

ORDER AFFIRMING SUSPENSION

DARRELL JORDAN, Appellant,

v.

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

I. INTRODUCTION

Appellant Darrell Jordan (Appellant) appeals his March 27, 2018 thirty-day suspension by the Department of Safety, Denver Sheriff Department (Agency), for alleged violations of Career Service Rules (CSRs) 16-29 I. and R. On July 12, 2018, Hearing Officer Federico C. Alvarez conducted a hearing to determine the propriety of the suspension. Mallory A. Revel, Esq., of the law firm Foster Graham Milstein & Calisher, LLP, represented the Appellant; and Assistant City Attorneys Kristen A. Merrick and Rachelle E. Hill, represented the Agency. The Parties' Joint Exhibits 1 through 11 were admitted into evidence. Appellant testified on his own behalf and Deputy Rodrick Kemp (Deputy Kemp) also testified for Appellant. Civilian Review Administrator Alfredo Hernandez (CRA Hernandez) testified on behalf of the Agency.

II. ISSUES

The following issues were presented for appeal:

- A. whether Appellant violated CSR 16-29 I. and R. as they pertain to Agency Rule and Regulation RR 400.5 – Harassment of Prisoners; and
- B. if Appellant violated either CSR 16-29 I. and R., whether the Agency's thirty-day suspension of him conformed to the purposes of discipline under CSR 16-41.

III. FINDINGS

Appellant has been a Deputy with the Agency since October 1996. On November 9, 2017, Appellant was assigned to the Building 20 Dorm in the Denver County Jail. Inmate IN was new to this Dorm so Appellant was not familiar with him. Shortly after 5:00 a.m., Appellant was supervising the service of breakfast in the dining room to about twenty five inmates. From the camera view, Appellant stood at a desk in the far-right corner of the room. He generally faced the left wall towards eight visible tables. The right side of the room, up to the officer's desk, was open and without tables. A door to Appellant's right on the back wall provided access to a hallway in which three other Deputies staffed an officer's desk.

Ex. 3, the 17-minute video of the breakfast activity, along with other evidence showed that: Inmates entered the dining room from behind the view of the camera and lined up against the back wall, away from the camera. The inmates moved from left to right, to pick up a breakfast tray from a small table situated about midpoint against the wall. Three tier

clerks¹ staffed the tray table; one distributed trays, the second one poured coffee from a large dispenser into the inmates' cups, and the third placed a boxed drink and an apple on each tray. The inmates brought their individual cups to receive coffee. Inmates then sat down at one of the four-person tables to eat. The service of breakfast was orderly.

Inmate IN was one of the first inmates to pick up his food tray but then Appellant had refused him coffee because he had brought the wrong cup. Inmate IN was the first person to sit at one of the tables where he bartered food items for grits from other inmates who joined the table. A fifth inmate, from whom Inmate IN also got grits, added up a chair to the table. Appellant now sat down at his desk as the clerks had finished distributing breakfast and left the tray table to eat their own breakfast. Appellant did not announce that the service of food had ended. Inmate IN then moved, walking in front of Appellant to do so, to sit facing the back wall, in the far-left corner of the room at one of two tables joined together.

About five and one-half minutes after Appellant had first refused him coffee, Inmate IN left the room, retrieved the correct cup, and approached the tray table to get coffee. Appellant again denied Inmate IN coffee, now because the food line had closed. They conversed in disagreement, as Inmate IN walked away from the tray table into the open area toward the camera, then back, then left toward his seat while Appellant remained seated at his desk. Appellant generally stated that coffee was served during the distribution of breakfast, which had now concluded, so the food line was closed. Inmate IN stated his displeasure at this status, describing it as "fucked up" among other things. To this description, Appellant commented - Well, if you think that is fucked up, you ain't seen anything yet.

Inmate IN continued making complaints to Appellant while standing at his seat but then sat down as he last commented, maybe "fuck you." Appellant did not recall what Inmate IN said last but described it as "one last dig." Inmate IN lost his right shower sandal as he sat down. He picked the sandal up, straddled the bench at the table, which was positioned sideways, so that he faced the right wall while he replaced it on his foot. Meanwhile, in response to Inmate IN's last dig, Appellant stood up from his desk and ordered Inmate IN out of the room to a bench in the hallway. He opened the door and called to the Deputies outside for assistance, and moved toward Inmate IN about 7 steps. Inmate IN, still straddling the bench, then stood up and picked up his tray. In reaction, Appellant ordered Inmate IN to leave the tray on the table and moved another 4 steps to reach Inmate IN. Appellant was now facing the left wall so his back and his left side faced the camera, partly blocking Inmate IN and his tray from view.

Appellant and Inmate IN continued their debate. Inmate IN wanted to take his tray, only partly visible, with him to eat breakfast on the bench in the hallway, which Appellant prohibited. Appellant then moved left, closer to Inmate IN, so more of the tray became visible. Inmate IN held the tray about waist high, lowered it, momentarily set it on the table but then promptly raised it again. Deputies Hartzog and Kemp now approached the door to the room from the hallway. Appellant then grabbed the tray from Inmate IN, flung it upward toward Inmate IN's upper body and over his left shoulder. The food, mostly grits, fell off of the tray onto Inmate IN, the table, the bench, the floor and Appellant. The tray landed on the floor several feet behind Inmate IN. Appellant then again ordered Inmate IN out into the hallway. Inmate IN now began walking toward the door, with Appellant following. Deputies Hartzog and Kemp, who were now in the room, escorted Inmate IN out to sit on the bench.

The inmate seated across from Inmate IN flinched backward as the food flew off of Inmate IN's tray, some of which appeared to land on his own tray. He then promptly quit

¹ Tier clerks are inmates who are approved for and perform authorized work in the facility.

eating and left the table, as did the inmate seated to the right of Inmate IN. A few of the other inmates had at times looked up to watch Appellant's and Inmate IN's interaction. Most of them deliberately ignored it. Others only looked up when the Deputies were facing away toward the door as they escorted Inmate IN out of the room. No inmate had any other visible reaction.

Appellant had followed the other Deputies and Inmate IN out of the room about three steps but then returned and walked behind the view of the camera to wash the food off of his arm. One clerk then picked up Inmate IN's tray from the floor, stacked it on the table, and then retrieved and put on latex gloves to continue cleaning up the spilt food. Appellant then returned to room, shut the door, sat at his desk, and dried his lower arm with paper from a roll. A second clerk placed two chairs around the spilt food to block others from walking in it. The clerks then moved the chairs so the first clerk could begin to clean the grits on the table and the floor. He slipped as he reached for the floor but then regained his balance.

The inmates then began to finish their breakfast, discarding any remaining items on their trays into a trash can to the left of the tray table and stacking up the trays on the table. They then left the room to an area behind the view of the camera. Two more inmates who walked through the area where Appellant spilled the food also slipped but regained their balance. Then one of the clerks mopped the floor, including the area with the spilt food.

Deputy Kemp gave Inmate IN, now sitting on the bench, a towel so that he could clean the food off of himself. Last, another Deputy let Inmate IN have another breakfast tray.

Based on this incident, CRA Hernandez found that Appellant violated RR 400.5, which can be a Conduct Category D through F. CRA Hernandez designated Appellant's violation a Conduct Category D, which the Agency's Discipline Handbook defines as "[c]onduct 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." Due to Appellant's prior discipline within the applicable seven-year span, the disciplinary matrix categorizes his violation as a Discipline Level 6, for which the presumptive penalty is a thirty-day suspension. Based thereon, CRA Hernandez suspended Appellant for thirty days. Appellant filed his appeal timely.

IV. ANALYSIS

A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction of this direct appeal of a suspension pursuant to CSR 20-20 A.2. The Hearing Officer is not to conduct a *de novo* review. CSR 20-56 A.

B. Burden and Standard of Proof

In attempting a reversal of the Agency decision, Appellant bears the burden of proof, which is to prove that the Agency decision and/or its application of its disciplinary matrix was clearly erroneous. CSR 20-56 A.

C. CSR Violation

The Agency suspended Appellant based on its finding that he violated CSRs 16-29 I. and R., which state respectively:

Failure to maintain satisfactory working relationships with co-workers and other individuals the employee interacts with as part of his or her job.

Conduct which violates the Career Service Rules, the City Charter, the Denver Revised Municipal Code, Executive Orders, written departmental or agency regulations, policies or rules, or any other applicable legal authority. When citing this subsection, a department or agency must cite the specific regulation, policy or rule the employee has violated.

The Agency found that Appellant violated CSRs 16-29 I. and R. based on its finding that he violated Rule and Regulation 400.5 - Harassment of Prisoners, which states:

Deputy sheriffs and employees shall not taunt or harass any prisoner or encourage or permit others to do so. Deputy sheriffs and employees shall not maliciously embarrass, intimidate or threaten any person or encourage or permit others to do so.

Of the facts described above, CRA Hernandez disciplined Appellant based on his comment - If you think that is fucked up, you ain't seen anything yet; and on his flinging Inmate IN's tray onto the floor.

Appellant argues various claims against the Agency's finding that he violated the CSRs, including that: (1) he cannot have a "working relationship" with an inmate, (2) his actions did not meet the definitions of "taunt," "harass," and "maliciously," and (3) he did not intend to maliciously embarrass, intimidate or threaten Inmate IN.

Initially, the Hearing Officer concludes that, pursuant to CSR 16-29 I., Appellant does have a "working relationship" with the inmates, to whom he owes a duty to maintain their care and custody. Appellant interacts with the inmates in a custodian-inmate relationship which occurs within the context of his work duties. CSR 16-29 I. imposes on Appellant the duty to maintain a satisfactory working relationship with "other individuals," without excluding inmates therefrom. Appellant himself perceives and testified to a positive relationship with inmates, in which he: (1) takes care of their needs, (2) ensures that none of them are bullied, and (3) maintains an excellent rapport with them, for which they appreciate him and miss him when he is absent.

The Hearing Officer accepts that the definition of taunt² includes, "to reproach or challenge in a mocking or insulting manner : jeer at." Appellant's comment to Inmate IN - If you think that is fucked up, you ain't seen anything yet - is a taunt. Appellant is warning Inmate IN that his negative experience of losing his breakfast coffee is just the first of more bad experiences to come and/or that they are going to get worse. However, Appellant helped create Inmate IN's quandary by failing to advise him that he needed to retrieve the correct cup before the food line closed. Therefore, Appellant also thereby alerted Inmate IN that Appellant may, at his discretion, enforce more rules previously unknown to Inmate IN with detrimental impacts. Hence, Appellant's comment to Inmate IN's quandary is a taunt, not educational, as he attempted to portray it, and it escalated the tension between them.

The Hearing Officer accepts that the definition of harass includes, "to create an unpleasant or hostile situation for especially by uninvited and unwelcome verbal or physical conduct." Appellant can readily impose such a situation on Inmate IN due to the imbalance of power in favor of a custodian over an inmate. Appellant created an

² CRA Hernandez accepted the Merriam-Webster dictionary definitions from Appellant's counsel as applicable to RR 400.5.

unpleasant or hostile situation for Inmate IN verbally, through his comment as described above, and physically, by flinging his food tray onto the floor. Therefore, the record shows that Appellant taunted and harassed Inmate IN.

The Hearing Officer accepts that the definition of malicious includes, "having or showing a desire to cause harm to someone : given to, marked by, or arising from malice." The Hearing Officer supplements this definition with the definition of malice, "desire to cause pain, injury, or distress to another." The definition of malicious thus defines an action motivated by malice as a desire to cause harm to someone. The record shows that Appellant intended to treat Inmate IN with malice, that is, to inflict distress on him through his comment and by flinging his food tray to the floor. Inmate IN's evolving behavior - from voicing, with cursing, his displeasure at unwittingly losing his coffee, to resignation at having lost it, to trying to keep his breakfast, but finally to silent submission - proved that Appellant had maliciously intimidated and threatened him into compliance.

And even an inmate in jail clothing would be embarrassed by having his food thrown onto his neck, chest, and arms. Incredibly, Appellant denied knowing whether he had thrown food on Inmate IN. He testified that he had flung the tray away from Inmate IN instead of toward him, as evidenced by Ex. 3. Appellant also claimed to not recall seeing that Inmate IN had a lot of grits on his tray or that he threw grits on Inmate IN, the latter because Inmate IN walked away from Appellant (to the bench.) Ex. 3 clearly shows that Appellant stood next to Inmate IN with the tray between them before he grabbed it and flung it away. To take this action, Appellant had to have observed its contents. That Appellant also threw grits on himself, although he had actually flung the tray away from himself, shows that he knew that he threw grits on Inmate IN. In spite of Appellant's testimony, the record also shows that he maliciously embarrassed Inmate IN and therefore, that he violated RR 400.5.

For these reasons, the Hearing Officer concludes that Appellant failed to show that the Agency was clearly erroneous in finding that he violated CSR 16-29 I. and R. based on his violation of RR 400.5.

V. DEGREE OF DISCIPLINE

Appellant claims that the Agency erred in disciplining him because CRA Hernandez erred in determining his level of discipline and failed to assess him a mitigated penalty.

16-41 Purpose of Discipline:

The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

1. Seriousness of the Offense

As described above, CRA Hernandez designated Appellant's violation of RR 400.5 as a Conduct Category D, the most lenient category available under the Agency's disciplinary matrix, and he disciplined Appellant with the presumptive penalty therefor. CRA Hernandez elected the presumptive penalty after weighing Appellant's mitigating factor, his lack of comparable discipline given his tenure at the Agency, and the aggravating factors related to

his reaction to this incident. The aggravating factors include that Appellant refused to acknowledge that he: (1) acted inappropriately, (2) escalated the incident, (3) had other options in dealing with Inmate IN, (4) created potential risk to himself, other Deputies, or other inmates in the instance that Inmate IN might have reacted aggressively; and (5) created potential risk to the inmates who almost slipped on the spilt food.

Appellant continued to assert that he had a legitimate reason for his actions, to maintain the control of the dorm. The Hearing Officer assesses Appellant's actions more realistically as proving to the inmates that he had unfettered power over them. As described above, his actions were inappropriate. At his November 29, 2017, Internal Affairs Bureau (IAB) interview, he claimed that flinging Inmate IN's tray was appropriate because it ended the incident. At his March 6, 2018 contemplation of discipline meeting, Appellant made a statement committing to call a supervisor to assist in future, similar situations. However, before he flung Inmate IN's tray, he had already achieved the equivalent of his proposed solution by calling the other Deputies in for assistance. Rather than wait for their assistance, he escalated the incident further.

At the hearing, Appellant continued to describe his taunt of Inmate IN as a neutral and informative comment rather than an inappropriate one. He avoided responsibility for the consequences of flinging the tray by claiming not to know: (1) that Inmate IN had a lot of grits on his tray, (2) what amount of grits he threw on the floor, or (3) that he saw the two inmates who subsequently also slipped on them. Appellant disregarded his exposure of the other Deputies and four inmates seated at the tables where Inmate IN was eating to a potential physical struggle. Appellant also disregarded that, had Inmate IN affected trajectory of the tray when he threw it, he could have hit another inmate with it.

2. Prior Record

On April 29, 2014, the Agency suspended Appellant for ten days for using inappropriate force, in violation of its use of force policies. That discipline was upheld, and considered by CRA Hernandez. See In re Jordan, CSA 30-14 (8/25/14), *aff'd In re Jordan*, CSB 30-14A (2/19/15). Thus, this Agency discipline of Appellant is progressive, consistent with CSR 16-42 A.1.

3. Likelihood of Reform

Appellant failed to establish that he integrated the concept of reform. He did testify that he has not thrown a tray since this incident and will not do so again. However, by disregarding facts, Appellant ignores the consequences of his misconduct, diminishes its import and avoids the need to consider any reform. Especially problematic for Appellant is his description of facts, as described above, that is explicitly inconsistent with the video evidence³ and/or that contradicts his prior statements. He testified to facts contrary to the clear video evidence. When confronted with prior inconsistent statements, Appellant merely claims to not recall them to avoid admitting his inconsistencies. Appellant therefore precluded any meaningful contemplation of his reform through his tactics.

Finally, Appellant claims that he should have received a mitigated penalty due to his largely stale commendations⁴ and his excellent Performance Enhancement Program Reports. However, they are insufficient to overcome Appellant's issues described in the Seriousness of the Offense, the Prior Record, and the Likelihood of Reform so as to place his discipline beyond the

³ In addition to the items described in this Decision, in his IAB Interview, Appellant stated that he slapped Inmate IN's tray down when he clearly flung it up and over Inmate IN. At the hearing, Appellant testified that he did not see Inmate IN change tables, when he walked in front of and in Appellant's view to do so.

⁴ From 2000 to 2006, Appellant received commendations and letters of appreciation mostly for speaking to ROTC students at Denver's East High School and hosting tours of the Denver County Jail.

range of alternatives available to a reasonable and prudent administrator. See In re Romero, CSB 28-16A, 2 (6/15/17); In re Redacted, CSB 31-13A (8/8/14). Therefore, the record does not support any mitigation of Appellant's discipline herein.

For the reasons described above, the Hearing Officer concludes that Appellant failed to prove that the Agency's thirty-day suspension of him was clearly erroneous on any grounds, including that: (1) it failed to conform to CSR 16-41's Purpose of Discipline, or (2) the record lacked a reasonable justification for it, or (3) it is contrary to what a reasonable person would conclude from the record as a whole, or (4) the agency failed to follow its Rules and Regulations or its disciplinary matrix, or (5) the Executive Director of Safety exceeded her/his authority.

VI. ORDER

Accordingly, the Hearing Officer AFFIRMS the Agency's thirty-day suspension of Appellant.

DONE July 19, 2018.



Federico C. Alvarez
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements 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 decision's certificate of delivery. See Career Service Rules at www.denvergov.org/content/denvergov/en/office-of-human-resources/employee-resources/rules-and-policies.html. 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.