CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 30-14A

In the Matter of the Appeal of:

DARRELL JORDAN,

Petitioner/Appellant,

v.

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

Respondent/Agency.

DECISION AND ORDER

Denver Deputy Sheriff Darrell Jordan (hereafter "Jordan" or "Appellant") received a ten-day suspension for three times going "hands-on" with a prisoner who "posed no threat to Jordan during the entire incident."[1] Jordan appealed that suspension. The Hearing Officer affirmed the discipline.

Jordan filed a timely Petition for Review. He asks us to overturn the Hearing Officer's decision based on three factors. First, he claims that the Hearing Officer violated his due process rights by conducting a hearing that violated the tenet of basic or fundamental fairness when he imposed an expert disclosure requirement on him but not on the Agency. Next, Appellant argues that we should overturn the Hearing Officer because he erred in allowing the

[1] Hearing Officer Decision, page 2, last sentence.

Manager of Safety[2] to offer expert testimony, when, according to Appellant, he was not qualified to do so. Finally, Appellant claims that the Hearing officer abused his discretion by not allowing his counsel to cross examine certain aspects of the Manager's testimony. Because it helps us resolve the other two issues, we address the second issue first.

Appellant claims that the Hearing Officer erred when he certified the Manager as an expert witness and allowed him to offer expert testimony. We agree, in part. We firmly believe that it was error for the Hearing Officer to require the Agency certify the Manager as an expert witness. We hold the Manager, is not required to be an expert for him to be able to testify why he believed discipline was warranted, why he believed certain actions amounted to violations of Career Service rules or agency regulations, or why he levied the discipline that was imposed.

The Manager's position is a civilian office. There is no requirement that any Manager of Safety, or anyone acting on behalf of the Manager of Safety, have a law enforcement, firefighting, or public safety background[3]. As such, the root of the problem in this appeal is the misunderstanding of the parties to this action (including the Hearing Officer), that the Manager of Safety must be an expert in the fields of law enforcement, public safety, or use of force before he or she can testify as to why discipline was administered. We categorically reject that notion. We do not intend to say that Deputy Manager Vigil was not qualified to render an expert opinion. Indeed, the Hearing Officer believed he was and we would agree

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[2] In this case, the person offering the testimony was Deputy Manager of Safety Jess Vigil. While he is not ***the*** Manager of Safety (or Executive Director of the Department of Safety as the position is now known) he is acting as the designee of the Manager of Safety and, as a result, speaks for the Manager. The Manager of Safety is the appointing Authority for the Sheriff's Department (Denver City Charter Section 2.6.4). The Manager was authorized to appoint a deputy to perform certain tasks and functions (Charter Section 2.6.2). Under our rules, an appointing authority or his or her designee may impose discipline (CSR 16-70).

[3] The Safety Department has full control of not only the Sheriff's Department, but of the Police Department and Fire Department as well. (Charter Section 2.6.1)

with that determination. We only intend to say that there is absolutely no need or requirement that the Manager be hearing officer-certified as an expert before he can offer an opinion concerning why he imposed discipline.

We should not lose sight of the fact that we are not engaged in trials to determine violations of constitutional rights; but rather, we are engaged in a process squarely within the employer-employee relationship to determine if rules were broken and discipline is warranted. Whether Deputy Vigil could be certified as a use of force expert in the U.S. District Court for the District of Colorado is of no import to us. What matters to us, and what should matter to the parties and the Hearing Officer is that he was the decision-maker in a disciplinary action. To the extent that we still engage in *de novo* hearings where the burden of proof is on the Agency to demonstrate that discipline, and then the amount of discipline, is warranted and appropriate, we hold that the Manager, just like any other appointing authority, must be able to explain why discipline was imposed in the first instance, and why the level of discipline that was imposed is appropriate within the bounds of our system.

Simply, this is how the City Charter and our rules work. The Charter makes the Executive Director of the Department of Safety the appointing authority for the Sheriff's Department (Charter Section 2.6.4). Our rules require the appointing authority or designee to issue discipline. (See, e.g., CSR 16-20, 16-70). Nothing in the Charter or our rules requires an appointing authority to be a court-certified or hearing officer-certified expert before they may issue discipline or explain the discipline they have issued. The fact that the appointing authority is the appointing authority is sufficient to allow him or her to testify at hearing as to why discipline was issued and why a certain level of discipline was administered. Certainly, the Manager is entitled to interpret his or her own rules (such as the Departmental Rules

prohibiting use of inappropriate or excessive force) and decide whether conduct violates those rules. Absent that authority, the power of discipline is taken out of the Manager's hands, unless the Manager's background serendipitously coincides with what the parties and/or a hearing officer decides makes him an expert on any particular subject.[4] Consequently, we reject Appellant's contention that the imposed discipline should be overturned because the Hearing Officer permitted Deputy Manager Vigil to testify regarding the imposition of discipline.

Appellant also argues he should receive a new hearing, or we should overturn the discipline, because he did not receive a fundamentally fair hearing in that the Hearing Officer did not allow Appellant's expert witness[5] to testify because he was not designated as an expert witness; while the Agency's witness, Deputy Manager Vigil, was allowed to testify, though he was not designated as an expert.

First, as we have already determined above, there was no requirement for Deputy Manager Vigil to be certified as an expert. While, undoubtedly, some of his testimony ventured into the area of opinion, those opinions were being offered as those of the appointing authority in support of discipline, explaining why the Agency believed rules had been broken and why the chosen level of discipline was appropriate. Such testimony is virtually a requirement of our system where the burden of proof is on the agency to justify the imposition of discipline and the specific level of discipline imposed.

The proposed testimony of Appellant's witness, however, is a totally different animal.

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[4] We also believe that if the parties or the hearing officer were able to require an appointing authority to be a certified or certifiable expert in any particular field, said requirement would impinge on the Mayor's ability to appoint an appointing authority by imposing *de facto* hiring qualifications. Similarly, the hearings process would impinge on an appointing authority's ability to appoint the designee of his or her choosing for purposes of imposing discipline by imposing those same expert-certifiable requirements.

[5] Denver Deputy Sheriff Dwaine Cook.

We first note that the witness was initially identified as someone who had "observed the events" giving rise to the discipline. The Agency had no way of knowing, based on this representation, that the observation of the events was not first hand, but rather, was based on a review of the videotape of the events.

We hold that Appellant was not denied a fair hearing when the Hearing Officer refused to allow the proposed expert offer his opinion. First, the Hearing Officer was well within his right to not allow the expert to testify as a sanction for the apparent misrepresentation. Second, the Hearing Officer was within his right to refuse to hear the testimony because it would not have added to his understanding of the facts or issues at hearing. Indeed, our review of the record indicates that the witness was a "defensive tactics" expert. Given that the prisoner at the center of these events never posed a threat to Appellant, and Appellant was never in a position where he needed to defend himself, we do not see how a defensive tactics expert could have assisted the Hearing Officer.

In addition, we do not see how Appellant could have been in any way prejudiced by the Hearing Officer allowing Deputy Manager Vigil to testify without a prior designation as an expert. For the same reasons that Deputy Manager Vigil was not required to be certified as an expert, there was no requirement that he be designated as an expert.

Further, we find it inconceivable that Appellant could have been taken by surprise by the Manager's testimony, when the complete subject matter of that testimony has been laid out in the disciplinary letters. We also note counsel for Appellant have participated in numerous hearings before our hearing officers and have had numerous opportunities to question the Manager of Safety. While the specifics of any particular discipline might change from case to case, the role of the Manager does not, so that Appellant's counsel would, at all times, have

been aware of the nature of the testimony the Manager would offer. This stands in sharp contrast with the proffered testimony of Appellant's witness where the Agency reasonably interpreted the description of the testimony to be offered by Appellant's witness as that of an occurrence witness.

We also do not see how Appellant could consider it unfair that Deputy Manager Vigil was permitted to testify, even without a prior expert designation, given that Appellant had endorsed him as a witness. (See Appellant's pre-hearing statement, as well as transcript p. 4, lines 11-12 where Appellant admits that he has endorsed as a witness all witnesses endorsed by the Agency.) Nor do we see how Appellant could claim unfair surprise that the Manager was going to offer what Appellant considered expert testimony, even without an expert designation, since it was known that the Manager was not an occurrence witness and that the only reason he was being called was to explain the discipline. In sum, we see no unfairness in the Hearing Officer refusing to hear the testimony of Deputy Cook, while accepting the testimony of the Manager.

Finally, Appellant argues he received an unfair hearing because he was not allowed to cross-examine Deputy Manager Vigil concerning his qualifications as an expert witness on the subject of use of force. Because we have held that the Deputy Manager did not need to be qualified as an expert, we find no error in the Hearing Officer's decision to prohibit the line of questioning. In any event, such a decision was within the discretion of the Hearing Officer and we find no abuse in the exercise of that discretion.

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

SO ORDERED by the Board on January 15, 2015, and documented this day of February, 2015.

BY THE BOARD:

Chair (or Co-Chair)

Board Members Concurring:

Patti Klinge

Derrick Fuller

Neil Peck, Esq.

Gina Casias, Esq.