which the CRA selects the most applicable category, which is itself affiliated with a Level of penalty. The Level of penalty is variable due to the Deputy's circumstances, including prior discipline.

The Agency concluded that, pursuant to its Discipline Matrix, Deputy Fazio's RR 300.19.1 Housing Post Order, V violation constituted Conduct Category C, described above, with a presumptive penalty of a two-day suspension.

3. Agency's Final Disciplinary Action

On March 1, 2018, the Agency disciplined Deputies DeMello and Fazio with a ten-day and a four-day suspension, respectively, comprised of concurrent penalties for each rule that Appellants allegedly violated, since the violations arose from the same incident. Appellants filed timely appeals of their discipline.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper in the Career Service Hearing Office pursuant to CSR 20-20 A.2., as Appellants appeal their suspensions. In disciplinary appeals under CSR 20, review is not *de novo*. CSR 20-56 A.

B. Burden and Standard of Proof

Each Appellant retains the burden of persuasion, throughout the case, to prove the Agency's finding that his violation of CSR 16-29 R. was clearly erroneous or that the Agency's application of its disciplinary matrix in assessing his level of discipline was clearly excessive. CSR 20-56 A.

C. CSR Violations

Deputy Fazio claimed in his Prehearing Statements that CRA Hernandez lacked authority under the Charter of the City and County of Denver to discipline them and that the Agency therefore violated the Charter in doing so. However, Deputy Fazio abandoned this claim as he made no factual or legal presentation on it at the hearing. The Hearing Officer also notes that the Colorado Court of Appeals resolved this issue in Gale v. Career Service Auth. Bd.,² 17CA0736 (03/29/18), holding that the Agency can delegate discipline to its CRA consistent with the Charter.

As described above, the videos, exhibits 7, 8, and 9 show that Appellants could not have made the 9:05 and 9:30 rounds nor used the PIPE at these times. Neither Appellant disputes the content of the videos. Thus, this evidence dispenses with some of the defenses that Appellants attempted to prove at the hearing. One such defense is Deputy DeMello's claim that Appellants could have made their rounds in increments, while cleaning up the flooding, delivering items to inmates, or distributing the meals. While possible, this dual execution of duties did not occur.

² Although unpublished, the Hearing Officer treats this decision as binding since it addresses this Agency's delegation of disciplinary authority to its CRA.

The next defense so disposed is Appellants' claim of the ability to execute their rounds by standing on the first tier floor of the 2-floor pod and visually surveying the windows in the pod. Besides the videos showing that Appellants did not make the rounds, they also show that Appellants could only have seen any inmates that stood in the window of their cell. However, it is not physically possible to see any inmate, particularly those on the second floor, standing away from the window, any inmate who was lying down, or who was in the interior of any cell from this point. Hence, surveillance of the 2D pod from the first tier floor could not constitute making a round.

The next defense so disposed is Appellants' claim that the flooding caused by the inmates precluded them from making the round because it prevented them from approaching and accessing the cell doors to scan the PIPE. Appellants testified that they wanted to avoid the flood water contaminated with fecal matter/urine to avoid spreading the contamination. However, as evidenced by exhibits 7, 8 and 9, at the time of Appellant's dereliction, the flooding was confined to a smaller portion of the first floor of the pod. Also, Exhibit 14 shows that Appellants used the PIPE earlier when the flooding was evidently worse. Further, Exhibit 7 shows that shortly after 9:07 p.m. Deputy Fazio walks through the remaining water to access the rear of the pod when he could easily have circumvented it. Even if the standing water was deterring, its remaining presence did not prevent Appellants from executing the majority of their rounds.

Appellants also claim that Sergeant Sanford ordered them to disregard the POST Order mandating rounds by ordering them to get a verbal response from inmate SH while allowing him to keep his window covered. However, this order only excluded the removal of the window covering from SH's window. It still explicitly required them to make their rounds. As such, it is no defense.

The Agency accepts that rounds may be missed for valid reasons. However, everyone agrees that missed rounds must be recorded along with their related causation. In fact, Appellants missed some rounds earlier this day while attending to some of the emergencies described above. The Agency accepted the justification for those omissions and did not criticize Appellants therefor.

Deputy DeMello defends his Accurate Reporting violation, his entry into the shift log that Appellants made visual rounds at 9:05 and 9:30 p.m., claiming that he assumed that Deputy Fazio had made them because they had no system of reporting rounds when made. Alternately, Deputy DeMello blamed Deputy Fazio as reporting that he had made these rounds although Deputy DeMello does not explicitly recall Deputy Fazio making such report. Conversely, Deputy Fazio stated that he would not report a round unless he had made it. Deputy DeMello also testified that if he missed a round, he would have recorded the omission.

Deputy DeMello also testified that the round that he recorded at 9:05 p.m. actually recorded the round that Appellants made at 8:58 p.m. However, as shown by Exhibit 14, Appellants recorded the 8:58 round with the PIPE, while Deputy DeMello recorded the 9:05 round as being made visually and without the PIPE. So, his 8:58 and alleged 9:05 recordings refer to distinct actions. Further, Deputy DeMello recorded the 9:05 and 9:30 rounds either at that time or by soon after 10:00 p.m. when his shift ended.

He would have had recent knowledge of what rounds Appellants made or failed to make in the preceding hour. So, Deputy DeMello has no excuse for his erroneous reporting.

For these reasons, the Hearing Officer concludes that Appellants do not show that the Agency was clearly erroneous in finding that they violated CSR 16-29 R. as it pertains to the Agency Rules and Regulations described above.

V. DEGREE OF DISCIPLINE

16-41 Purpose of Discipline:

The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

A. Seriousness of the proven offense

Appellants' failure to make rounds in a Special Management unit is a serious offense. Inmates are housed in such unit due to characteristics warranting special housing. Sgt. Sanford testified that inmates are more prone to suicidal tendencies during the period around the holidays. Since these inmates are housed in their cells for 23 hours of the day, it is of utmost importance for Appellants to comply with the Order and make the rounds of the cells to monitor the inmates for their safety and security.

The Parties disagree about the implications of SH's suicide attempt. The Agency has considered the injury in determining its discipline. Deputy DeMello argues that he should have been commended for saving SH's life rather than disciplined. The Hearing Officer concurs that Appellants are not at fault for SH's self-inflicted injury. However, the Hearing Officer also concurs that the fact that an injury occurred soon after Appellants' dereliction is troublesome for the Agency. The evident observation is that, had SH instead injured himself shortly after the 8:58 round, Appellants would not have discovered him for an hour, with perhaps fatal consequences.

Deputy DeMello's erroneous reporting can be less serious in that a failure to report does not negate the Agency employees' otherwise proper execution of their duties. However, the Agency must have correct data from which to monitor its operations and assess whether adjustments are necessary to prevent deficits. Deputy DeMello's creation of faulty data coinciding with an inmate's suicide attempt prevents the Agency's assessment of whether its operations contributed to the attempt or whether it needs to alter them.

B. Prior Record

On January 11, 2017, Deputy DeMello received a Written Reprimand for a violation of Full Attention to Duties. Deputy Fazio had no prior discipline.

C. Likelihood of Reform

The Hearing Officer concludes that Appellants will reform their conduct. Both are highly regarded by the other Agency employees, and the Agency conceded at hearing they are both “accomplished and dependable” employees. [Agy. Opening]. Appellants have both received positive evaluations. Deputy Fazio garnered the attention of the supervisory staff as an employee worthy of “tagging” for the special management unit before completing his probationary period. The Hearing Officer discounts their dissembling at the hearing, that prioritizing other activities over making their rounds did not violate 16-29 R., as litigation posturing, not as an indication of their future behavior. This discipline will make a corrective impact on Appellants.

D. Additional Factors - Deputy Fazio

The Agency assigned Deputy Fazio to the 2D pod in disregard of its DO 4430.1C5.A., which states, “staff who are assigned to work directly with inmates in restrictive housing units are to be selected based on criteria that includes completion of probationary period, experience and suitability for the assignment.” Deputy Fazio would have had to make rounds in any facility to which he was assigned regardless of his probationary status. However, as noted above, the inmate population in 2D pod requires a heightened level of attention.

The Agency takes the position that it interprets DO 4430.1C5.A. to vest it with discretion to assign deputies still on probation to special management duties, rather than precluding it from this action. [Hernandez testimony]. The Hearing Officer disagrees that the Agency’s action constitutes an actual construction of its DO. The DO is clear, merely requires the application of its mandate, and does not require interpretation. The Agency may at times need to exercise its judgment to staff its operations as needed. Evidently the Agency had tagged Deputy Fazio two months earlier for assignment to the 2D pod, providing him with experience in it for such time when its staffing needs required it to deploy him there. While the Agency’s proactive action is commendable, it nevertheless violated its DO.

The Agency then acts in an untoward fashion by disciplining Deputy Fazio for violation of another rule without factoring in its premature deployment of him in the 2D pod. As he noted, but for its deployment of him to the 2D pod, the need for his discipline would not have resulted. See 20-56B.1.c.ii.; In Re Hammernik, CSA 41-17 (3/21/18). The Agency also lacked the requisite range of alternatives available to a reasonable and prudent administrator and, as such, it was unable to discipline Deputy Fazio consistent with the dictates of CSR 16-41. See In re Romero, CSB 28-16A (6/15/17); In re Ford, CSB 48-14A, 8-9 (12/17/15)

The Hearing Officer first addresses Deputy Fazio's RR-400.8.2 violation as it is more serious. The Hearing Officer finds that the Agency's omission constitutes extraordinary mitigation as it comprises an issue specific to Deputy Fazio that its Discipline Matrix fails to address appropriately. See Denver Sheriff Department Discipline Handbook, Section 25.3.2. The Agency found Deputy Fazio's violation to be a Conduct Category D, the lowest available for this violation, and imposed a four-day suspension from a four to six-day range, also the lowest penalty available. To mitigate the discipline one step, the Hearing Officer can only address the Discipline Level, and therefore reduces it from a 5 to a 4, for which the mitigated penalty is a one to two-day suspension. Preserving the Agency's intent to impose on Deputy Fazio the minimum penalty available, the Hearing Officer finds that a one-day suspension is appropriate for this violation.

Implementing a similar analysis, the Hearing Officer reduces Deputy Fazio's one day suspension for the violation of RR-300.9.1 one step to a written reprimand.

VI. ORDER

For the reasons stated above, the Hearing Officer concludes that Deputy DeMello did not prove that the Agency's discipline of him was clearly erroneous because it failed to conform to CSR 16-41's Purpose of Discipline, or the record lacked a reasonable justification for it, it exceeded the range of alternatives available to a reasonable and prudent administrator, or it failed to be reasonably related to the seriousness of his violations or was clearly excessive.

For the reasons stated above, the Hearing Officer concludes that Deputy Fazio proved that the Agency's discipline of him was clearly erroneous in that his discipline failed to conform to CSR 16-41's Purpose of Discipline, and it exceeded the range of alternatives available to a reasonable and prudent administrator.

Accordingly, the Hearing Officer AFFIRMS the Agency's discipline of Deputy DeMello; and MODIFIES the discipline of Deputy Fazio to a one-day suspension for his RR-400.8.2 violation and a written reprimand for his RR-300.19.1 violation.

DONE June 7, 2018.



Federico C. Alvarez
Career Service Hearing Officer