CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. A71-18

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

ANDRIA SPARER,
Appellant-Petitioner,

vs.

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

Denver Deputy Sheriff Andria Sparer (Appellant) was working at the Downtown Detention Center (DDC). She was assigned to work at a desk in the booking area where new arrestees would wait to be booked into custody or re-booked into the DDC from elsewhere. Denver Deputy Sheriff Kitzman had the same assignment and was working at the same desk seated next to her.

On the day in questions, Sgt. Lovato and Deputy Hammernik were attempting to escort an unruly inmate to an isolation cell. The inmate was yelling, cursing and physically resisting Lovato and Hammernik, causing such a commotion that Appellant was roused from her desk chair to observe the incident. Deputy Kitzman also got out of his chair to view the commotion, but upon seeing what was going on, ran from his desk to help Lovato and Hammernik control the unruly prisoner. The struggle was loud enough so that at the same time Kitzman left his desk to assist his fellow deputies, four other deputies ran past Appellant, also with the intent of helping Lovato and Hammernik control the prisoner.

Appellant, however, evidently made an independent assessment of the situation and came to a different conclusion about an appropriate course of conduct. Though Appellant did take four slow steps in the direction of the altercation, she then stopped, looked down, and turned around to go back to her desk, while continuing to look down. As she got back to her desk she looked up in time to see another deputy run past her to assist Sgt. Lovato and Deputy Hammernik.

As she began to re-take her seat behind her desk, Appellant looked towards the fingerprint area where she observed a nurse standing, and she went over to the

fingerprint area to investigate this. On her way to the nurse, she looked at the cell where Lovato, Hammernik and others were still struggling to control the unruly prisoner. Appellant never did offer assistance in controlling the prisoner.

Eventually, the Denver Department of Safety, Denver Sheriff Department (Agency) determined that Appellant's failure to offer her assistance to Lovato and Hammernik violated its internal rule, RR-200.17.1 (Failure to Aid and Protect Fellow Deputies – Unreasonable) which states:

> Members of the Department shall not unreasonably fail to assist and protect each other and those with whom members come into contact during the performance of their duties.

As a result, Appellant was issued a ten-day disciplinary suspension. Appellant appealed her suspension to a Hearing Officer.

The Hearing Officer determined that the Agency's version of the events, as well as its application of RR-20.17.1 and the Agency's Disciplinary Matrix, were reasonable and affirmed the discipline, finding that Appellant had failed to prove the Agency's actions to be clearly erroneous. Appellant has now appealed the Hearing Officer's decision to this Board. We AFFIRM the Hearing Officer's decision.

Appellant's first claim in her brief is that the Agency bears the burden of proving that a rules violation occurred by a preponderance of the evidence. This is wrong and it is the second time Appellant's counsel has asserted the wrong standard in briefing.

This time, the incorrect statement of the burden of proof was made two weeks after we corrected Appellant's counsel in our published opinion in the *Fazio* appeal (No. 14-18A). Although it is possible this was sloppiness rather than an intentional attempt to mislead us, it is still inexcusable. We expect that Appellant's counsel will correctly state the burden of proof in future briefings. Failure to do so will result in the brief being stricken.[1]

This appeal, of course, is an appeal of the Hearing Officer's decision. The claim made by Appellant, however, is not applicable to the Hearing Officer, but rather, is guidance to the Agency decision-maker as to how he or she should determine whether there is sufficient evidence to bring charges of discipline in the first instance. At Hearing, per Career Service Rule 20, the burden rests with the Appellant to prove that the Agency's disciplinary actions taken against her were clearly erroneous.

Starting at page 7 of her brief, Appellant claims the Hearing Officer erred by finding that the Agency's determination of a rules violation was reasonable because the rule she violated applies to an unreasonable failure to offer assistance and, according to

[1] Our concern of sloppiness is bolstered by Appellant's brief, at the very top of page 7, where counsel takes issue with the Hearing Officer's determination concerning "Deputy Fuller," who, is neither a party to nor a character in this appeal.

Appellant, her failure to offer assistance to Hammernik and Lovato was reasonable. She bases her reasonability claim upon an assertion that in some instances, a large number of officers responding to an incident might have the potential for injury to responding deputies or the inmate(s) involved.

Even assuming this to be true, the fact that Appellant can imagine a situation where so many deputies respond to a disturbance that it creates a safety risk for the responding deputies does not prove that the situation presented in this case is such a situation and it most definitely does not prove that the Agency was clearly erroneous in determining that this was not such a situation.

Appellant also claims that her failure to go to the assistance of Hammernik and Lovato was not unreasonable based simply on the sheer number of deputies that eventually did show up to assist. We do not find this argument persuasive.

The record reflects that at the time she first noticed the commotion between the inmate and Hammernik and Lovato, those two were the only deputies interacting with the prisoner. Seeing the incident from the same vantage point, Deputy Kitzman left his desk and ran to help the two deputies. Four other deputies heard the commotion and also understood their obligation and ran to assist Hammernik and Lovato.

The record demonstrates that at the time Appellant chose not offer assistance to Lovato and Hammernik, there was not a plethora of other deputies on scene. The fact that eventually, a large of number of deputies appeared to help Lovato and Hammernik does not justify Appellant's decision to fail to offer assistance at a time when the horde of deputies had not yet materialized.

Further, and most importantly, we note the Hearing Officer based his ultimate finding on the testimony offered by Sgt. Lovato. Sgt Lovato was unequivocal in testifying that regardless of the situation, it is not up to an individual deputy as to whether they should respond to a situation such as the one presented in this case. Rather, it is up to the sergeant in charge of the situation to determine how much help is enough help.

In fact, in this case, Sgt. Lovato testified that that she did not believe too many deputies had responded to the incident. She further agreed with a question posed to her at hearing that a deputy should never look to the number of deputies who have already responded to a situation in determining whether they, themselves, should respond; elaborating that there is always something that deputy can be doing, even if he or she cannot get physically hands-on with the disruptive inmate.[2]

RR- 200.17.1 required Appellant to offer assistance to Hammernik and Lovato. She chose not to do that. We agree with the Hearing Officer, and the record supports the conclusion, that Appellant did not prove that the Agency was clearly erroneous in

[2] See Hearing Officer's decision, p. 4.

determining that her failure to offer assistance was unreasonable under the circumstances, and, therefore, in violation of Agency regulations.

Appellant next claims the Hearing Officer erred in upholding the Agency's imposition of a ten-day suspension. Specifically, Appellant argues the Disciplinary Handbook which provides guidelines to the Agency for implementing its Disciplinary Matrix requires the disciplinary decision-maker to take into account all of the circumstances in a case to determine whether an aggravated, mitigated or presumptive penalty should be imposed.

Appellant also notes the Handbook's guidelines advise that when discipline is imposed, those sanctions must reflect all facts and circumstances relevant to the determination of appropriate discipline; and that when mitigating and aggravating circumstances are considered, they must be documented.

The Handbook lists factors that could be considered as mitigation and lists others that could be aggravation. Appellant claims that because the decision-maker failed to document consideration of every listed mitigating factor, he has broken the rule of the Handbook and said breaking of the rules requires us to invalidate the discipline imposed. We disagree.

First, we are not persuaded by Appellant's rhetorical switching of terminology. At page 10 of his brief, Appellant correctly refers to sections of the Agency's Discipline Handbook as "guidelines." At page 11 of his brief, Appellant refers to those same Handbook sections previously acknowledged as "guidelines," as "rules." Appellant was correct the first time. The Handbook offers guidelines. It does not create rules.

And we have never held, and will not hold today, the trivial and inconsequential failure to interpret and implement the guidelines literally in the manner suggested by Appellant here amounts to a breach of rules, or even a sufficient departure from the guidelines to cause us concern.

We have held previously, and continue to hold, the Handbook constitutes a set of guidelines that must be followed to the extent the overall sense of those guidelines reflect their intent of imposing fair and consistent discipline. So long as the guidelines in the Handbook are substantially complied with in reaching those ends, we will not disturb any imposed discipline.

The Hearing Officer found, and the record supports the finding, that the Agency appropriately followed the guidelines in imposing discipline on Appellant.[3]

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[3] Also, as noted above and at page 10 of Appellant's brief, discipline must reflect relevant circumstances. It is up to the decision-maker, in the first instance, to determine what is relevant in considering the appropriate sanction, that is, the decision-maker, the Agency's Civilian Review Administrator (CRA), has the discretion to determine what is and is not relevant in reaching his ultimate decision as to what discipline he will impose. Appellant has failed to prove that the CRA abused his discretion regarding the consideration of aggravating and mitigating circumstances.

Appellant further argues that the Agency's decision-maker, its Civilian Review Administrator (CRA), failed to give sufficient weight to what Appellant believed to be mitigating circumstances. First, to the extent that the weight to be accorded any mitigating or aggravating factor is a matter within the discretion of the CRA, we see nothing in this record that would indicate the CRA abused this discretion.

The fact that Appellant, himself, believed he is entitled to more mitigation is not grounds for us finding that the CRA abused his discretion or that the Hearing Officer, in upholding the discipline, erred.

In any event, we are not convinced that Appellant is correct in her claim that the mitigating circumstances she claims existed, were actually present. For example, at page 12 of her brief, Appellant claims to be entitled to mitigation under Handbook Section 19.6.1. Appellant claims that because she acknowledged what she did, she is entitled to mitigation.

But consideration of mitigation under Handbook Section 19.6.1 requires; specifically, evidence of the employee's, "willingness to accept responsibility" ***and*** the employee must "acknowledge wrongdoing."

Both the CRA and the Hearing Officer found that Appellant had failed to acknowledge wrongdoing; with the Hearing Officer specifically noting her testimony where she admitted that if faced with the same situation in the future, she would act in the exact same way. Appellant's admission that she did something is not a mitigating factor, absent her recognition and admission that what she did was wrong.

And Appellant's claim to entitlement of mitigation under Handbook Section 19.6.3 is absurd. That factor has the CRA taking into account "the culpable mental state of the deputy in the commission of the violation."

Appellant claims she is entitled to mitigation because she made a decision not to assist Lovato and Hammernik based on her determination that enough deputies had already responded to the situation; in other words, because she didn't believe she was violating a rule, she did not have a culpable mental state. But it is precisely her intentional and wrong decision which both constitutes and proves her culpability in the rules violation.

Appellant was under no misapprehensions about the rule in question. No one was in any way acting on her physically or psychologically, to get her to disobey the rule. There is no indication that her thinking was clouded or impaired. There was no evidence that that Appellant was impaired from making a well-reasoned, correct choice because she was under some sort of extraordinary stress, say from something emotional such as just having attended the funeral of a close friend or family member or finding out that she or a loved-one was just diagnosed with cancer. There was nothing in the record to indicate that Appellant's mental state was anything *but* culpable.

The decision to fail to offer assistance to Lovato and Hammernik was not hers to make, nevertheless she made the wrong decision in failing to offer assistance, and she made it knowingly, willingly and intentionally. Appellant is not entitled to mitigation because she intentionally chose to disobey a rule.[4]

Ultimately, it is immaterial as to whether Appellant might be entitled to more consideration of mitigation, because that, in and of itself, would not be sufficient grounds for overturning the Hearing Officer's decision. Career Service Rule 20-56(B)(1)(c)(ii) states:

> c. Discipline shall be deemed to be "clearly erroneous," in whole or in part, in the following circumstances:
>
> ii. If the EDOS fails to follow the applicable Departmental guidelines, rules or regulations, an applicable matrix or its associated guidelines, and absent such failure the discipline imposed would not have resulted.

In the instant case, Appellant has failed to prove that even if the CRA made some errors in the application or implementation of the provisions of the Handbook, that absent these mistakes, she would have received a different, lighter punishment. Absent said proof, these alleged errors committed by the CRA are not grounds for overturning his disciplinary decision.

Finally, Appellant argues that the Hearing Officer's decision sets bad precedent by encouraging or promoting inconsistent instruction and expectations regarding assistance in use of force situations. The Hearing Officer's decision does no such thing. Rather, it merely reinforces the current rule which requires deputies to assist other deputies. The Hearing Officer's decision keeps in place the well-settled practice that it is not the deputies' place to decide how much help is too much help, but that said decision rests solely with the ranking officer in charge at the incident.

The Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on June 20, 2019, and documented this 18th day of July 2019.

BY THE BOARD:

Karen DuWaldt, Co-Chair

Board Members Concurring: Neil Peck, Patricia Barela Rivera, David Hayes, Tracy Winchester

[4] Appellant also claimed entitlement to mitigation under Handbook Section 19.6.5, but that mitigating factor only applies to offenses of minimal severity. The CRA and the Hearing Officer, however, found Appellant's offense to be serious (Hearing Officer's decision, p.5). This mitigating factor, therefore, need not have been applied to Appellant's case.

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **DECISION AND ORDER** on July 18, 2019, in the manner indicated below, to the following:

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For the Career Service Board