CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER,
STATE OF COLORADO
Appeal No. 14-16A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:
FRANK ESPINOZA,
Petitioner-Appellant,
vs.
DEPARTMENT OF SAFETY, DENVER SHERIFF DEPARTMENT,
and the City and County of Denver, a municipal corporation,
Respondent-Agency.

On December 9, 2013, Denver Deputy Sheriff Frank Espinoza (Appellant), acting as a Release Officer for the Denver Sheriff Department (Agency), failed to adequately check a prisoner's paperwork and erroneously authorized the release of the prisoner from custody. The Agency's Internal Affairs Bureau interviewed Appellant about this erroneous release on August 19, 2014. In his interview with IAB, Appellant admitted to making the error and appeared to accept responsibility for his error.[1] Appellant received a four-day suspension for his misconduct in connection with the erroneous release.[2]

Forty-one days after his interview with Internal Affairs concerning the erroneous release, on September 29, 2014, he did it again. Appellant failed to adequately review paperwork and authorized the release of a prisoner who should not have been released. For this erroneous release, Appellant received a seven-day suspension. Like last time, Appellant appealed his suspension to a Hearing Officer. Like last time, the Hearing Officer affirmed the suspension. Like last time, Appellant appealed the Hearing Officer's decision to this Board. And like last time, we AFFIRM the Hearing Officer's decision.

Appellant's primary argument is that the Agency's Civilian Review Administrator (CRA), the person responsible for administering discipline to Denver Deputy Sheriffs, erred in her application of the Agency's Disciplinary Matrix, and that this error resulted in the imposition of an improper penalty. We do not believe the Hearing Officer committed any sort of error in upholding the penalty imposed by the CRA. We believe the record fully justifies the CRA's conclusion and the Hearing Officer's concurrence in that conclusion, that Appellant's erroneous release of a prisoner had a pronounced negative impact on the operations or image of the Agency or on relationships with the public, qualifying the erroneous release as a Matrix Category C violation. The Hearing Officer's conclusion is both factually supported by the record and reasonable.

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[1]Despite his admission to Internal Affairs, Appellant appealed his four-day suspension to a Hearing Officer, an appeal we ultimately affirmed in Case No. 42-15A.

[2]Because the person released was a dangerous felon, and because of the efforts needed to locate the erroneously released prisoner, this misconduct was assigned as a Disciplinary Matrix Category D violation.

We also agree with the Hearing Officer that Appellant's erroneous release of the inmate violated Career Service Rule 16-60B, the prohibition against careless performance of duties. Appellant actually does not dispute this finding.[3]

Appellant's seven-day suspension amounted to an aggravated Matrix Category C penalty. Appellant claims that the Hearing Officer erred by upholding the imposition of an aggravated penalty. At pages 6 through 8 of her decision, the Hearing Officer conducted a detailed analysis explaining her rationale for affirming the aggravated penalty. We find that analysis to be amply supported by record evidence and well-reasoned. We find no error in the Hearing Officer's upholding of the Matrix aggravated penalty.

We should note that even if there was no Matrix analysis, or even if there were flaws in the Agency's or Hearing Officer's analysis of the Matrix, we would still uphold the imposition of a seven-day suspension. We hold that such a suspension, imposed for a second act of misconduct virtually identical in nature to the first, is within the range of alternatives available to a reasonable administrator.

Appellant also argues that statements he made in his pre-disciplinary meeting were improperly used against him. We disagree. First, despite Appellant's assertions to the contrary, there is no evidence in the record supporting his claim that statements he made in his pre-disciplinary meeting were used to prove the charge of Carelessness (CRS 16-60B) brought against him.

We, however, do not see any prohibition against an Agency using statements made by an employee in a pre-disciplinary proceeding to affect the level or amount of discipline ultimately imposed. We note that this is a two-way street. In this case, the CRA used statements made by Appellant to assess the appropriateness of an aggravated penalty. The CRA, in other cases, would be equally free to use statements made in a pre-disciplinary meeting to justify the imposition of a mitigated penalty; and we hardly believe that Appellant would be urging us to reject the CRA's imposition of a mitigated penalty which was based on statements made by the Appellant at a pre-disciplinary meeting on the grounds that the use of such statements violated his rights[4].

Finally, Appellant urges to reduce his penalty because of the significant delay between the date of his misconduct and the imposition of discipline. The delay is, in fact, unacceptable and unjustified. Nevertheless, in this case, we do not see the delay as grounds for mitigating Appellants repeat of an act of serious misconduct. The Hearing Officer refused to mitigate the penalty due to the delay based, in part, on the fact that Appellant had not demonstrated prejudice as a result of the delay. And while it is true, as claimed by Appellant, that this Board has never formally made a showing of prejudice an absolute requirement before mitigation for delay may be imposed, we believe that to be an issue of common sense; that is, Appellant must make some showing of prejudice as a result of the delay before a Hearing Officer or this Board will even begin to consider mitigating a penalty as a result of delay.

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[3] The erroneous release also violated Agency Rules and regulations, RR-400.4.4 dealing with erroneous releases of prisoners. This violation of internal rules also supported a finding by the Hearing Officer that Appellant's misconduct violated CRS 16-60L (failure to observed departmental regulations). We note the Agency often brings multiple charges concerning single acts of misconduct, forcing the Hearing Officers to consider and rule on these multiple charges; when the bringing of one charge would have the same impact on all involved.

[4] Indeed, in Case No. 45-15A, Appellant received a mitigated penalty from the CRA, in part based on statements of acceptance of responsibility raised by his attorney in his pre-disciplinary meeting.

In any event, because of the serious nature of the misconduct, and because it is repeat misconduct, and because Appellant has refused to acknowledge his responsibility for the erroneous release, we see no reason to mitigate the penalty, even when considering the delay in the imposition of discipline.

The Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on December 15, 2016, and documented this 8th day of March, 2017.

BY THE BOARD:

Co-Chair

Board Members Concurring:

Neil Peck

Derrick Fuller

Patricia Barela Rivera