

8/14/08

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 41-08

DECISION

IN THE MATTER OF THE APPEAL OF:

ERIC GRIFFITH,
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Eric Griffith, appeals his dismissal from the Denver Sheriff's Department (the Agency). A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on July 23, 2008. The Appellant was present and represented himself. The Agency was represented by Andrea Kershner, Assistant City Attorney. The Agency presented witness Alvin LaCabe Jr. The Appellant testified on his own behalf. Agency's Exhibits 1-12¹ and Appellant's Exhibits A-C were admitted by stipulation. [Pre-Hearing Conference 7/23/08 @ 12:38:00 p.m.]. Factual Stipulations were also admitted in advance of hearing. ["Stipulation of Facts and Issues Presented to the Hearing Officer," filed June 20, 2008].

II. ISSUES PRESENTED FOR APPEAL

Prior to hearing, the parties stipulated the sole issue before the Hearing Officer was "whether termination of Mr. Griffith was excessive discipline in relation to the stipulated facts and rule violations." [Stipulation of Facts and Issues, *supra*].

III. FINDINGS

In pertinent part, the parties stipulated as follows. The Appellant was employed as a deputy sheriff for the Agency since 2000. His recent annual reviews have been rated as "meets expectations" (2004) or "exceeds expectations" (2005, 2006). He is knowledgeable of department procedures, post orders, and job responsibilities.

¹ Exhibit 9, in addition to pages 9-1 through 9-64, also contains separate CD recordings 9-65, 9-66, and 9-67. Exhibit 12 is a CD recording.

On October 11, 2007, the Appellant was arrested in a reverse-prostitution sting, resulting in criminal charges arising from his solicitation of an undercover police officer (UCO) posing as a prostitute. He entered into a diversion program. As a condition of diversion, the Appellant admitted he committed the crime with which he was charged - prostitution under the Denver Revised Municipal Code §38-158 (a) (1) & (7). [Exhibit 9-29]. Specifically, in a signed statement, the Appellant wrote "I agreed to exchange money for sex (oral). I know my actions on that night were wrong. And to this day I still regret everything about that night." [Exhibit 2-1]. As further conditions of his diversion, the Appellant paid a \$75 fee and completed 20 hours of community service. [Exhibit 4-5]. After completing all conditions of his diversion, the criminal case against the Appellant was closed on March 4, 2008.

The parties also stipulated to the following. The Appellant has been employed as a deputy sheriff with the Agency since his graduation from the academy in 2000. He was assigned to the Denver County Jail for his entire tenure. The Appellant admitted on October 11, 2007 he was driving near Colfax and Vrain Streets at 11:43 p.m. He explained he was just taking a drive although he lives in Thornton. The Appellant admitted he saw the UCO talking to someone in a car. He circled the block and stopped near her. When she asked if he was looking he replied he was "always looking" and that his eyes were "wide open." The Appellant then pulled over to the side of the road and discussed a sex act and price with the UCO. The parties disagree whether he followed the UCO's directions where to drive to meet her, or drove off in the opposite direction. The Appellant told IAB he had no intention of engaging in the solicited sex act with the UCO, and that he was just joking. ["Stipulation of Facts and Issues Presented to the Hearing Officer," filed 6/20/08]. In order to determine whether the Appellant was joking I considered the following.

The UCO recorded her encounter with the Appellant on October 11, 2007. The pertinent portions of their dialogue were as follows.

UCO: [In soft voice] 9-0-5 mary-boy-robert. 9-0-5 mary-boy-robert. White Jeep. [pause, then brightly]. How are you, honey?... What are you looking for? I do everything... but you have to wear a condom too.

Appellant: O.K.

UCO: O.K.? and I have some, so that's O.K. We could try, I guess?

Appellant: O.K.

UCO: How much money do you have?

Appellant: I only have a twenty.

UCO: O.K., I could do a blow job and...

Appellant: O.K.

UCO: for twenty, yeah?

Appellant: Sure. Sure!

UCO: I got a house right on sixteenth... It's my auntie's house, but she isn't home and its three houses on the right, just past his pink [house]."

UCO [in soft voice, as in beginning]. This is the white Jeep that circled like 20 times, all night long.

[Exhibit 9-65, a CD recording; see also Exhibit 9-9].

The Appellant followed the UCO's directions. He was arrested when he arrived at or near the designated destination.

A pre-disciplinary meeting was held on April 28, 2008. The Appellant appeared with his attorney and provided a statement. The statements were given full consideration by Manager LaCabe who was the final decision maker in the Appellant's discipline. The Agency served the Appellant with its notice of dismissal on May 20, 2008, effective at the end of that day.

The parties stipulated the Appellant violated the following Career Service Rules:

CSR 16-60 L., Failure to observe written department or agency regulations, policies, or rules.... Specifically, the Agency cited Denver Sheriff's Personnel Manual §200.4: Deputy Sheriffs and employees shall not depart from the truth, knowingly make misleading statements or falsify any report, record, testimony or work related communications. §300.10. Deputy Sheriffs and employees shall not indulge in immoral indecent or disorderly conduct that would impair their orderly performance of duties or cause the public to lose confidence in the Department. §300.11 Deputy Sheriffs and employees shall not become involved in activities involving violations of the law;

CSR 16-60 P. Conviction of or being charged with a crime. Prior to imposing discipline under this subsection, the department or agency shall follow the guidelines contained in subsection 16-61;

CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive Orders or any other applicable legal authority;

CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

IV. ANALYSIS/ DEGREE OF DISCIPLINE

A. Jurisdiction and review.

Jurisdiction is proper under CSR §19-10 A. 1. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof.

The Agency retains the burden of persuasion, throughout the case, to prove its decision to dismiss the Appellant complied with the purposes of discipline under the Career Service Rules. CSR 16-20. The standard by which the Agency must prove its case is by a preponderance of the evidence.

C. Propriety of dismissal.

In determining the degree of discipline, appointing authorities must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. In re Mounjim, CSA 87-07, 18 (7/10/08), citing In re Ortega, CSA 81-06, 16 (4/11/07).

1. Severity of the offense.

Dismissal may be appropriate for a single egregious event that results in substantial harm or violates a fundamental tenet of an agency's mission. In re Strasser, CSA 44-07, 3 (CSB 2/29/08). The safe care and custody of prisoners constitutes a core mission of the Agency, [Stipulation of Facts]. LaCabe testified convincingly that a deputy's admission of soliciting a prostitute, while perhaps not as detrimental to another agency, was critically important in the Sheriff's Department, since there is an enormous potential for compromise of the Appellant in the handling of those arrested for or convicted of similar charges. [LaCabe testimony]. The Appellant did not dispute this testimony. The Agency would also be justified in having great concern over the handling of prostitutes by a deputy who has admitted responsibility for his actions leading to charges of prostitution against him. [*Id.*, see also Exhibit 3-1. "I accept responsibility for my actions that resulted in these charges as stated by the police report and / or witness statements"]. Finally, the Sheriff's Department may choose to treat deputies' violations of the law outside the work place more severely than another agency might because of heightened public trust and confidence placed in law enforcement.

2. Past record.

The Appellant has maintained annual performance reviews which met or exceeded expectations during the past three years. He has no prior discipline. [Stipulation of Facts]. LaCabe considered the Appellant's good work record. [LaCabe testimony].

3. Penalty most likely to achieve compliance.

While the Career Service Rules direct the decision-maker to choose the penalty most likely to achieve compliance with the rules if possible, In re Mounjim, CSA 87-07, 18 (7/10/08), citing In re Ortega, CSA 81-06, 16 (4/11/07), a single incident, as stated above, may justify dismissal where the incident is severe enough to violate a core function or tenet of the agency. Strasser, *supra*. The Appellant's admission of a basis for the criminal charges, and the resulting compromise to his duties, constitute a violation severe enough to preclude progressive discipline.

4. Other factors.

The Appellant, while admitting in his criminal case that he took responsibility for his actions related to the prostitution charges, never accepted responsibility during the course of the agency's investigation and during this appeal. During his interviews with IA, and at hearing, the Appellant insisted he was joking with the UCO and had no intention of following through with the sex-for-payment to which he had agreed. Based on the available evidence, the Appellant's alleged joking is not credible for the following reasons. He drove around the block to the UCO's location several times. Even by his own admission he drove around the block once, meaning he passed the UCO at least twice. It defies logic that the Appellant was taking a drive many miles from his home, and chose to circle this particular block, an area well-known in law-enforcement circles for prostitution, [LaCabe testimony], at least once, and more likely, many times, without an interest in the UCO's activities and only to joke with her. This point is less critical, however, than the fact that he stopped and engaged in a transaction with the UCO, since the Appellant could have circled 100 times without engaging in any wrongdoing under the law or under the Career Service Rules. Once he engaged in, and completed an agreement to participate in prostitution, both Denver's ordinances and the Career Service Rules were invoked.

The Appellant argued that he drove away from, rather than toward the designated meeting point because he did not follow the UCO's directions to turn right, but instead turned left, away from the area. After reviewing the transcript and the recording of the interaction, I conclude from the context of their exchange, that the UCO's use of the word "right" was not intended as a turn direction, but as a point of precision, as in "right there." The house where the UCO directed the Appellant was within, or nearly within view, as evidenced by her statement "it's three houses on the right, just past this pink [house]," and her preceding statement, where she indicated a house "on this street." The arresting officers did not chase after the Appellant; rather he drove to the location where they were waiting for him. Therefore, it is more likely the UCO was indicating the specific house, rather than which direction, the Appellant should go, and it is more likely, by a preponderance of the evidence, that the Appellant drove toward the location indicated by the UCO, not away from it. One officer stated much later, with uncertainty, that the Appellant may have travelled away from the pre-arranged bust area. [Exhibit 9-32]; however his statement was made more than four months later, and was contradicted by two other arresting officers whose statements were made with certainty that the Appellant drove to the designated location. [Exhibit 9-34; 9-36]. The Appellant

agreed to wear a condom. He agreed to pay \$20 to receive oral sex. There was nothing that sounded light-hearted or joking in his tone during the transaction. [Exhibit 9-65 CD]. It is unlikely the Appellant drove many miles from home, agreed to pay for oral sex, agreed to wear a condom, and did so in apparent earnestness, all for a joke.

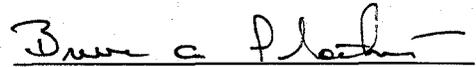
V. CONCLUSIONS

The hearing officer must not disturb the agency's determination of discipline unless it is clearly excessive or based substantially upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), citing In re Delmonico, CSA 53-06, 8 (10/26/06). For reasons stated above, LaCabe's determination to dismiss the Appellant was not clearly excessive, and was based on considerations supported by a preponderance of the evidence.

VI. ORDER

The Agency's termination of the Appellant's employment on May 19, 2008, is AFFIRMED.

DONE August 14, 2008.



Bruce A. Plotkin
Career Service Hearing Officer