

DECISION ON REMAND AFFIRMING 10-DAY SUSPENSION

JAMES JOHNSON, Appellant,

v.

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

I. INTRODUCTION

This Decision follows a remand from the Career Service Board (CSB). The Agency assessed a 10-day suspension against Appellant on April 19, 2017. Appellant appealed to the Hearing Officer, below, who reversed the suspension after a *de novo* hearing on August 28 and 29, 2017. The Agency filed a petition for review with the CSB. The CSB reversed the Hearing Officer with respect to the alleged violations, and remanded the case for reconsideration of the degree of discipline originally assessed by the Agency. In reconsidering the degree of discipline, I adopt the findings of the CSB in its Decision and Order of January 17, 2019.

II. DEGREE OF DISCIPLINE

When one or more violations alleged by the Agency is established, deference is owed to the assessed degree of discipline.¹

An Agency's imposed discipline should be upheld if it is within the range of alternatives available to a reasonable and prudent administrator. *In re Economakos*, CSB 28-13A, 2 (3/24/14); *Adkins v. Division of Youth Services, Dept. of Institutions*, 720 P.2d 626, 628 (Colo.App., 1986); *Colorado Dept. of Human Services v. Maggard*, 248 P.3d 708 (Colo. 2011). Specifically, discipline imposed by an Appointing Authority should be affirmed by a hearing officer unless that discipline has been imposed arbitrarily, that is, based substantially on considerations unsupported by record evidence, or that discipline is clearly excessive. *Economakos, supra*. Applying that deferential standard, I turn next to the Agency's stated basis for assessing a 10-day suspension.

The CSB found Appellant in breach of the rules alleged by the Agency, specifically, Career Service Rule (CSR) 16-60 A., neglect of duty, and CSR 16-60 L.,² failure to observe written departmental or agency regulations, policies or rules, as it pertained to Agency Rule RR 1100.8, failure to supervise. The CSB agreed with the Agency's bases for those findings, including: Appellant failed to formulate a tactical plan or any plan whatsoever to address exigent circumstances; failed to communicate with subordinates about any plan or course of action;

¹ "In determining whether discipline is reasonably related to the offense, the hearing officer will not disturb agency's determination unless it is clearly excessive or based substantially on considerations that are not supported by a preponderance of the evidence." *In re Vigil*, CSA 110-05, 8 (3/3/06), citing *In re Douglas*, CSB 154-02 & 166-02, 5 (1/27/03); *In re Armbruster*, CSA 377-01 (3/22/02); *In re Gallegos*, CSB 27-01 (5/21/01); but see n.2, below.

² As they pertain to the Sheriff's Department, these, and all CSR 19 rules, were subsequently repealed and replaced by CSR 20 (January 10, 2018).

and failed to provide a plan or course of action to subordinates. In re Johnson, CSB 24-17A, 3 (1/17/19). The Board also agreed with the Agency's finding Appellant breached the minimum qualification of his position in failing to apply problem solving techniques to his position. [*Id.*]. The CSB's agreement with the Agency's findings, perforce, renders them reasonable.

The first step for the decision maker in following the disciplinary decision matrix is to elect a conduct category that describes the wrongdoing. A violation of RR 1100.8. falls between category B and F. The Agency's decision-maker, Civilian Review Administrator Shannon Elwell, assigned Johnson's conduct to category D, for his neglect of duties and failure to supervise [Elwell testimony; Exh. 27]. Category D describes 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.

[Exh. 20-23, 20-90].

1. Guiding Principles. The Agency's Guiding Principles are:

Honesty: Being ethical and honest in everything we do or say.

Respect: Treating others as we would want to be treated. We will uphold the values of the constitution of this nation, including freedom from prejudice and favoritism, and providing justice for all.

Fairness: Acting with respect to all, including other employees and the public.

Openness: Being objective, accessible, tolerant, flexible and adaptable. We will listen to others' points of view, striving for open communication and willingness to compromise.

Teamwork: Encouraging a harmonious, supportive environment, putting the "team" first, and fostering positive working relationships.

Judgment: Making reasonable decisions based on common sense and good judgment.

Sensitivity: Recognizing the humanity in others and being able to deal with difficult people and situations with compassion and concern.

Personal Leadership: Taking personal responsibility and initiative to get things done. Being proactive, rather than reactive. Setting goals and looking toward the future. We will set a positive example for others to follow.

Integrity: Having the courage to do the right thing, maintaining self-discipline, control and self-restraint.

Accountability: Being accountable for everything we do.

Professionalism: Demonstrating skill, knowledge and competency in carrying out all assigned duties. Striving for excellence and continued self-improvement.

[Exh. 20-50].

Elwell referred only globally to these principles; however, failings of some of these principles emerge when considering Johnson's conduct in view of the CSB findings.

Judgment: The CSB found Johnson "had made incorrect assumptions about what the plan was (having failed to communicate with any subordinate regarding any plan or course of action)...." [Johnson, supra]. This failing also applied to his lack of leadership.

Leadership: The CSB found Johnson's conduct "did not rise to the level of leadership required by the situation" in that he failed to articulate a tactical plan, did not know what his

subordinates planned, made incorrect assumptions about the plan, and failed to provide any course of action," [Id.], and "instead of leading, instead of commanding or acting or advising or deciding, he simply sat back and watched. From the Agency's standpoint, this was unacceptable." [Id. at n.2].

Accountability: "The record reflects that Appellant did virtually nothing during a crisis situation." [Id. at 6].

Professionalism: The CSB found Johnson failed to uphold one of the minimum qualifications of his Classification Specifications [Exh. 34] - apply problem solving techniques to the situation. The CSB stated

Here, the record reflects that Appellant's performance during the incident did not rise to the level of meeting minimum job requirements and, as a result, was in violation of the Career Service Rules requiring adequacy of work performance. We see no evidence in the record of Appellant applying problem solving techniques, attempting to find alternate solutions to the complex problems he and his subordinates were facing, or that he was sifting out relevant versus irrelevant information to make logical judgments.

[Johnson, *supra*; Exh. 34-3]³. In light of the CSB's findings, Johnson's conduct was substantially contrary to the above-referenced guiding principles.

2. Mission. The mission of the Agency is "To provide safety and security for the community by ensuring care custody, transportation and reentry services for detainees by operating safe, secure, efficient and humane facilities that adhere to federal, state, and local laws." [Exh. 20-50].

The CSB found care of inmates is a top priority of the Agency and determined that Johnson's failure to act was a deficient expression of that obligation. Johnson, supra at 4. "[H]ad the Appellant formulated a tactical approach when the situation first escalated it is very possible no crisis would have occurred." [Id. at 2]. Johnson's failure to oversee the care of this crisis betrayed the Agency's mission.

3. Demonstrable serious risk to deputy sheriff, employee or public safety. As noted above, Johnson "did virtually nothing during a crisis situation" and found had he performed his proper function "it is very possible no crisis would have occurred." Given these findings, Johnson's failure to act created a demonstrable serious risk to Marshall.

The CSB's findings establish Johnson's actions were substantially contrary to the guiding principles of the Department, that he substantially interfered with its mission, and his actions involved a demonstrable serious risk to public safety. Consequently, the Agency established those actions and failure to act met the criteria of Category D misconduct.

Having assigned the proper conduct category, the decision maker is tasked with considering any prior violations of the same offense or conduct category that would raise the level of presumptive discipline. [Exh. 20-27, 20-28]. Elwell noted Johnson had no prior discipline that counted against him in his 24 years with the Agency.

Next, the decision maker considers mitigating and aggravating circumstances. [Exh. 20-29 through 20-36]. Elwell considered it was mitigating that Johnson was a new captain who

³ *Contrast In re Gutierrez*, CSB 65-11A, 2 (4/13/13). "Given the broad, general nature of job specifications, we do not believe that they were ever intended to serve as specific performance standards."

became the Watch Commander of the DDC less than two months before the events underlying this case;⁴ Also in mitigation, Elwell acknowledged Johnson's work reviews were "excellent," [Exh. 2-17], including the highest level of attainment, "outstanding," [Exh. CC-1, 2, 3, 4, 6], which was assessed during the same year as this incident, and "exceeds expectations" for the year after. [Exh. CC-8].

As aggravating factors, Elwell noted the subsequent death of inmate Marshall. She also cited the demonstrable legal or financial risk to the Department or City arising from Johnson's neglect of duty. [Exh. 2-17].

The Agency presented no evidence that linked any of Johnson's actions, or lack of action, to Marshall's death. To the contrary, Elwell testified that Marshall's death was unrelated to the degree of discipline. [Elwell testimony]. As a matter of law, an unproven justification cannot support an aggravated disciplinary penalty. In re Rocha, CSB 19-16A, 6 (7/6/17). Thus, the first basis for aggravating Johnson's penalty was not established.

Notwithstanding the foregoing, an aggravating factor is established in the matrix by an incident that includes "the existence of an actual and demonstrable legal or financial risk..." involving the improper care of an inmate. [Exh. 20-23, (emphasis added)]. The notice of intent to sue filed by Marshall's family constituted a demonstrable legal or financial risk to the Department or City arising from the incident in which Johnson neglected his duty of care toward an inmate.⁵ The Agency, therefore, established this aggravating factor.

Next, as a first Conduct Category D violation, the matrix places Johnson's violation of RR 1100.8 at a penalty level 5. [Exh. 20-90]. The penalties for that level range from a mitigated suspension of 4-6 days, to a presumptive 10-day suspension, to 14-16 days of suspension in the aggravated range. While Johnson's work record was exemplary, Elwell found it was "not sufficiently weighty" to justify a mitigated penalty in view of the established aggravating factor.

Having found that Elwell established both mitigating and aggravating factors, her election of a 10-day suspension fell within the parameters of the Agency's matrix, and therefore also fell within the range of penalties that could be assessed by a reasonable administrator. See Economakos, *supra*; see also In re Gajarszki et al, CSB 30-17A, 32-17A, 33-17A (10/18/18).

The burden falls to Johnson to prove the discipline assigned for the proven violations was imposed arbitrarily, that is, based substantially on considerations unsupported by record evidence, or that discipline is clearly excessive.⁶ Economakos, *supra*. In that regard, Johnson noted his exemplary work history [Exh. CC]. Elwell already factored in Johnson's notable work record, as well as his lack of experience as a captain who had to respond to a dire emergency. Johnson failed to establish that the degree of discipline elected by the Agency's decision maker was clearly excessive or based substantially on considerations that are not supported by a preponderance of the evidence.

⁴ "Captain Johnson was transferred to the DDC as a Watch Commander in September 2015. This was the first time he has worked in the facility..." [Exh. CC-9].

⁵ I make no determination that Johnson's neglect contributed to Marshall's death; Nonetheless, under the matrix, an aggravating factor is established by an incident that included a legal or financial risk to the Agency or City that involved, inter alia, improper care of an inmate. [Exh. 20-23]. Both factors – a legal or financial risk to the City and improper care of an inmate - were present, if not connected. Language in the matrix that suggests direct causation between the employee's conduct and the risk of legal or financial consequences is notably absent. All that is required is "the existence of an actual and demonstrable legal or financial risk..." Thus, it was not improper to assess this aggravating factor under the expansive parameters of the Agency's disciplinary matrix.

⁶ Under CSR 20-56, the burden of proof now resides with an appellant to prove the agency's disciplinary decision was clearly erroneous or that the application of the disciplinary matrix was clearly erroneous.

III. ORDER

The Agency's 10-day suspension of Captain Johnson's employment, beginning May 7, 2017, is AFFIRMED.

DONE February 15, 2019.



Bruce A. Plotkin
Hearing Officer
Career Service Board

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.