

DECISION AFFIRMING TWO-DAY SUSPENSION

SPENCER HASWELL, Appellant,

v.

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

I. INTRODUCTION

This is an appeal of Appellant's two-day suspension assessed by his employer on October 9, 2019, for alleged violations of specified Career Service and Agency rules. A hearing was conducted by Bruce A. Plotkin, Hearing Officer, on January 7, 2020. The Appellant was represented by Reid Elkus, Esq., from the law firm of Elkus & Sisson PC, while the Agency was represented by Shelby Felton and Margaret Tharp, Assistant City Attorneys. Appellant's exhibit B was admitted, as were Agency exhibits 1, 3-9, and 12-16. Appellant testified during his case-in-chief and also presented Michael Haswell by telephone. Civilian Review Administrator Alfredo Hernandez testified for the Agency.

II. ISSUES

The following issues were presented for appeal:

- A. whether Appellant established the Agency's finding - that he violated Career Service Rule (CSR) 16-28 R. as it pertains to Denver Sheriff's Department Rules/Regulations (RR) 300.2 or 300.11.6. - was clearly erroneous; or
- B. whether the Agency's application of its disciplinary matrix in assessing a two-day suspension was clearly erroneous.

III. FINDINGS

The Appellant, Spencer Haswell, has been a deputy sheriff in the Agency since 2017. On February 22, 2019, Mesa County Sheriff Deputy Brian Eldridge and other deputies were executing an arrest warrant on Haswell's adult nephew, Sage, in Clifton, Colorado. Sage's father, Michael, who is Haswell's brother, irately protested the service of the warrant. He yelled at the deputies, shoved his hand in their faces and was otherwise aggressive. Michael's wife called Haswell while telling Eldridge "here, talk to my brother-in-law. He's a cop." [Exh. 15 at 2:30]. While on speakerphone with his brother and Eldridge, Haswell provided incorrect information about the necessity of showing

the arrest warrant and providing a copy of it to his brother. Because of Haswell's incorrect information, his brother became more hostile, more belligerent, and caused a volatile situation. Eldridge ended the call due to the heightened tension it caused. [Exh. 5-10].

After his nephew's arrest, Haswell called Mesa County Sheriff's Office (MCSO) dispatch. He asked the dispatcher if there was a copy of the warrant. The dispatcher replied the warrant system is paperless, and informed Haswell he could contact the records department. Haswell then asked, "so if I were to look it up through my system at work, 'cause I'm a deputy as well, I should be able to find it using a case number, correct?" [Exh. 12 at 0:38-:45; see also Exh. 4-2].¹ When Haswell continued to inquire about the warrant, the dispatcher told him she would ask a deputy to call him.

Later the same day, Eldridge, who recorded the phone call, asked Haswell if he was a law-enforcement officer. Haswell identified himself as a Denver Deputy Sheriff. [Exh. 12 at 1:03-108; Exh. 15 at 17:11-13]. Haswell asked if the warrant was "present" at the time of the arrest. He argued "if the primary owner of the property asks you to see the warrant, you have to show it to them." [Exh. 15 at 11:48- 12:02 and 19:19-27; Exh. 5-10, 5-11]. Eldridge replied, "Sage and Dakota were both shown their warrants, but I have no obligation to show those to your brother." [*Id.* at 1:14-1:29].

Haswell continued to argue about Eldridge's arrest authority, claiming that, because Eldridge had only an arrest warrant and no search warrant, "you cannot arrest them inside the house. They have to be outside the house, because they are not primary owners of the residence." [Exh. 15 at 20:30-20:36]. That statement was unfounded in law.

Eldridge told Haswell "your brother was out of control, threatening, putting his hands in the face of deputies. I will tell you this: I've worked here for quite some time. The amount of restraint that the deputies showed on scene was incredible." [Exh. 15 at 21:02-20:16]. Haswell immediately continued to argue: "so who shoved him and put their hand on their firearm?"

After further exchanges, Eldridge told Haswell "... and you did not help him. You caused him to be even more out of control when you're telling him he needs to see the warrant, he has to see it physically – that spun him up, so you were a proximate cause...." Haswell interrupted again, telling Eldridge "because that is [the] law." Eldridge continued "you almost caused your brother to go to jail tonight; I need that to be clear." [Exh. 15 at 22:55-23:21].

Haswell replied he was not seeking information as a deputy, and that he was not calling as his nephew's legal counsel. He told the IA investigator that his questions to Eldridge were simple but Eldridge "became a dick about it." [Exh. 15 at 14:02-14:11]. A review of the recorded phone call between Haswell and Eldridge did not bear out the

¹ That statement became the basis for the Agency's charge of Soliciting Preferential Treatment, RR 300.2, against Haswell. [Exh. 8-7].

accusation. While there was some cross talk, Eldridge remained calm, professional, and polite, even while Haswell interrupted four times. [Exh. 15 at 18:22; 18:37; 20:04; and especially 23:09]. After listening to the phone call, Haswell acknowledged to Internal Affairs (IA) "like I told you, I was irate and I was heated."

Eldridge called the DSD to complain about Haswell's behavior. He followed that phone call with an email summarizing his complaints. [Exh. 3-2 to 3-4].

An investigation ensued, following which the Agency convened a pre-disciplinary meeting on Wednesday, September 18, 2019. Appellant attended with legal counsel. On October 9, 2019, the Agency sent its notice of suspension to the Appellant. This appeal followed timely on October 22, 2019.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR 20-20 A.2., as the appeal of a suspension.

B. Burden and Standard of Proof

The Appellant retains the burden of persuasion, throughout the case, to disprove the Agency's findings of either or both its rule violations or the Agency's application of its disciplinary matrix. CSR 20-56 A. A "clearly erroneous" standard applies to Appellant's burden of persuasion. CSR 20-56 A.

C. Career Service Rule Violations

CSR 16-28 R. Conduct which violates... agency rules....

CSR 16-28 R. connects violations of Denver Sheriff's Department [DSD] Rules and Regulations (RR) with the Career Service Rules. The Agency charged Haswell with violating CSR 16-28 R. through the following two Agency Rules:

1. RR 300.2 Soliciting Preferential Treatment

Deputy sheriffs... shall not... identify themselves as Department members, or otherwise attempt to use their position as Department members to solicit or attempt to solicit any preferential treatment not extended to the general public or to solicit or attempt to obtain any benefit to which they would not otherwise be entitled....

The Agency charged Haswell with violating CSR 16-28 R. via his violation of Agency Rule 300.2 – Soliciting Preferential Treatment. Two elements are required for a violation under this rule: self-identification as a DSD employee; and solicitation of treatment not available to the public or otherwise available to that DSD employee. Subjective intent is not more persuasive than the reasonable interpretation of the request under the circumstances. Otherwise a simple denial would always prevail, leaving the violation unenforceable.

After his unsuccessful bid to obtain a copy of the arrest warrant from Deputy Eldridge, Haswell called the MCSO and spoke with a dispatcher. The dispatcher told him there is no such copy because warrants are electronic. The dispatcher directed Haswell to check with the MCSO Records Department. The Agency determined the wrongful solicitation occurred when Haswell then asked, "if I were to look it up through my system at work, 'cause I'm a deputy as well, I should be able to find it using a case number, correct?" [Exh. 12 at 00:39-00:45; Exh. 8-7].

Two factors were of paramount importance. 1. Haswell identified himself to the dispatcher as a deputy, in violation of the first element; 2. Haswell identified the purpose of his call was to obtain a copy of the warrant for his nephew's arrest. "I was just wondering if you guys had a warrant copy on hand." [Exh. 12 at 15 seconds]. Taking those two factors together, the dispatcher's belief, that Haswell was seeking restricted warrant information - was reasonable. Since Haswell's question, under the circumstances, was reasonably found to solicit restricted information, Haswell failed to establish the Agency's basis for assessing this violation was clearly erroneous.

It appeared Haswell was unaware that seeking warrant information was wrong. For reasons stated above, that lack of bad intent does not absolve Haswell of the violation; rather it inures to possible mitigation of the degree of discipline, below.

2. RR 300.11.6 – Conduct Prejudicial.

Deputy sheriffs and employees shall not engage in conduct that: (i) is prejudicial to the good order and effectiveness of the department; (ii) brings disrepute on, or compromises, the integrity of the City or the Department; or (iii) is unbecoming of a deputy sheriff or employee.

The Agency also found Haswell violated CSR 16-28 R. via his violation of RR 300.11.6. Hernandez found Haswell violated all three subsections of this DSD rule. [Exh 2-11] in his first phone call with Eldridge and in his phone call to the MCSO dispatcher.

(a) Good order and effectiveness. Hernandez stated Haswell violated this subsection in that he interfered with the execution of an arrest warrant. [Hernandez testimony]. That conduct does not establish a violation, since it requires the prejudice to injure the Denver Sheriff's Department ("the department") whereas the harm described by Hernandez applied to the MSCO. On its face, this alleged basis for a violation under RR 300.11.6 is clearly erroneous.

(b) Integrity of the City or Department. Hernandez stated Haswell violated this subsection in that "the integrity of the City is always at issue in the context of the conduct of a deputy, " and "by stating to Deputy Eldridge 'you need to do this, you need to do that' in the midst of his trying to execute an arrest warrant, was just at odds with what we would expect a deputy sheriff to do, and so for that reason I found that that in itself also brought disrepute on or compromised the integrity of the City or the Department." [Hernandez testimony]. This conclusory allegation, in essence a general

disapproval of Haswell's actions, fails to establish how the integrity of either the City of Denver, or that of the DSD, was compromised or brought into disrepute. See In re Wilson, CSA 38-17, 10 (12/8/17) ("conclusory statements are insufficient to establish what conduct violated this subsection, or the link between them."). These alleged bases for finding a violation under RR 300.11.6 are clearly erroneous.

(c) Conduct Unbecoming. The evidence established that Haswell exacerbated his brother's already-inappropriate actions and caused Eldridge to become legitimately concerned about the threatening behavior to the point of terminating the call and considering arresting Michael. [Exh. 15 at 11:08-11:25; Exh 6-13. As a deputy sheriff, Haswell is a peace officer, [DSD Order 1.00.5003]. Haswell's conduct was unbecoming where his unsolicited, incorrect, and inappropriate legal advice interfered with an arrest and exacerbated an already-tense situation in contravention of his function as peace officer.

Haswell claimed he did not insist that Eldridge take any particular action. "I wasn't calling him saying "this is legal advice, this is what you have to do. I literally asked, 'where is the arrest warrant, why wasn't it provided?' and I was hung up on." [Exh. 5-10; Exh. 15 at 11:26-11:32]. First, even assuming, and I do not make such an assumption, that the arrest was unlawful, it would not change whether Haswell conducted himself in a manner contrary to RR 300.11.6. Haswell's focus on the propriety of the arrest incorrectly diverted the focus of conduct to the MCSO deputy, whereas the focus of this appeal is on Haswell's conduct.

Even if Haswell were correct, it would not change that he inflamed an already-tense arrest, and, but for the restraint of the arresting officers, nearly caused his brother to be arrested as well. Eldridge correctly summed up the problem with Haswell's arguments concerning Eldridge's legal authority to arrest his nephew, while simultaneously claiming he was calling as a concerned uncle and not as a peace officer. Eldridge told Haswell "we don't get to take that hat on and off." [Exh. 15 at 23:43].

When Haswell questioned Eldridge's authority, his sister-in-law had already identified him as a "cop" to Eldridge in the speakerphone call, and Eldridge continued to have the impression Haswell was a police officer, when he asked Haswell "are you an officer," at the beginning of their second conversation. [Exh. 6-3], Eldridge believed they were talking "one cop to another cop." [*Id.*]. Given that understanding, when Haswell insisted Eldridge had no authority to enter his brother's house and arrest his nephew ("That one you cannot do, and I know that for a fact"), he was making that claim under the color of his authority as a peace officer regardless of his claim that he was not. Haswell failed to establish that the Agency's finding of wrongdoing under subsection (c) of this rule was clearly erroneous.

V. DEGREE OF DISCIPLINE

The decision maker reviewed the IAB file, including Eldridge's email complaint [Exh. 3], transcripts, all recorded exchanges in that file, and Haswell's prior performance reviews. [Hernandez testimony]. Hernandez determined Haswell's interactions with Eldridge, and his interaction with the MCSO dispatcher, fit the definition of Conduct Category C violation under the Agency's disciplinary matrix in that his conduct "had a pronounced negative impact on (i) the operations or professional image of the Department or (ii) relationships with other deputy sheriffs, employees, agencies, detainees or the public." [Exh. 8-9]. Level C is the minimum category for a violation of RR 300.2 and falls roughly in the middle of the range of options [A-F] for a violation of 300.11.6. [Exh. 1-118]. Since Haswell had no prior violations, the Agency's disciplinary matrix sets the penal level at 3 for both violations. [Id]. The penalty table sets a penalty range from a written reprimand as a mitigated penalty, to a presumptive penalty of a 2-day suspension, to an aggravated penalty of 3-4 days. [Exh. 1-127]. Hernandez was, therefore obligated to weigh any mitigating and aggravating factors. [Exh. 1-31 through 1-36].

Hernandez considered in mitigation that Haswell's prior work reviews were positive and he had no prior discipline. In aggravation, Hernandez considered it aggravating that Haswell told the MCSO dispatcher that he was a deputy and attempted to solicit non-public information on that basis. The description of conduct which is already accounted for in the definition of the violation is not an aggravating factor. [Exh. 1-32 at 19.4 ("...care should be used to ensure that a potentially... aggravating factor has not already been taken into consideration in the... definition/elements of the specific violation that has been sustained")].² Haswell did not dispute the Agency's application of its disciplinary matrix.

There was additional mitigation. Haswell had no prior reported violations. He is a member of the Marine Corps Reserves. [Exh. 9-17]. I also found no ill intent by Haswell. It appeared Haswell was honest about his intentions and his actions. However, during the speakerphone call with his family and Deputy Eldridge, Appellant gave incorrect information, albeit unintentionally, which caused his brother to become more confrontational and which interfered with an arrest. Haswell had no bad intent in seeking warrant information from the dispatcher, although his question caused her to believe he was seeking restricted information. That Haswell did not intend those consequences is not material to the foreseeable outcome of his actions: his brother became uncontrolled and was nearly arrested because of incorrect information from Haswell. His naive question to the dispatcher caused legitimate concern whether she should provide access to restricted information. When Haswell provided incorrect legal advice, his sister-in-law had just identified him as a "cop." Thus his information was provided under the color of his authority, regardless of his claim that he was merely speaking as a concerned uncle. In summary, Haswell failed to establish that the

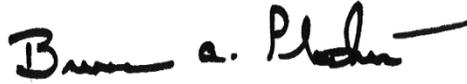
² Since Hernandez assigned the presumptive instead of an aggravated level of discipline, this was harmless error.

Agency's findings of wrongdoing were clearly erroneous. He also failed to establish that the presumptive penalty of a two-day suspension, assessed concurrently for each violation, was clearly erroneous. Finally, Haswell failed to establish that the Agency's application of its disciplinary matrix was clearly erroneous.

VI. ORDER

For reasons stated above, the Agency's assessment of a two-day suspension of the Appellant's employment on October 9, 2019, is AFFIRMED.

DONE February 10, 2020.



Bruce A. Plotkin
Career Service Board Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this final order, in accordance with the requirements and limitations of CSR 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery, below. See Career Service Rules at www.denvergov.org/csa. All petitions for review must be filed with the:

Career Service Board

c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

Career Service Hearing Office

201 W. Colfax, Dept. 412, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.