CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 010-19A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

ABBEY ELLIS, Respondent-Appellant**,**

v.

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

On January 6, 2018, Denver Deputy Sheriff Abbey Ellis (Appellant) was assigned to work housing unit 2B at Denver's Downtown Detention Center (DDC). During meal service, when inmates are allowed out of their cells and permitted to sit at communal dining tables, one inmate, TC, slipped into the shower area, closed the shower curtain and hung herself. She eventually lost consciousness, causing her feet to protrude from under the closed shower curtain.

Six minutes later, Appellant was conducting a partial round.[1] In doing so, she passed by the shower area but did not notice TC. As Appellant was securing the inmates back into their cells, she noticed that one cell only had one inmate where there should have been two. Appellant did not ask the inmate in the cell her identity, and then left the cell unlocked to return to her desk to confirm how many inmates should have been in that cell.

From the record before us, it appears that while checking how many inmates should have been in the cell, Appellant never bothered to check the identity of the inmates who should have been occupying the cell. Rather, the Hearing Officer found, and Appellant admits, that she assumed the missing inmate was inmate BH, who had previously threatened Appellant. In reality, the person in the cell was BH, and the inmate hanging in the shower was BH's cellmate, TC.

Because Appellant believed the missing inmate posed a threat to her, she called for back-up to help look for inmate BH. Deputy Varela responded that he would be able to provide assistance shortly. Appellant did not search for the missing inmate during the three minutes she waited for Varella to arrive.

[1] A "round" is a visual check of the presence and condition of inmates.

While waiting for Varella, Appellant had her back to the housing pod for 17 seconds. When Varella showed up, he took the lead in searching for inmate BH, with Appellant slowly following behind him. Varella's search followed the same route as Appellant took on her partial round, including passing by the shower area.

Varella, however, unlike Appellant, noticed inmate TC's foot protruding from the shower curtain. He pulled back the shower curtain, saw the unconscious inmate, ran to the officer's desk to retrieve a cutting tool. When the tool proved ineffective, another Deputy managed to untie TC and free her from the sheet she had used to hang herself.[2]

The matter was investigated. The Department of Safety, Denver Sheriff Department (Agency) issued Appellant a 14-day suspension[3] for misconduct constituting violations of rules and regulations, stemming from the occurrence described above. Specifically, the Agency charged Appellant with violating Career Service Rule (CSR)16-29R, which prohibits conduct which violates, *inter alia*, departmental regulations, policies or rules; as would be applied to Departmental rule RR-200.16, which provides that Deputy Sheriffs shall not fail to perform the required duties of their assignments.

The Agency found that Appellant violated this rule in five separate ways: 1) failing to check the shower area; 2) failing to identify the missing inmate; 3) failing to secure a cell door; 4) failing to remain situationally aware while waiting for back-up; and 5) failing to act more promptly in searching for the missing inmate. The Agency further charged Appellant with violating RR-400.8.1 which prohibits deputies from failing to protect prisoners from harming themselves or other prisoners and requires them to stay alert to these possibilities.

Appellant appealed her suspension to a Hearing Officer. The Hearing Officer determined that Appellant failed to meet her burden of demonstrating the Agency's disciplinary decision to be clearly erroneous per CSR 20-56. Accordingly, the Hearing Officer upheld the Agency's disciplinary action. Appellant has now appealed the Hearing Officer's decision to this Board.

Appellant first argues that the Agency erroneously aggravated Appellant's penalty. The first error the Agency's Civilian Review Administrator (or "CRA", the Executive Director of Safety's designee for issuing discipline in the Denver Sheriff Department) allegedly made was that he failed to consider mitigating circumstances. The Hearing Officer, however, at page 4 of his decision, found that the CRA considered two mitigating circumstances; the fact that Appellant had no prior violations; and the fact that her work reviews were favorable. We find these conclusions reached by the Hearing Officer to be supported by the record.

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[2] Medical personnel were able to revive TC , who was stabilized and transported to the hospital.

[3] Both offenses were determined to be Disciplinary Matrix Category D violation. These were Appellant's first such sustained violations. The penalty imposed reflects a 4-day deviation upward from the 10-day presumptive penalty based on a finding by the Agency's Civilian Review Administrator (CRA) of aggravating circumstances.

Appellant next takes issue with the CRA's determination that Appellant's failure to accept responsibilities for her actions amounted to an aggravating factor. Appellant claims that this consideration by the CRA was factually in error because Appellant had, in fact, taken responsibility for her actions. The Agency, at pages 7- 8 of its brief, points to several instance in the record where Appellant refused to even acknowledge that she made any mistakes at all.

For example, Appellant claimed that the only thing she would have done differently during the entire episode would have been to walk faster, had she known of the severity of the situation. She told an investigator that the only thing she could think of that maybe she should have done was to identify the inmate in the cell. She claimed several times that all of her actions were within policy and done according to her training.

Appellant's attorney continued with this theme at a pre-disciplinary conference, announcing that they were not there to acknowledge that Appellant made any mistakes on the day in question and, in fact, that she had not made any mistakes. In that same meeting, Appellant herself continued to insist she had not made any mistakes.

So while it is true, as Appellant asserts in her brief, that Appellant might have, in a few instances, acknowledged that she had been caught making errors in the performance of her duties, it appears to us that these acknowledgements needed to be pulled out of the Appellant and did not amount to any full throated admission that she had made mistakes, regretted making the mistakes, or would learn from her mistakes and perform better in the future.

Appellant's admissions of her errors appear to us to be nothing more than an acknowledgement that she got caught making those errors; and that it would be absurd for her to maintain that those errors, such as leaving a cell door unlocked, or failing to discern the identity of the inmate in the cell, were not, in fact, errors. The CRA's determination that Appellant failed to take responsibility for her action was supported with record evidence. As such, the Hearing Officer's findings consistent with those facts were not clearly erroneous.

Appellant next argues that the CRA's use of Appellant's failure to accept responsibility for her actions as an aggravating factor violates the disciplinary guidelines set out in the Agency's Handbook which serves as explanation and direction regarding the use and application of the Agency's Disciplinary Matrix. Specifically, Appellant argues that while the Handbook lists *acceptance of responsibility* as a mitigating factor, it does not list *failure to accept responsibility* as an aggravating factor.

While this statement is factually accurate, it does not mean that the CRA violated the terms of the Handbook in considering Appellant's failure to accept responsibility as an aggravating factor. The Handbook, in its Section 19.9 lists 14 circumstances that can be considered as aggravating factors within confines of disciplinary determinations in the Matrix. That list of 14 circumstances, however, is prefaced with the statement,

"Aggravating circumstances may include, but are not limited to… ." And Section 19.10 of the Handbook further explains, "[t]he above potential aggravators are intended as a guide only. It is impossible to list all the circumstances which might be considered aggravating in a particular case."

The Handbook is clear. The list of aggravators was not intended to be the sole and exclusive factors that a CRA could take into account in determining whether a penalty should be aggravated. Neither the CRA nor the Hearing Officer erred in considering an aggravating factor not found within Section 19.9 of the Handbook.

Appellant next argues that using the failure to accept responsibility as an aggravating factor set bad policy precedent because it forces litigants to make a "terrible choice" between making admissions in hope of receiving a mitigated penalty, or at least not receiving an aggravated penalty, or maintaining their innocence and risk receiving that aggravated penalty. Appellant also fears that the CRA will use the power he has over deputies arbitrarily.

The Board concurs with the position taken by the Agency in its brief that all anyone is really looking for from deputies finding themselves in these situations is for those deputies to tell the truth. The Board is not looking for Appellants to admit to things they did not do or accept responsibility for things which are not responsible. If an appellant has a good faith belief that he did not commit any acts of misconduct or that he is not responsible for misconduct or rules violations, and he has evidence, the law, and/or logic and common sense to back him up, he should feel free to maintain a posture of innocence.

Needless to say, however, the disciplinary decision maker may possess evidence to the contrary or may not have the same interpretation of facts or law possessed by an appellant, the decision-maker is duty bound to do what he or she believes is correct. It is then up to the Hearing Officer to sort things out.

We do not believe it is management's intent to quash good faith disagreements with its disciplinary decisions, but it should not be forgotten that we are working within a system that regulates the employer-employee relationship, and, as such, it is a fact of life that all opinions are not created equally. The Agency, that is, management, gets to manage. It sets standards and policies and is entitled to enforce those standards and policies.

So it is true, but unavoidably so, when deciding whether to contest discipline, an employee may be faced with choices, but these choices are neither terrible nor horrible, as suggested by Appellant. Because management is entitled and obligated to manage, under our rules, the Agency is entitled to deference when acting reasonably and within the law.

But we can assure employees who need to make choices that management, when exercising its prerogatives, cannot do so arbitrarily. And should the Hearing

Officer, or this Board, encounter an exercise of arbitrary authority, neither will hesitate to provide an employee with a remedy.

The goal of any employer, and certainly of the Agency here, is for its employees to perform at their best, to do their jobs in accordance with the guiding principles and within the law and applicable regulations, and to constantly learn and improve on the job. We believe that aggravating a penalty when an employee fails to accept responsibility for his or her actions, may be a proper tool for achieving these goals, and, accordingly, does not set an improper policy or precedent.

Appellant further urges us to find that the Hearing Officer made factual findings that are unsupported by the record. We disagree.

First, the Appellant takes issue with the Hearing Officer's findings that Appellant, for 17 seconds, had her back turned to the pod, and, therefore, was inattentive to activities going on behind her, including the possibility of attack from the inmate she feared was planning on ambushing here. A video of the incident supports the Hearing Officer's finding. It is supported by record evidence and, therefore, not clearly erroneous.

Appellant also argues at page 10 of her brief that this finding was prejudicial to her. We do not see how this argument provides us with any ground for overturning the Hearing Officer's decision under our rules.

Appellant next takes issue with the Hearing Officer's conclusion that she appeared to act casually during the incident. While we believe this conclusion reached by the Hearing Officer is a reasonable inference drawn from record evidence, even if it was not, we do not see how this would cause us to conclude that the Appellant, had, in fact, met her burden of proving the Agency's actions to be clearly erroneous.

Appellant next claims that the Hearing Officer "put significant weight" in a complaint that Appellant failed to properly conduct her rounds on the day in question. But the Agency is correct when it notes that Appellant was not disciplined for failing to properly conduct rounds. In addition, the argument overtly askes this Board to re-weigh evidence. The weight to be given any piece of evidence is within the province of the Hearing Officer and not the Board. This argument does not offer us any justification for overturning the Hearing Officer's decision.

Appellant further argues that the Hearing Officer erred in allowing the CRA to use injury to the inmate as an aggravating factor. Appellant claims the record reflects the inmate was not injured. Regardless of whether the inmate was injured, he was most certainly harmed, and as a practical matter, said harm was sufficient reason to impose a penalty in the Matrix-aggravated range. Section 26.2 of the Disciplinary Handbook (p.31) states:

> When assessing the "harm" or "risk of harm" which arises from a particular violation, it should be understood that "harm" is not limited to physical injury. The term "harm" is intended to apply to any demonstrable wrong, prejudice, damage, injury or negative effect/impact which arises from the violation.

We believe the inmates hanging experience and loss of consciousness constitutes "harm" as defined by the Handbook so as to sufficiently justify a finding of aggravating circumstances sufficient to warrant the imposition of a penalty in the Matrix-aggravated range.

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

SO ORDERED by the Board on November 21, 2019, and documented this 21st day of May 2020.

BY THE BOARD:

Neil Peck

Neil Peck, Co-Chair

Board Members Concurring: Karen DuWaldt, Patricia Barela Rivera, Tracy Winchester, David Hayes

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:

Career Service Board
CareerServiceBoardAppeals@denvergov.org

Career Service Hearing Office
CSAhearings@denvergov.org

City Attorney's Office
dlefiling@denvergov.org

Richard Stubbs, Sr. Asst. City Attorney
Richard.Stubbs@denvergov.org

Mallory Revel, Esq.
mrevel@fostergraham.com

Erin O'Neill, Esq.
eoneill@fostergraham.com

Alfredo Hernandez, Department of Safety
Alfredo.Hernandez@denvergov.org

/s/ George Branchaud
For the Career Service Board