HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 30-06

DECISION

IN THE MATTER OF THE APPEAL OF:

JASON MARTINEZ,
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Deputy Jason Martinez (the Appellant), appeals a 45 day suspension assessed by his employer, the Denver Sheriff's Department (the Agency) on May 11, 2006. The Agency alleges the Appellant violated specified sections of the Career Service Rules and Denver Sheriff's Department Orders by playing cards on duty, by leaving a jail door unsecured in a felony dormitory, and by lying to investigators concerning the former two allegations. The Appellant denies he violated any Career Service Rule or Agency regulation and seeks reversal of the suspension.

A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on September 7, 2006. The Appellant was represented by Reid Elkus, Esq. and Donald Sisson, Esq. The Agency was represented by Joseph DiGregorio, Assistant City Attorney, with Major Deeds serving as advisory witness.

Agency Exhibits 1-3 and 5-9 were admitted by stipulation. Exhibits 4-13 through 4-16 were admitted over objection. The Appellant offered no additional Exhibits.

The Agency presented the following witnesses: the Appellant, Sergeant Harold Minter, Sergeant Kelly Bruning, and Manager Alvin LaCabe Jr. The Appellant presented Deputies Jared Simpleman, Darin Turner, and David Pacheco as his witnesses.

II. ISSUES

The following issues were presented for appeal:

1. whether the Appellant violated Career Service Rule (CSR) 16-60 A., B., E. 3., or L;

2. if the Appellant violated any of the above-stated CSRs, whether the Agency imposition of a 45-day suspension was reasonably related to the seriousness of the offense(s) and took into consideration the Appellant's past record.

III. FINDINGS

The Appellant has worked as a Denver deputy sheriff for six years. He has been disciplined twice for dishonesty, including a verbal reprimand in March 2004, and a written reprimand in December 2004.

For the past two years the Appellant has been assigned to the Denver County Jail. On March 12, 2006, he and Deputy Simpleman were working together in a shift from 2:00 a.m. to 12:00 noon on a floor designated as 12B, the second floor of a three-floor building. At that time, the 12B tier housed felons. It contains dormitory-style bunk beds with shared bathroom facilities, as opposed to individual cells and facilities. Two deputies are assigned to each shift for 12B compared with one deputy for misdemeanor dormitories. On March 12, 2006, 12B contained 44 felons. [Exhibit 4-14].

The shift supervisor, Sergeant Harold Minter (Minter), was making rounds on the morning of March 12. When he arrived at 12B at about 9:15 a.m., he found the main door (grill) to 12B unlocked. When he entered, he observed the Appellant and Simpleman seated at the officer's table across from each other. Each was holding playing cards fanned out, and there was a pile of cards between them on the table. Neither deputy noticed Minter enter 12B. When Minter came to within three feet of the deputies, he exclaimed "what the fuck are you doing?" surprising both deputies who hadn't noticed Minter enter 12B. Simpleman immediately replied "playing cards," while the Appellant quickly lowered his cards under the table and said nothing. Minter returned to the Sergeant's office and made the following notation in the Appellant's Employee Performance Evaluation Review. "While conducting Rounds I observed D/S [Deputy Sheriff] Martinez playing cards on duty with another officer in 12A." Minter's designation of the location as 12A, rather than 12B, was an inconsequential mistake.

Two days later, Minter met with the Appellant and Simpleman. He told them about his notation over the card-playing and also told them it was security violation to leave the 12B grill unlocked. The deputies asked if Minter intended to refer the case to Internal Affairs for investigation, to which Minter replied "as far as I'm concerned this is it, it's done, it's over." Neither deputy disputed the veracity of Minter's notation.

The following day, Sergeant Bruning (Bruning) of the Internal Affairs division of the Sheriff's Department undertook an investigation concerning Minter's allegations. After conducting interviews with Minter, Simpleman, and the Appellant, Bruning presented his report at a pre-disciplinary meeting on April 17, 2006 attended by the Appellant with his attorney, Reid Elkus, Esq. Following the meeting, Manager LaCabe (LaCabe) issued the Agency's notice of suspension on May 11, 2006. The Appellant filed a timely appeal on May 15, 2006.

Jurisdiction

The City Charter §C5.25(4) and CSA 2-104 b) 4) requires the Hearing Officer to determine the facts in an appeal *de novo*, meaning hearing the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975), 1975 Colo. App. LEXIS 969, (add'l citations omitted). I find both issues, whether the Appellant breached Career Service Rules, and whether discipline was appropriate, are properly before me.

IV. ANALYSIS

A. CSR 16-60 A. Neglect of Duty.

The factual issue to decide here is whether the Appellant was playing cards on duty. The legal issues are: if the Appellant was playing cards on duty, whether that act constitutes a neglect of duty; whether the Appellant was responsible for securing the 12B grill; if so, whether leaving the grill unlocked for 20 minutes constitutes a neglect of duty.

1. Whether the Appellant was playing cards on duty. The Appellant insists he and Simpleman were not playing cards, but merely sorting the cards of an UNO deck at the request of several inmates. Both the Appellant and Simpleman testified that, beginning around 6:00 a.m. that morning, inmates complained the UNO deck was short. The importance of the complaint is that inmates gamble with cards and other games, so that perceived cheating could lead to violence. [Simpleman and Appellant testimony]. I deem the following evidence relevant to the Appellant and Simpleman's assertion they were counting, and not playing UNO cards.

a. The deputies were seated in a manner such that their cards were concealed from the other, as when playing cards, rather than sitting side by side or showing their cards, as in a cooperative effort to account for missing cards.

b. The Appellant's holding cards in a fan was more likely evidence of playing cards, rather than evidence of sorting cards into their various colors and numbers as alleged by the Appellant.

c. There was no evidence Minter had any ill-will other motive to fabricate testimony against the Appellant. Minter clearly recalled the deputies were playing and not sorting cards. He also clearly recalled that when he asked "what the fuck are you doing," the Appellant

attempted to hide his cards, and Simpleman reactively answered "playing cards." Neither deputy protested at the time, nor two days later, when Minter informed them he made a negative PEPR entry concerning the card-playing. Only when under investigation a week later, did the Appellant and Simpleman deny playing cards, raising the specter of self-interest that was absent from Minter's unimpeached testimony.

d. The Appellant did not offer an alternative explanation for quickly lowering his cards, other than to indicate culpable knowledge that he was doing something wrong.

e. Simpleman claimed his "playing cards" answer was sarcastic, and that Minter, who is not Simpleman's immediate supervisor, simply doesn't know him well enough to have understood the humor; however if Minter did not know Simpleman well enough to have understood Simpleman's sarcasm, then conversely, Simpleman did not know Minter well enough to have offered such a statement and expect the irony to be understood. In addition, Simpleman indicated no contemporaneous verbal or visual indication that his answer was anything other than a true response to Minter's question. Under the circumstances, a superior officer demanding "what the fuck are you doing," Simpleman's later "sarcastic" explanation is not credible.

f. Both the Appellant and Simpleman testified they were counting UNO cards due to continuing complaints by "several" inmates beginning as early as 6:00 a.m. Incongruously, no cards were missing after they finished counting. [Appellant and Simpleman testimony].

For these reasons, I find, by a preponderance of the evidence, the Appellant and Simpleman were playing cards, not counting them. The Appellant did not dispute his card-handling occurred on duty.

2. Whether playing cards on duty constitutes a neglect of duty under CSR 16-60 A.

a. New CSR Rule 16-60 A. This is a case of first impression under CSR 16-60 A. With the repeal of CSR 16-50 A. 1), Gross negligence or willful neglect of duty, and its apparent replacement by this rule, there now appears to be little substantive difference between this rule and CSR 16-60 B., Carelessness in performance of duties and responsibilities. Semantically, the terms differ in that "neglect of duty" implies a failure to perform a duty, while "carelessness in the performance of duties" implies a slipshod practice of duty. However, both terms incorporate the concept of negligence and each term is defined, at least in part, by the other. "Neglect" means "to fail to carry out (an expected or required action) through carelessness or inattention," while "carelessness" means "negligence." *Webster's Unabridged Deluxe Edition (1979).*

As a practical matter, this change reduces the burden on the Agency to prove a violation under CSR 16-60 A. compared with its predecessor, CSR 16-50 A. 1), since the element of deliberation or consciousness is no longer required. *Compare* In re Espinoza, CSA 30-05 (1/11/06), In re Trujillo, CSA 28-04 (5/27/04), In re Stockton, CSA 159-02, 15 (12/4/02). Therefore, to sustain a violation under CSR 16-60 A., the Agency needs only to establish the following by a preponderance of the evidence: (1) the Appellant had an important work duty;

(2) he was heedless or unmindful of that duty; (3) no external cause prevented the Appellant's performance of that duty; (4) the Appellant's failure to execute his duty resulted in significant potential or actual harm.

b. Application of CSR 16-60 A. to the present case. It is conceivable that deputies might play or handle cards on duty yet not neglect their duties, for example, in order to relieve tedium where surveillance of inmates is not actively required, or as part of their duty to account for missing game pieces so as to lessen the risk of a violent reaction to perceived cheating. The Appellant claimed even though he and Simpleman were counting cards, they were aware of inmates' activity in 12B.

The Appellant's duties included devoting undivided attention to the safe-keeping of inmates, and not to engage in "playing video or board games, watching TV or other activities not directly connected with official duties." [Exhibit 5, 200.9, *see also* 200.16]. Due to the heighten risk associated with the felon dormitories, it is critically important for deputies to be alert to inmate activity. For that reason, two deputies are assigned, rather than one, as in the misdemeanor dormitories.

Minter testified neither the Appellant nor Simpleman saw him enter 12B, and remained unaware of him until he was about three feet away and asked "what the fuck are you doing?" Minter described their reaction as surprised. [Minter testimony]. The Appellant replied he was aware of Minter entering 12B [Appellant testimony].

I weighed the following in determining the credibility of the witnesses' irreconcilable statements: the Appellant's strong non-verbal statement in lowering his cards under the table; Minter's already-established credibility; Minter's credible description of the Appellant's reaction to seeing Minter as surprised after Minter had entered 12B undetected; the evident motivation for the Appellant to cover up his card-playing; and the Appellant's failure to explain his actions until one week later when under investigation.

In light of these findings, I conclude Minter's contemporaneous observation that the Appellant was unaware of Minter entering 12B, was more credible than the Appellant's later denial. Since Minter surprised the Appellant during his entry and approach to the officer's desk, then the Appellant neglected the activities of inmates in 12B during the same time. Even assuming the Appellant was counting cards, which he said took at least ten minutes, he more likely than not, neglected inmate activity during that time, as evidenced by his lack of awareness of Minter entering 12B. For these reasons, the Appellant's playing cards with Simpleman on March 12, 2006 was a neglect of duty under CSR 16-60 A.

3. Whether the Appellant was responsible for securing the 12B grill.

The main door to and from 12B is called the grill, and consists of vertical and horizontal metal bars. The Appellant did not dispute his responsibility for locking the grill, but disputed only when the grill should be locked according to 12B post orders.

4. Whether the Appellant's leaving the grill unlocked for 20 minutes constitutes a neglect of duty.

The Agency found the Appellant violated his post orders for 12B, which require the grill "will be closed and locked when not in use." [Exhibit 8, p.1]. The Appellant protested he was penalized under an obsolete order which reads the grill "will be closed and locked when not in actual use for entry or exit." [Exhibit 3, p.2]

The Appellant's claim that the Agency was required to present evidence by the drafter of the newer post order has no merit. Such practice would result in impermissibly cumbersome hearings where each dispute over the meaning of a rule would require testimony from the drafters. The option to present such testimony was open to the Appellant. The remaining issue is to determine if the difference between the old and new 12B post orders was material.

The Appellant's actual duties on March 12 required him to keep the grill "closed and locked when not in use." [Exhibit 8, p.1]. The older rule cited by the Agency, reads "when not in actual use for entry or exit." While the old rule attempted, perhaps in-artfully, to specify the conditions under which the grill may be opened, a plain reading of the rules makes it evident both rules express the same instruction, to keep the grill locked except when necessary to use it. The Appellant failed to prove there is a substantial difference between the two orders, and is therefore not prejudiced by the difference in semantics. The evidence established the Appellant unlocked the grill after the five-minute chapel call, then left it unlocked for 20 minutes while he returned to the officer's table to re-engage in his card playing, and until after Minter left. The 12B inmates were not allowed to go to chapel that morning, but grill remained unlocked for at least 20 minutes.

Given these facts, the grill was not "in use" for 20 minutes. No reasonable interpretation of either post order would permit such an expansive definition of "in use" as claimed by the Appellant. Therefore the Appellant's dispute over semantics is immaterial. In colloquial terms, the difference between the old and new post orders is a distinction without a difference.

The Appellant also argued that, since he was disciplined under the prior post order, he was not afforded due process. He claims the Agency failed to provide due process in that he was not provided notice of the violation under which he was disciplined. Because the difference between the old and new post orders is immaterial, and the Appellant acknowledged the current rule, this claim fails.

The Appellant also argued it is common practice for deputies to unlock and leave the grill door unlocked after the five minute call for mass-movement activities such as chapel or meals, and such practice has not been met with discipline. [Appellant testimony]. Even if the practice of leaving the door unlocked following a five-minute call is condoned, no evidence established that leaving the grill unlocked and unattended for 20 minutes, is permissible under the 12B post orders.

For the reasons stated in this section, the Appellant's failure to lock the 12B grill for 20 minutes after chapel call was a neglect of duty. Therefore, the Appellant violated CSR 16-60 A. by a preponderance of the evidence.

B. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

CSR 16-60 B. replaces repealed CSR 16-51 A. 6) with identical language. Therefore cases under the prior rule are instructive. To prove the Appellant was careless in the performance of a duty or responsibility, the Agency must establish the Appellant had an important work duty or responsibility, his performance was heedless of that duty, with the result that potential or actual significant harm resulted. *See* In re Owoeye, CSA11-05 (6/10/05). In order to give full meaning to this rule, I distinguish it from CSR 16-60 A. in that I review the Appellants acts, not his omissions, in light of his duty. Without this distinction, the two rules would merge, since the same facts and standards would prove both violations.

1. Work duty.

The Appellant's work duties regarding devoting undivided attention to inmate activity are stated in Denver Sheriff's Department Rules 200.9, and 200.16, [Exhibit 5]. His duty concerning the securing of the 12B grill is contained in the 12B post orders, [Exhibit 8].

2. Heedless performance.

LaCabe stated his rationale for discipline under this rule was the same as for Neglect of Duty, above. [LaCabe testimony]. The evidence, above, established the Appellant played cards while on duty, in violation of Sheriff's Department rules 200.9 and 200.16. He failed to lock the 12B grill for 20 minutes after chapel call, in violation of 12B post orders, [Exhibit 8]. Both these events were omissions of the stated duties rather than heedless or slipshod performance of those duties. Consequently, the Agency did not prove the Appellant violated CSR 16-60 B. by a preponderance of the evidence.

C. CSR 16-10 E. Any act of dishonesty, which may include, but is not limited to:

3. **Lying to superiors...**

It was established, by a preponderance of the evidence above, that the Appellant was playing UNO with Deputy Simpleman on March 12, 2006, rather than counting UNO cards as claimed by the Appellant. *Per force*, the Agency established the Appellant violated CSR 16-10 E. by a preponderance of the evidence. In addition, the Appellant re-stated his denial of playing UNO during Bruning's investigation, and during the Appellant's pre-disciplinary meeting. Each denial was an additional incident in violation of CSR 16-10 E.

D. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

Departmental Rules and Regulations

200.4 Deputy Sheriff [sic] and employees will not willfully depart from the truth, knowingly make misleading statements or falsify any report, testimony, or work related communication.

The Agency established the Appellant was playing, rather than counting UNO cards with Deputy Simpleman on March 12, 2006. Consequently, the Appellant's continued representation to the contrary, during Bruning's investigation, constitutes a misleading statement and false report in violation of Sheriff's Department Rule 200.4. Likewise, his representation that he was counting cards, made to committee members at his pre-disciplinary meeting on April 17, 2006, were misleading statements and false testimony in violation of Sheriff's Department Rule 200.4.

200.9 Deputy Sheriffs and employees to devote undivided attention to duties. Reading, playing video or board games, watching TV or other activities not directly connected with official duties, while on duty, is prohibited.

The Appellant was playing cards while on duty March 12, 2006. This activity falls within the proscription contemplated by Rule 200.9, and therefore constitutes a violation of this rule. The Appellant's denial of playing cards has already been discounted.

200.16 Deputy Sheriff [sic] and employees will not fail, neither willfully or through negligence, incompetence or cowardice, to perform the required duties of their assignment.

The Agency has previously established the importance of the Appellant's duty to safeguard the grill to 12B as required by 12B post orders, [Exhibit 8, Exhibit 3]. Based upon the factual findings, above, the Appellant was charged with and failed tosecure the 12B grill on March 12, 2006. This failure of duty constitutes negligence in violation of Sheriff's Department Order 200.16.

300.21 All employees of the Department shall read and obey all directives and orders issued by the Mayor, the Manager of Safety, Director of Corrections and Undersheriff, command officers or their designees that relate to the Sheriff Department's duties and assignments. Employees shall also read, maintain familiarity with, and carry out all Department Orders, Post Orders and written procedures relating to their specific duty posts and assignments.

LaCabe referred to the above-referenced Departmental Orders and 12B Post Orders in his assessment as to why the Appellant was in violation of this order. The Appellant, Simpleman, and Deputy Turner all testified the Agency failed to provide, failed to train, or inconsistently trained them in the procedure for securing the 12B grill, yet the Appellant acknowledged

familiarity with Exhibit 8, which contain the 12B Post Orders in effect on 3/12/06. By playing cards in violation of Department Rule 200.9, and failing to lock the 12B grill in violation of Rule 200.16, the Appellant failed to carry out those orders, both in violation of Sheriff's Department Rule 300.21.

a. **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**.

LaCabe testified the Appellant violated this rule by his lack of truthfulness, resulting in harm to the Agency. LaCabe's description of the Appellant's violation was already address in both Agency and CSR violations, above, and therefore would be redundant here. LaCabe's description of the harm done to the Agency by the Appellant's dishonesty would seem particularly apt if there were a public perception of untrustworthiness, however this matter was entirely internal, and there are adequate remedies available to the Agency between the departmental rules and Career Service Rules. The Agency did not prove the Appellant violated this rule other than by his dishonesty, which was addressed above.

V. CONCLUSION

The Appellant violated the following Career Service rules by a preponderance of the evidence: CSR 16-60 A., Neglect of Duty, CSR 16-10 E. Any act of dishonesty..., and CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules. What remains is to determine if the degree of discipline assessed was reasonably related to the gravity of the offense, took into consideration the Appellant's record and was reasonably calculated to correct the inappropriate behavior.

VI. DEGREE OF DISCIPLINE

The consequences for failing to pay close attention to the activities of felony inmates in the county jail are enormous. The Appellant was previously disciplined twice for dishonesty in 2004, for which he received a verbal, then a written reprimand. The Appellant merits a significant penalty for a third violation when he failed twice to abide by the corrective orders from previously-imposed discipline. It was apparent that LaCabe considered varying degrees of discipline including dismissal, and that his choice to assess a 45-day suspension fell within the range of discipline that was reasonably related to the gravity of the offense, took into consideration the Appellant's past record, and is reasonably calculated to correct the inappropriate behavior.

VII. ORDER

The Agency's imposition of a 45-day suspension on the Appellant beginning May 24, 2006 is AFFIRMED.

DONE this 3rd day of October, 2006.

Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the decision, as stated in the certificate of mailing below. The Career Service Rules are available at www.denvergov.org/csa/career service rules.

All petitions for review must be filed by mail, hand delivery, or facsimile transmission as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX: 720-913-5720. Transmissions of more than ten pages will not be accepted

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