CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO
Appeal No. 57-13A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

BRUCE MITCHELL,

Respondent/Appellant.

vs.

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

Petitioner/Agency.

Denver Deputy Sheriff Bruce Mitchell ("Appellant") mistakenly released a prisoner. For this mistake, he received a 28-day disciplinary suspension; sixteen days for the improper release, ten days for improper use of the internet (as the Agency alleged that Appellant was paying more attention to the internet site up on his computer rather than the business of the prisoners in front of him), and two days for failing to obey a direct order.

Appellant appealed that discipline to a Hearing Officer. The Hearing Officer sustained the sixteen day suspension for the improper release, but determined that Appellant had not improperly used the internet and that the Agency had failed to prove that Appellant violated a direct order. As a result, the Hearing Officer ordered that the discipline be modified to a sixteen day suspension.

The Agency petitioned for review of the Hearing Officer's modification of the discipline. Appellant did not appeal the Hearing Officer's order upholding the sixteen-day suspension.

The Agency first argues that the Hearing Officer's determination that the Agency failed to prove Appellant disobeyed a direct order is clearly erroneous. The Agency makes this claim based on the fact that there is direct testimony that a direct order was given, that said order was not followed, and that the only testimony to the contrary is that Appellant (and his co-worker, Deputy Kline) did not remember receiving any such order. The Agency argues Appellant's lack of memory cannot act to dispute or rebut actual record evidence; and since there is no record evidence disputing the fact that an order was given, the Hearing Officer's conclusion to the

contrary is clearly erroneous. The Agency appears to seize on the Hearing Officer's language at page 6 of her decision where she relates, "Both Appellant and Deputy Kline testified that they were given the last known address, but neither recalled a specific instruction that they must go there and only there." We believe the Agency has misinterpreted the Hearing Officer's words.

It appears plain from the record that the Hearing Officer did not intend to say that the two Deputies had no recollection of what was told to them, but rather, that they *did* recall the conversation in question, but that no such order was given during that conversation; that is, the officers did not recall being given an order because they recalled that said order was, in fact, not communicated. A review of the Deputies' actual testimony indicated that they recalled not having been given specific instructions to go only to the Aurora address, so that the Hearing Officer's statement about them not recalling the specific order was, in fact, an expression that they had recalled that some other information had been conveyed and not that they could not remember at all what had been said to them. Appellant testified that he had not been given an order to go only to the last known address (Tr. Vol. II, p. 54:12-20). Deputy Kline testified that when he was instructed go find the prisoner, he was not given any parameters limiting his search (Tr. Vol. I, p. 255:3-11).

Consequently, it is not the case, as implied by the Agency, that the findings concerning the terms of the order pit the positive testimony of the Captain issuing the order versus the lack of recollection of the individuals receiving the order. Rather, the Hearing officer was presented with conflicting testimony. The Captain testified that she issued an order to the Deputies to go to the last known address and only to the last known address. Appellant and Deputy Kline testified that the Captain did not give them an order to go only to the last known address. The Hearing Officer weighed the evidence, made credibility determinations, and concluded that the Agency had failed to prove by a preponderance of the evidence that the Captain issued the order as she had stated. There is evidence in the record from which the Hearing Officer could reasonably conclude that the order was not given. Because the Hearing Officer's finding is supported by record evidence, it is not clearly erroneous.

The Agency next argues that the Hearing Officer erred by misinterpreting Career Service Rule 16-60Z – Conduct Prejudicial. We do not see how (and the Agency does not explain how) the Hearing Officer misinterpreted this rule.[1] Rather, the Agency actually argues that the Hearing Officer erred when she found that the Agency failed to prove actual harm to the Agency, a requisite for the finding of a violation of this rule. The Hearing Officer concluded, after reviewing the evidence, the only attempt at a showing of actual harm to the City came from the testimony of the Deputy Manager of Safety who testified that the public would be outraged if it knew of this event: but that this "harm" was speculative and not actual.[2] We agree. We find no

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[1] In fact, the very first sentence of the Agency's argument, in the middle of page 9 of its brief, seems to concede that the Hearing Officer perfectly understood what was required to prove a violation of this rule.

[2] Agency Exhibit 2, the letter imposing discipline on Appellant refers to the "risk" of harm to Appellant and the fact that Appellant's actions "could have had" dire consequences (Agency Exhibit 2-8), appearing to us to be an admission by the Agency that while Appellant's actions could have caused harm, they did not actually cause harm.

misinterpretation and further find that The Hearing Officer's factual findings and conclusions are supported by substantial evidence in the record.

The Agency next makes an argument concerning Appellant being distracted, claiming that regardless of why he was distracted, his distracted state led to the erroneous release of the prisoner. The Agency does not inform us as to under which ground for appeal this argument would fall. And, indeed, we see no ground stated under C.S.R. 19-61.[3]

Regardless of whether there are actual grounds for considering this argument, we note Appellant was specifically charged with violating C.S.R. 16-60 D, which prohibits, in relevant part, "the unauthorized use of the internet." The Hearing Officer determined that Appellant's internet use did not contribute to the erroneous release of the prisoner. She found as a matter of fact, that Appellant had minimized Craigslist (which had been on his computer prior to his interaction with the prisoner) and that Appellant was not actively looking at the internet site at any time when the prisoner was in front of him. The Hearing Officer also found that while Appellant was surely distracted, it was not by the internet. These findings are supported by the testimony of Appellant himself as well as the video of Appellant's interaction with the prisoner. Because these findings are supported by record evidence, we will not disturb them.

The Agency suspended Appellant for ten days specifically as a result of his allegedly improper use of the internet. The Hearing Officer, correctly, in our view, ordered that the ten days be restored to Appellant. The Agency, however, urges us to reinstate the discipline originally imposed for this violation (10 days of unpaid suspension), even if the specific violation was not proven, arguing that if Appellant "was distracted by the processing paper work and an inmate on the phone, his conduct is that much more egregious and the disciplinary determination by the MOS of a 28 day suspension should be reinstated." [4]

This argument, however, leads us to a place we will not go. The Agency had already suspended Appellant for sixteen days as a result of his erroneous release of the prisoner. Were we, the Hearing Officer or the Agency to take the ten days not proven for the internet use and tack them on to the sixteen days imposed for the erroneous release (because Appellant was otherwise distracted)[5], we would have a classic case of improper charge stacking. In other words, we would be suspending the Appellant for sixteen days for the initial erroneous release (the sixteen days being the proper punishment for this offense per the disciplinary matrix), and then punishing Appellant an additional ten days for being distracted to the point where he erroneously released a prisoner. While improper use of the internet is a separate offense and one that can be separated (and, therefore separately punished from) the erroneous release: the act of erroneously releasing the prisoner and erroneously releasing the prisoner because one was distracted cannot be separated and are not distinct acts.

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[3] Those grounds are: A) New evidence; B) Erroneous rules interpretation; C) Policy-setting precedent; D) Insufficient evidence; and E) Lack of jurisdiction.

[4] Agency brief, p. 13

[5] We are not convinced that the Hearing Officer or this Board has the authority to impose a higher level of discipline for a particular charge than was originally imposed by an agency or that the authority exists to re-allocate discipline from an unproven charge onto a proven charge.

An agency has the discretion to charge and impose discipline based on the totality of circumstances (e.g. impose a thirty-day suspension for conduct which violates any number of rules) or it may impose discipline in a manner where a specific amount of discipline is attributed to specific acts of misconduct (as was done here). In this latter scenario, an agency may not impose discipline for one act of misconduct which violates several rules and impose that discipline to be served in a consecutive fashion[6]. That is charge stacking which we do not approve[7].

Finally, the Agency claims that the Hearing Officer erred as matter of policy in improperly admitting evidence of subsequent remedial measures in the form of new policies and equipment designed to prevent erroneous releases. We have held on numerous occasions that the rules of evidence do not strictly apply in our hearings.

Second, as Appellant pointed out at hearing, per C.R.E. Rule 407 evidence of subsequent remedial measures is inadmissible "to prove negligence or culpable conduct in connection with the event." The evidence was offered neither to prove the Agency's negligence, nor its culpable conduct in relation to the erroneous release.

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

SO ORDERED by the Board on September 25, 2014, and documented this day of November, 2014.

BY THE BOARD:

Colleen Rea

Chair (or Co-Chair)

Board Members Concurring:

Derrick Fuller

Gina Casias

Neil Peck

[6] We note at page 4 of the Hearing Officer's decision, she found that the Agency imposed sixteen suspended days for the erroneous release, ten days suspended for the improper use of the internet and two days suspended for disobeying an order with, "the three penalties to run concurrently to total a 28-day suspension." We believe the Hearing Officer misspoke. Had the penalties actually been assessed concurrently, Appellant would have served only sixteen suspended days. The record reflects that the penalties were imposed consecutively.

[7] Improper stacking could be avoided by having the separate rule violations and the separate disciplines for those rule violations stemming from the same acts being served concurrently.