

**DECISION MODIFYING TWO-LEVEL DEMOTION WITH ATTENDANT LOSS OF PAY
TO A 30-DAY SUSPENSION**

GARY WILSON, Appellant,

v.

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

INTRODUCTION

The Appellant appeals his demotion for alleged violations of specified Career Service Rules, and Agency rules, regulations and orders. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on September 21, October 2, and 3, 2017. The Agency was represented by Ashley Kelliher, Esq. of the law firm of Allen & Curry, PC, while the Appellant was represented by Nathan Chambers, Esq., of the law firm of Nathan D. Chambers, LLC. Agency exhibits 1-40 were admitted. Appellant's exhibits A-I, K-GG, LL-NN, and PP-TT were admitted. Shannon Elwell, former Civilian Review Administrator (CRA), testified for the Agency. Appellant and Lisa Calderon testified on behalf of the Appellant.

I. ISSUES

The following issues were presented for appeal:¹

- A. whether the Appellant violated Career Service Rule (CSR) 16-29 A, R, or T;
- B. if the Appellant violated one or more of the Career Service Rules, whether the Agency's decision in assessing a two-level demotion conformed to the purposes of discipline under CSR 16-41;
- C. whether Appellant disclosed official misconduct pursuant to Denver's Whistleblower Ordinance and, if so, whether such disclosure was a substantial or motivating factor in his demotion.

II. FINDINGS

A. Findings regarding discipline.

The Appellant, Gary Wilson, has been employed with the Denver Sheriff's Department (Agency) for 25 years. He began as a deputy, was promoted to Sergeant in 1998, then to Captain in 2000, Major in 2003, Chief in 2006, and became the Denver Sheriff in 2010. He resigned

¹ Appellant's notice of discipline also alleged the Civilian Review Administrator lacked authority to assess discipline; however, no evidence was produced at hearing regarding the allegation, and I consider the claim was withdrawn. Moreover, the Career Service Board has settled this issue definitively in favor of such authority. In Re Gale, CSB 02-15A, 1-3 (7/21/16).

that position in 2014 without fault,² and returned to the rank of Chief. At the time of the incident underlying this appeal, he was one of five Division Chiefs in the Agency. That rank is immediately below the Sheriff.

On September 1, 2016, Wilson received a phone call from Alvertis Simmons who he had known for five years,³ and who Wilson knew as a close friend or relative of the family of former Denver Mayor Wellington Webb. Simmons told Wilson that Webb's granddaughter, who is also the niece of current Executive Director of Safety Stephanie O'Malley, had an active warrant for her arrest. Simmons wanted to arrange for Webb's granddaughter to turn herself in. During a series of phone calls and messages that day, Simmons asked Wilson many questions about a possible bond amount and how long it would take for Webb to see a judge and be released from custody. Wilson called the National Crime Information Center (NCIC), a law enforcement database, and asked civilian employee Selena Dupree to run a search of Webb, which confirmed the warrant. Wilson relayed that information to Simmons and also told Simmons that Webb did not have a pre-set bond, meaning she would have to be held in custody until she saw a judge who would then set bond. After Wilson told Simmons to bring in Webb as soon as possible, Simmons told Wilson he would bring in Webb next week, after the [Labor Day] holiday.

Six days later, September 7, 2016, Simmons and Wilson exchanged another series of phone calls and texts. Wilson told Simmons that if Webb appeared after 2:00 or 3:00 p.m., he could not guarantee Webb would be seen the same or even the next day, so that earlier is better.

Wilson then called his sister, Captain Phazaria Koonce to tell her the former Mayor's granddaughter would be turning herself in. Koonce was in charge of operations at the DDC, had no duties regarding the reception or processing of inmates, and was largely unfamiliar with those processes. [Exh. 23-10].

The following day, September 8, Simmons called Wilson to tell him he was on his way with Webb. Wilson said, "give me a ring when you guys are in the lobby and I'll have someone come out and meet you guys." Wilson called Koonce to advise her Webb was on her way in, and added that Sergeant Givens should assist Koonce because he was familiar with warrants. [Id]. Givens had never taken anyone into custody on a warrant from the lobby of the DDC and didn't know the process. [Exh. 20-21].

Koonce called Givens, telling him her goal was to expedite Webb's appearance in court. "It's typically taken up to two to three days for people to get into court, so let's try and get her in to court before then." [Exh. 2-7; Exh. 23-5]. She asked Givens if he still knew people in the NCIC who could expedite the warrant-checking process.

Koonce and Givens met Simmons and Webb in the DDC lobby. Givens went to the ID bureau to retrieve Webb's warrant, explaining to the agent he was trying to expedite the process, as the warrant was for the granddaughter of the former Mayor. The Agent referred him to her supervisor. In her 12 years in the warrants division, the Agent had never been asked to expedite the book-in process for anyone other than for safety reasons such as a violent inmate. The supervisor said it was the first time she had been asked to expedite a warrant because of a family relationship.

² In reviewing discipline, one might ask why the highest-ranking uniformed officer in the Denver Sheriff's Department, would voluntarily resign his position. The only evidence concerning the leadership change was Wilson's testimony that the Mayor and he mutually agreed to it for political reasons. No wrongdoing was alleged as a reason for the change and none was inferred in this decision.

³ In addition to working with Simmons, a community activist, Wilson also spent time with and supported Simmons' youth basketball camp by speaking and playing basketball there. [Exh. 26-14].

Givens told the supervisor he was trying to expedite Webb's warrant so that she could go to court the same day. The supervisor asked her manager to let the Commander of the unit, Commander Lisa Fair, know about the request. Fair accommodated the request. The supervisor told her staff to expedite the process which meant taking Webb's warrant out of sequence and processing her warrant before any others. The supervisor calculated that expediting Webb's warrant likely saved several hours compared with the normal process.

Givens returned to the DDC with Webb's warrant. He went to the intake division and notified Deputies Kirkbride and Pohl that the granddaughter of the former Mayor would be coming through, giving both of them the impression she was going to be treated differently.

Givens returned to the DDC lobby to meet Koonce and Webb. Koonce conducted a cursory pat-search of Webb, then she and Givens walked Webb the wrong way, against the normal inmate processing direction, to the intake area. They did not handcuff Webb as is required by the Reception Desk Post Order. Normally, an officer from the intake division comes to the lobby in order to accompany self-reporting inmates to the intake area whereas here, Koonce and Givens accompanied Webb. Deputy Britton, assigned to the Intake post, assumed Webb was being given a tour by Koonce and Givens since she was not handcuffed or searched. Deputy Sawyer approached Britton, telling him "that is former Mayor Wellington Webb's granddaughter and they want us to rush her through and this is bullshit and this is what Frank Gale got fired for and I'm not getting fired for it."

When Koonce and Givens arrived with Webb in Intake, she told Sgt. Hitchcock, a 22-year veteran "that she was walking somebody through." Givens asked Deputy Kirkbride for Webb's paperwork, announcing "I'm going to go take it to Records to try and get her to court the same day." Hitchcock told Givens "we're not walking anyone through." Givens replied "it's Mayor Webb's granddaughter," but Hitchcock answered, "I don't care about that, she's not walking through." Hitchcock later said it was not Koonce's function to take an inmate to Intake and described their route as "cross-contamination because everybody that's coming out already has their stuff and should be heading out... it's not an 'in'-door."

In the Records Department, Givens stood by as Kirkbride entered Webb's information which Givens had carried in. Kirkbride found it highly unusual that Givens and Koonce had walked Webb through the process. Givens then told Sgt. Jordan that Webb needed to be rushed through the process. Jordan replied "we don't do that anymore. That's an unlawful order." The request reminded Jordan about the Frank Gale case.⁴ She was sufficiently concerned to contact Captain Gutierrez who told Jordan to treat Webb like anybody else, and advised Jordan to call Chief Oliva to advise him what was happening. Deputies Jarock and Vigil overheard the exchange between Jordan and Givens and said about the attempted curtailed procedure "that isn't right." They approached their supervising Sergeant, Hitchcock, about it and were told "we don't rush anybody through the process. She will get processed just like everybody else." Jarock and Vigil, who photographed new inmates and dealt with the ID Bureau daily for a long time said, "we've never seen anybody's fingerprints clear that quick, even on days like holidays when we're really slow." Oliva called Koonce and ordered her that no preferential treatment was to be given to Webb. Executive Director of Safety Stephanie O'Malley sent an email to Sheriff Firman directing him to treat Webb the same as any other inmate.

The normal procedure for a self-reporting arrestee is to provide photo identification. The Information officer then calls Intake and an officer comes up front, pats down the arrestee and walks them back to Intake. The inmate is escorted through metal detectors, with emptied pockets, and everything metal is removed. The inmate is searched again by facing the wall on

⁴ In re Gale, CSA 02-15 (11/23/15), *aff'd In re Gale*, CSB 02-15A (7/21/16).

footprints painted on the floor. Women are searched head to toe by women deputies. The deputy then passes a wand called a Transfrisker over the arrestee's entire body to search for metal. Deputies also check inside of the mouth. Bare feet, and shoes and socks are examined. Arrestees then walk through another metal detector, then stand for their photograph, after which they sit in a waiting area. In short, the intake process is extensive and exacting in order to maximize security and to minimize mistakes.

Webb was not handcuffed when she arrived in Intake, did not pass through any metal detector, was not pat-searched in the Intake area, did not stand on footprints, and was not required to remove metal beads from her hair. Deputy Kirkbride felt it was not her place to question superior officers Koonce and Givens, about the failure to follow normal procedures in the Intake area, but the incident created widespread gossip in the area about the special treatment afforded Webb.

Wilson was served with a contemplation of discipline letter on March 30, 2017. A contemplation of discipline meeting was held on May 11, 2017, which Wilson chose not to attend as is his right. On June 8, 2017, the Agency served Wilson with its notice of a double demotion - from Division Chief to Captain - signed by Civil Review Administrator Shannon Ellwell, [Exhibit 1]. This appeal followed timely on June 22, 2017.

B. Findings regarding Whistleblower retaliation.

1. Agency Reorganization.

In early 2016, the Denver Sheriff Department reorganized its command structure. As is pertinent to this case, instead of five Chiefs with equal authority, two of the Chiefs were given authority over the others. Chief Connie Coyle was made Chief of Administration, with authority over Wilson and two other chiefs. Coyle received a pay raise, a different badge with the designation of "Chief" while Wilson retained his badge and working title of "Division Chief." [Wilson testimony]. Both remained at the CSA classification of Chief. [compare Exh. W with Exh. X].

Wilson believed the reorganization violated the Career Service Rules and Agency policies. A few days after the reorganization was announced, Wilson complained to Executive Director of Safety Stephanie O'Malley about the reorganization. He also voiced his objection to the reorganization in a memorandum to Sheriff Patrick Firman on February 15, 2016. [Exh. V]. Wilson wanted his objection to remain a private matter, as he stated his memo "is not intended to be used through the formal complaint channels... to resolve this matter in a way that will prevent public disclosure and a resolution that remains private." [Id.]. However, the memorandum also specified Wilson's belief that the reorganization violated several Career Service Rules, parts of the Denver Revised Municipal Code, and also Agency policies. [Id.]. Neither O'Malley nor Firman took any action.

2. The subordinate sergeant.

On February 17, 2017, Wilson informed a sergeant that he would be reassigned to a new assignment under Wilson. Wilson asked the sergeant not to discuss his upcoming assignment with anyone. Instead, the sergeant spoke with the other sergeant he was about to replace. The second sergeant then complained to Chief Connie Coyle about being replaced.

Wilson believed the sergeant's prohibited communication was a violation of his direct order and wanted to assess discipline, but, during a meeting between the sergeant, Wilson, and Chief Coyle, Coyle told Wilson she would handle the matter informally.

Two months later, Wilson learned Coyle was transferring the sergeant to the Agency's Internal Affairs Bureau. In a memorandum dated April 17, 2017, Wilson complained to Firman, asking him to reverse Coyle's decision. He also asked Firman to consider an investigation, [Exh. FF], but Firman denied the requests. On June 2, 2016, Wilson sent a complaint to the Independent Monitor about Firman and Coyle's decision not to investigate the incident, alleging misconduct on the part of Firman, Coyle, and the sergeant. [Exh. DD].

III. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR 19-10 A.1.b., as the direct appeal of a demotion, and under CSR 19-10 A.1.f., as the direct appeal of a whistleblower retaliation claim. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion to prove Wilson violated one or more cited sections of the Career Service Rules, and to prove its decision to demote Wilson two levels, from Division Chief to Captain, complied with CSR 16-41. Wilson retains the burden of persuasion to prove the Agency engaged in unlawful retaliation for protected whistleblower conduct. A preponderance of the evidence standard applies to each party's claim.

C. Career Service Rule Violations

CSR 16-29 A., Neglect of duty or carelessness in performance of duties and responsibilities.

The notice of discipline did not distinguish whether Wilson's conduct was neglect or careless performance of a duty and did not identify a particular duty outside of the other cited Agency rules. The Agency's only basis for alleging this violation was a reference, in the notice of discipline and in Elwell's statement at hearing, that Wilson violated all cited rules by his preferential treatment of Webb when he spoke with Simmons, and by disclosing confidential information from the NCIC.

The remaining paragraphs in the notice of discipline described a combination of credibility issues, specific bad conduct, actual and inferred effects of that conduct, a discussion of foreseeability, and repeated references to the specified Agency rules and regulations. Aside from those specified violations that require their own analyses, I did not find a specified duty to evaluate. I find the notice, as written, failed to provide reasonable notice as to what duty or duties were alleged to have been violated. As such, no violation is found here, and this allegation is dismissed.

CSR 16-29 R., 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.

Denver Sheriff Departmental Rules and Regulations (RR)

RR 200.19 Performance of duties.

This Agency rule serves as a conduit for linking specific violations of its rules and regulations to Career Service Rule 16-29 R. In that regard, the Agency cited the following specific rules Wilson allegedly violated.

RR 200.6 Access to NCIC/CCIC

Deputy sheriffs and employees shall not access and/or disclose National Crime Information Center (NCIC)/Colorado Crime Information Center (CCIC) information, records, reports, etc. for personal use and/or gain or for any other unauthorized purpose.

The NCIC contains confidential criminal justice information, is closely monitored for unauthorized use, and misuse may jeopardize accreditation for use by an entire law enforcement agency. In the notice of discipline, and in testimony, Elwell stated the rule prohibits giving NCIC information to a member of the public as Wilson did for Simmons. [Exh. 1-28; Elwell testimony], but the plain language of the rule does not support that statement. Wilson's disclosure to Simmons, confirmed the existence of an active warrant about which Simmons was already aware. It is not clear such disclosure was for "personal use," "for a personal gain," or for any "unauthorized purpose," which phrase is undefined. The restriction as stated by the Agency would have to derive from a policy or other rule, neither of which was presented by the Agency.

NCIC's own policy describes the use and dissemination of its data. There are two classes of data, restricted and unrestricted. "Restricted files" contain 10 specified exceptions against disclosure, none of which applied here. [Exh. B-2]. All other data is considered non-restricted and may be disseminated for law-enforcement purposes or by an authorized criminal justice employee to confirm the status of a person. [Id]. "Law enforcement purpose" is not defined, but disclosing the existence of a warrant, along with bond information as Wilson did, is not evidently a non-law-enforcement purpose.⁵ The Agency presented no state or local law prohibiting the dissemination made by Wilson here, nor did it present a policy to that effect beyond Elwell's bald assertion. [Exh. 8-3 @ 4.2.3.3].

From his IA interview through hearing, Wilson consistently maintained that confirming the existence of a bond and the bail amount "is what we would tell anybody." [Exh 26-16]. He added credibly "my understanding... and if I'm wrong, I apologize, but my understanding is that bond amounts, charges, those types of things, is public information." [Exh. 26-17, 26-28, 26-47].

Based on the dearth of supporting evidence for the proposition that it is unlawful for a law-enforcement officer to disclose NCIC information to a member of the public, the Agency failed to prove Wilson violated RR 200.6 by a preponderance of the evidence when he provided warrant information about Webb to Simmons.

⁵ I assume if NCIC, or the Agency regulations intended the public not to have access to NCIC information they would simply say so. While a citizen seeking warrant information about another citizen is evidently not a law-enforcement purpose under NCIC policy, [see Exh. 8-4 @ "Figure 2"], the same cannot be said about a law-enforcement officer providing similar information to a citizen about the citizen's warrant.

RR 300.21.2 Impartial Attitude

Deputy Sheriffs and employees shall maintain a strictly impartial attitude in the performance of their duties.

The Agency claimed this broadly-stated rule prohibits preferential treatment of anyone while acting in an official capacity. The notice of discipline appears to allege three distinct courses of conduct by Wilson condemned by the Agency under this rule:⁶ (1) Wilson's extensive communications with Simmons amounting to negotiations for surrender of a person under a warrant for arrest; (2) sending a subordinate, who was also Wilson's sister and who was unfamiliar with intake procedures, to meet Simmons and Webb in the DDS lobby; and (3) the subsequent and allegedly foreseeable⁷ shortcuts taken by Koonce and Givens in their attempts to expedite Webb's booking process.

1. Wilson's communications with Simmons before Webb's remand.

Wilson claimed this rule is inapplicable, pointing out the only rule referring to preferential treatment at the time of the incidents herein was limited to Agency employees, [Exh. O], and that rule was amended, only after this case arose, to add a prohibition against preferential treatment of close family members of Department of Safety employees who become incarcerated. [Exh. O-3 @ F.3.; Exh. N-3].

While the language in this rule is broad, the Agency's interpretation is not patently unreasonable and is entitled to deference under the circumstances in this case. [Department of Administration v. State Personnel Board, 703 P.2d 595 (Colo. App. 1985); Bryant v. Career Service Authority, 765 P.2d 1037, 1038 (Colo. Ct. App., 1988)]. Those circumstances include the following.

Two years before Webb's remand, Wilson was the Denver Sheriff, the highest-ranking officer in the Agency. Wilson's ex-wife, a Denver Sheriff's Department Captain, was arrested for a matter unrelated to Wilson. Wilson recused himself from any involvement in the case. He sent emails to the head of the Internal Affairs Bureau and to the Executive Director of Safety stating, without citing any particular rule, "[I] removed myself from any decision making regarding Capt. Gillespie's arrest due to the potential conflict of interest." He ordered the Chief of the DDC, Frank Gale, to provide no preferential treatment to the Captain." [See Gale supra at n. 3; Exh K]. Wilson further ordered Gale to ensure no subordinate engaged in any preferential treatment concerning Gillespie. Wilson knew Gale's preferential treatment of the Captain, and subsequent dishonesty about it, caused Gale's termination of employment. In short, Wilson was well-aware of the Gale case, and its consequences, including the obligation not to engage even in the appearance of impropriety.

Wilson claimed the Gale case was inapplicable, as the remand in that situation fell under the then-existing rule against preferential treatment. As noted above, that rule applied only to Agency employees. [Exh. O-3]. This response constitutes a rebuttal, but only as it pertains to the applicability of the preferential treatment rule, and does not negate the Agency's interpretation of the impartial attitude rule under RR300.21.2.

⁶ The structure of the notice of discipline made it difficult to determine what conduct violated what rule, except where the Agency occasionally said so. For that reason, I inferred the three courses of conduct from the Agency's text in its notice of discipline.

⁷ The Agency did not allege Wilson took part in, or directed Koonce to shortcut, the booking process for Webb. Rather, the Agency alleged he should have known that Koonce would do so.

While Wilson denied having a close relationship with Simmons, he acknowledged partaking in Simmons's youth basketball camp, and lecturing as well as playing "hoops" there for number of years. [Exh. 26-14]. He also knew Simmons as a highly-engaged community activist, and as a spokesman for the former Mayor's family. Wilson exchanged 12 calls and texts with that well-connected citizen, concerning the terms of arrest for the former Mayor's granddaughter. That kind and degree of communication suggests a partial attitude. [Exh. 1, n. 4].

Wilson claimed he would have done the same for anyone who called him. This claim was supported by testimony of another community activist, Lisa Calderon who testified credibly that she was "one of the [Denver Sheriff's Department's] biggest critics," yet Wilson, as Sheriff, always returned her calls regardless of the hour. [Calderon testimony]. When asked if Wilson is the kind of person who would exchange multiple calls with someone, even if they were not politically connected, Calderon replied "absolutely, I've seen it and I have referred some of those people to him." [Id.].

Despite Calderon's heartfelt praise, it is evident she, as Simmons, is a public figure, and Wilson exchanged, as he did with Simmons, many communications at all hours with this public figure. On the other hand, Wilson did not cite any instance in 25 years - of which 17 were in a managerial role - when he returned a single phone call from a citizen who was not a highly-placed member of the community, let alone exchange more than a dozen calls and texts over a pending criminal matter. In short, Wilson's exchange of multiple phone calls and texts with a close family friend of the former Mayor, over the terms of the arrest of the ex-Mayor's granddaughter, while he never did so for less-known members of the public, demonstrated a partial attitude in violation of RR 300.21.2.

In addition, while Wilson claimed this rule did not apply to providing preferential treatment to non-employees, he provided no alternate interpretation. The Agency's reasonable interpretation provided a rebuttable presumption of validity. More is required to rebut that presumption than a simple disagreement over its applicability. [Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984); see also Wine & Spirits Wholesalers of Colorado, Inc. v. Colorado Dep't of Revenue, Liquor Enf't Div., 919 P.2d 894, 897 (Colo. App. 1996)]. That reasonable interpretation was buttressed by the inherent understanding of many subordinates and their supervisors that disparate treatment is improper, particularly after the Gale case. Under these circumstances, the Agency established that Wilson's extensive communications with Simmons over the terms of Webb's surrender, demonstrated a partial attitude in violation of RR 300.21.2.

2. Sending Koonce to meet Webb in the DDC lobby.

As stated above, Wilson claimed he did not violate RR 300.21.2 because it does not include non-employees. However, command staff all the way to the Executive Director of Safety and even lower-ranking officers clearly understood the implications of showing partial treatment, even for a non-employee remand as was the case here. (1) Kirkbride told IAB there was much talk about Webb receiving special treatment "with her being escorted in," [Exh. 8-19], even aside from the attempt to expedite Webb's booking. (2) Deputy Jordan "didn't like the looks of this," [Exh. 12-3], also referring to seeing Webb escorted through the booking process by Koonce and Givens. Jordan refused to treat Webb differently because of her status. (3) Sgt. Hitchcock was disturbed "that someone from the Operations Unit who it's not even a function of their job, was bringing somebody back was odd in itself because that never happens." He added "in my two years of being at Intake, it's never occurred." [Exh. 13-8]. (4) Deputy Sawyer was livid at the prospect of treating an inmate preferentially, and referred specifically to the Gale case. All these allegations stand apart from whether Koonce and Givens' expedited or attempted to expedite Webb's intake, and whether that attempt to expedite was foreseeable by Wilson.

That many lower-ranking officers inherently understood the prohibition contained within RR 300.21.2 constitutes *de facto* notice to Wilson that the conduct prohibited by this rule includes a prohibition against special, preferential, or otherwise partial treatment of any arrestee. The evidence stated above constitutes proof by the Agency that, by asking a high-ranking subordinate who was largely unfamiliar with the remand process, to meet a self-remanded inmate, Wilson violated RR 300.21.2.

Wilson stated he was merely passing on information about Webb as the granddaughter of the former mayor and as a first-time arrestee only in case that information was needed for classification or safety reasons or in case the press inquired; however, he did not relay those concerns to Koonce when he simply told her the ex-mayor's granddaughter was being turned in and asked Koonce to meet Webb. While it is not plainly inferable, contrary to the Agency's assertion, that Wilson's telling Koonce to meet Webb would result in shortcutting the booking process, it is reasonably inferable that Koonce would do more than simply meet Webb and leave; i.e. it is reasonably inferable that she would also accompany Webb to Intake.

In addition, there are evident negative policy implications from Wilson's argument. If Wilson's treatment of Webb and Simmons were deemed impartial, because it is something a management-level officer would or should do for anyone who contacted him or her, then anyone with an active warrant could call a high-ranking officer to work out a timetable, at their own convenience, to turn him or herself in, be met in the lobby of the detention facility, and be personally escorted by a high-ranking officer, as happened here. If anyone with a warrant could properly engage in such an amenable arrest, command staff would have little time for their other duties, and arrests by negotiation would render arrest warrants relatively meaningless.

3. Expediting, or attempting to expedite Webb's booking.

Koonce admitted her intention, after receiving a call from Wilson, was to expedite Webb's booking so that she might be seen as soon as possible in court. In doing so, she and Givens short-circuited the usual intake process, created safety issues, and caused consternation to many subordinates. Wilson consistently claimed his goal in calling Koonce was just to pass information to the jail. He also explained he called Koonce because he had her number, and because she was the Operations Captain. He also said he wanted the DDC to know Webb was the former Mayor's granddaughter in case there was a classification need or media interest. [Exh. 1-22; Exh. 26-24]. Wilson denied telling Koonce to speed up the process for Webb to have her appear in court faster, and denied giving Koonce any direction how to process her. [Id]. Wilson told IA he wanted the DDC to have Webb's information out of concern for her safety. At hearing, Wilson reasonably testified that, had he not passed along Webb's status, he could have been subject to discipline if she were assaulted because of her celebrity.

Wilson's stated basis to pass along Webb's information, in itself, did not violate RR 300.21.2. His choices who to contact, and what information he provided, were less than ideal; yet Wilson was credible as to his stated intention, that he did not seek to expedite Webb's booking. It is more likely Koonce and Givens took it on themselves to expedite Webb's intake rather than doing so in response to Wilson's directive. There is no other basis to infer that it was foreseeable Koonce and Givens would take it upon themselves to expedite Webb's intake. Wilson denied any such intent, Koonce did not testify, and no one else indicated the attempts to expedite Webb's booking came from Wilson. Consequently, this aspect of the Agency's claim – that Wilson was responsible for actual and attempted procedural shortcuts to expedite Webb's intake in violation of RR 300.21.2 - remains unproven by a preponderance of the evidence.

300.11.6 Conduct Prejudicial

Deputy Sheriffs and employees shall not engage in conduct prejudicial to the good order and effectiveness of the department or conduct that brings disrepute on or compromises the integrity of the city or the Department or conduct unbecoming which:

- a. May or many not specifically be set forth in the Department rules and regulations or the Operations Manual; or**
- b. Causes harm greater than would reasonably be expected to result, regardless of whether the misconduct is specifically set forth in Department rules and regulations or the Operations Manual.**
- c. Conduct which is or could foreseeably:**
 - 1. Be prejudicial to the good order and effectiveness of the department or agency;**
 - 2. Bring disrepute on or compromises the integrity of the City; or**
 - 3. Be unbecoming of a City employee.**

Elwell testified Wilson violated all three subsections under part c., above. She stated Wilson violated the "good order" of the Agency, because deputies complained about Webb's receiving preferential treatment. The evidence demonstrates deputies complained about Koonce's accompanying Webb and complained she and Givens circumvented the normal intake and bonding procedures. Expediting the normal arrest procedure was not proven to be attributable to Wilson. However, privately negotiating the terms of arrest of the granddaughter of the ex-mayor with a representative of the ex-mayor's family, was or could, with reasonable foreseeability, be prejudicial to the Agency's good order and effectiveness. That Wilson asked Koonce, a high-ranking officer who was unfamiliar with the remand process, to meet Webb, was, or could reasonably be, foreseeably prejudicial to the good order and effectiveness of the Agency for reasons as noted, including the potential prejudice to the Agency's effectiveness through the poor optics of having one's sister, who is also a high-ranking officer, meet a public figure to take his charge into custody. For reasons noted above, such a practice could well undermine the Agency's good order and effectiveness. The Agency therefore established Wilson's violation of RR 300.11.6 c.1. The Agency also alleged additional bases for determining Wilson's violation of this rule.

Elwell testified Wilson's conduct was "conduct unbecoming of an officer who is also a leader in the Department." [Elwell testimony]. Conduct which is unbecoming of a City employee, under subsection c.3., is proscribed. Failure of leadership is not a readily-inferable proscription under this rule. This allegation failed to prove Wilson violated RR 300.11.6. c.3.

Elwell also stated Wilson's conduct brought disrepute on the Department, as evidenced by deputies' statements that Koonce's and Givens' conduct was unethical, that Wilson compromised the integrity of the Department, and that his conduct was unbecoming of an officer who is also a leader in the Department. [Elwell testimony]. Those conclusory statements are insufficient to establish what conduct violated this subsection, or the link between them. The Agency's notice of discipline, similarly failed to identify a causal link between Wilson's actions and this subsection. This portion of the Agency's claim under RR 300.11.6. remains unproven. However, the "good order and effectiveness" violation established above, also establishes a violation of the Agency's claim under the identical language contained in CSR 16-29 T.

IV. APPELLANT'S WHISTLEBLOWER RETALIATION CLAIM

A whistleblower claim is established under the Denver Revised Municipal Code (DRMC) by an employee's showing that 1) a supervisor imposed or threatened to impose 2) an adverse employment action upon an employee 3) on account of the employee's disclosure of information about any official misconduct to any person. In re Steward, CSA 18-08 (4/11/08), citing In re Wehmhoefer, CSA 2-08 (2/14/07); DRMC 2-108. As pertinent here, "official misconduct" includes any act or omission by any officer or employee . . . that constitutes a violation of any applicable rule, regulation or executive order, or an abuse of official authority. In re Steward, CSA 18-08, 2-3 (4/11/08), citing DRMC 2-107. Notwithstanding the foregoing, discussions between an employee and his supervisor about working conditions that do not assert official misconduct are personnel matters, not disclosures of official misconduct under the Whistleblower Protection Ordinance. In re Steward, CSA 18-08, 2-3 (4/11/08).

There is no dispute that a supervisor imposed discipline, fulfilling the first two elements of a whistleblower claim. As to the third element of causation, Wilson alleged the official misconduct he reported was twofold: the Agency's new organizational structure imposed in violation of the City Charter, Career Service Rules, and Departmental orders; and reporting Chief Connie Coyle's failure to support Wilson's desire to discipline a sergeant under his command who failed to obey a direct order, lied and was, instead, appointed by Coyle to the Internal Affairs Bureau. [Notice of Appeal p.1@ 1.e].

Wilson claimed his demotion was motivated by his opposition to a structural change in the Sheriff's Department which he said created an improper disparity in the authority of the Division Chiefs. [Notice of Appeal @ 1.e.]. Wilson stated he presented his concerns to Executive Director of Safety Stephanie O'Malley⁸ and to Sheriff Firman, pointing out the then-current organizational chart, [Exh. W], and comparing the new structure, [Exh. X] which created two disparate ranks of chiefs, one over the other with concomitant elevation in pay for the new, higher-ranking chief. Wilson stated the new structure created a de facto demotion for him, and a promotion with a \$10,000 boost in pay for Chief Connie Coyle, yet the changes were made without a competitive process and without notice, in violation of the City's Charter and job specifications.

He raised these concerns with O'Malley in February 2016, a few days after the new organizational chart issued and with Firman on February 15, 2016. [Exh. V]. Firman acknowledged circumventing the Charter because Charter changes are difficult to accomplish. [Wilson testimony].

Wilson alleged retaliation under his whistleblower claim in that he was treated differently after those meetings including: no longer being invited to executive level meetings, having decreased opportunities for contact with Firman; becoming the only division chief not to have an office downtown, thus having to video conference and being segregated from the executive team; having his Agency-issued SUV taken and replaced by an Agency-issued sedan, which is the kind of vehicle issued to Majors; finding out the SUV assigned to him was given to a lower-ranking Major; that this case was investigated internally by the Agency's own IAB, whereas other cases involving high-ranking officers were sent to an outside entity ; learning that a merely "successful" work review (PEPR) was issued in August 2016, that Firman acknowledged the lower-rated review (compared to prior PEPRs) played a role in the evaluation of this case although it was in error and was not corrected before the Manager of Safety's Office issued this discipline; and most notably, the failure of O'Malley to send this case to an outside investigator in light of her conflict of interest - the arrestee underlying this case is

⁸ The Executive Director of Safety has direct supervisory authority over the Sheriff. [D.R.M.C. Art. VI, §14-122; see also D.R.M.C. Art. II, Part 6, § 2.6.2].

her niece - yet her office, via the Civilian Review Administrator, assessed discipline even though the CRA is under O'Malley's direct authority as Executive Director of Safety.

As pointed out by the Agency, Wilson voiced his concerns about the Agency's reorganization [Exh. V] seven months before the Webb incident arose, and the Agency assessed discipline 16 months after Wilson stated his concerns. This gap tends to rebut the "on account of" requirement. Those words require a whistleblower claimant to establish his notice of wrongdoing was a substantial or motivating factor for the alleged retaliatory act. Taylor v. Regents of Univ. of Colorado, 179 P.3d 246 (Colo. App. 2007). Even more persuasively, complaints about workplace or personnel matters are not reports of official misconduct under the City's Whistleblower Ordinance. [General Government Committee Summary, July 24, 2007, comments by City Attorney David Broadwell⁹; In re Harrison, CSA 55-07, 89-07 and 90-07, pp. 65-66 (6/17/10)]. Wilson's simple recitation of various sources of authority failed to establish official misconduct by a preponderance of the evidence for reasons that follow.

Exhibit S was Wilson's 2016 work standards (Performance Enhancement Plan, or PEP). It was unclear how Wilson's PEP factored into his claim.

Exhibit T contained the Agency's Department Order 2051.1D, setting forth the Agency's policy concerning equal opportunity employment. Wilson did not specify what part of this policy applied or how.

Exhibit U is the Agency's process for promotion. Since the Agency stated the reorganization contained no promotion or demotion, the burden remained with Wilson to show how that reorganization was actually an improper promotion of Connie Coyle and a demotion to him. Wilson's allusion to the rule as a whole fails to establish official misconduct.¹⁰

Exhibit Y is the portion of the City's Charter which relates to the organization of the Denver Sheriff Department, sec. 2.6.4. That section states, in pertinent part, that the Department consists of chiefs whose salaries are set by ordinance. It is not evident the Charter requires all chiefs to be equally compensated or to have equality in reporting. Wilson provided no document or testimony that indicates the restructured reporting and pay was wrongful under that section.

Exhibit Z contains a City ordinance, effective January 1, 2016, establishing the pay of the highest-ranking Agency officers, including Chiefs. For those chiefs hired before January 31, 2016, as was Wilson, the annual salary was fixed at \$153,730. For those hired after February 1, 2016 the salary was fixed at 169,726. The ordinance also allows for a bump in pay based on longevity in the position. There was no evidence how long Coyle had been Chief, or what part of her pay may have been associated with longevity. There was insufficient evidence to conclude there was official misconduct due to the pay disparity between Coyle and Wilson.¹¹

Exhibit AA is the CSR concerning recruitment and selection. While Wilson generally stated the process in this rule was not followed, he failed to specify what subsection or in what manner the rule was violated. This too, is an insufficient basis to sustain Wilson's burden to prove official misconduct.

Exhibit BB is the CSR regarding appointments and status. The same comments immediately above apply here as well.

⁹ Legislative History: during this discussion preceding passage of the Whistleblower Protection Ordinance, Broadwell stated the intent of the legislation is to focus on protecting reports of actual wrongdoing as opposed to handling disputes that are really personnel matters.

¹⁰ Wilson's allegations raise non-whistleblower retaliation concerns. However that charge was not at issue in this appeal.

¹¹ However, see n. 10, above.

Exhibit CC is the CSR governing classification and compensation. Again, the comments above apply here as well. It is insufficient merely to state a multi-part rule was violated without specificity.

Regarding Wilson's concern that O'Malley did not send the case for discipline to an outside investigator, there was no indication the decision maker - Elwell - was aware of Wilson's complaint at the time she assessed discipline. Elwell flatly denied O'Malley played any role in this discipline, including that O'Malley did not review Elwell's decision, did not consult with her about it and was not otherwise involved in any way. [Elwell testimony]. Thus, even if the Agency did not handle Wilson's discipline consistently with other similarly-ranked officers, there is no evidence Wilson was prejudiced by the inconsistency. [In re Gale, CSB 02-15, 6 (07/21/16) ("It is settled law that a failure to follow established guidelines 'does not in and of itself implicate constitutional due process concerns.'") (add'l citations omitted)].

During his testimony, Wilson also pointed out the disparity between the prior organizational structure under Exhibit W and the new structure under Exhibit X, showing he reported to Coyle. Even though Wilson's statement is true, he failed to establish how such restructuring violated the Agency rules, or other authority. Wilson simply stated he was unaware of any authority which authorized such reorganization. [Wilson testimony]. That assertion, countered by the Agency's equally persuasive denial, fails to meet Wilson's burden to prove official misconduct by a preponderance of the evidence.

Wilson offered the following additional indicia of retaliation under his whistleblower claim: the replacement of his Agency SUV with a sedan usually associated with the Major position; being excluded from live participation in some meetings and excluded entirely from other meetings; and the relocation of his office away from the DDC. Even taken at face value, these allegations fail to state adverse employment actions taken on account of Wilson's reporting of official misconduct that are not equally explained by the Agency's legitimate right to reorganize.

Wilson second whistleblower retaliation claim was that he was disciplined in retaliation for reporting misconduct of a sergeant under his supervision and the sergeant's subsequent promotion instead of punishment by Wilson's supervisor. This complaint was a personnel matter not intended to be covered under the City's Whistleblower Ordinance. [See Steward, *supra*].

Finally, as to his claim that the Agency's wrongful assessment of PEPRs negatively impacted the discipline in this case, Wilson acknowledged as soon as he raised the issue of incorrectly-issued PEPRs, the mistakes were corrected, and those PEPRs were removed from his personnel file. [Exh. SS; TT]. Moreover, Elwell credibly replied those particular PEPRs did not affect her assessment of the degree of discipline.

Finally, the Agency established, based on the evidence of wrongdoing above that, even if Wilson had met his burden, the Agency demonstrated it would have reached the same conclusions about the established violations in the absence of Wilson's protected conduct. [See Taylor v. Regents of University of Colorado, 179 P.3d 246 (Colo.App.,2007), *citing Ward v. Industrial Commission*, 699 P.2d 960, 968 (Colo. 1985)]. For these reasons, Wilson's whistleblower retaliation claim fails.

VI. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-41 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-41. In

assessing the severity of wrongdoing and reasonableness of the Agency's conclusions, I begin with the Agency's assessments under its so-called disciplinary matrix.

A. Seriousness of the proven offenses

The Agency's disciplinary matrix specifies "special circumstances" that justify assessing a penalty beyond the maximum in the aggravated range, referred to as "extraordinary aggravation." [Exh. A-34 @ 25.0 et seq.]. As is pertinent here, an involuntary demotion, when assessed as extraordinary aggravation, must be documented and explained. [Exh. A-36 @ 25.4.3]. The penalty of a demotion with reduction in pay may be justified as one of the special circumstances if the deputy sheriff's conduct proves he is unfit to fulfill the responsibilities and duties of his rank. That determination, in turn, is measured by his "lack of ability, willingness or worthiness to perform in the current rank. [Id @ 25.5.1]. Another measure is whether the conduct would have prevented ("raised substantial questions as to") the deputy sheriff's fitness to hold that rank the first place. [Exh. A-37 @ 25.5.2]. Responsibility and trustworthiness also factor into such decision. [Begin at A-37 @ 25.5.3].

The Agency found some of Wilson's conduct justified discipline beyond the range maximum. Its "documentation and explanation" for determining what special circumstances justified a two-level demotion¹² were Wilson's rank and his fitness for his rank.

Rank. The first allegation justifying extraordinary discipline was "Wilson is one of the highest ranking command officers in the Department." [Exh 1-30]. As noted by the Agency's citation to section 20.0 of the matrix, a higher rank may justify aggravation, but only within the normal parameters of the matrix.¹³

Fitness. In conclusory fashion, the Agency alleged "Wilson has demonstrated a failure to comply with orders, rules and established procedure of the department, rendering him unfit to hold the rank of Division Chief." This statement, merely restates the matrix, and fails to explain the basis for extraordinary aggravation, as required by section 25.4.3. Every failure to comply with an order, rule, or procedure may be cause for discipline, but does not, per se, justify aggravation of the penalty and certainly does not justify extraordinary aggravation just by quoting the order, rule or procedure.

Next, the Agency claimed, in equally conclusory fashion, that "[a]llowing Chief Wilson to remain in his current rank would negatively impact the operations of the Department, the perceptions of subordinate deputies of the quality and professionalism of Department leadership and the effectiveness of a discipline system that would allow an officer to hold the rank of Chief after a serious breach of his duties and responsibilities."

Taking each of the allegations from that sentence in order, there is no explanation why or in what manner leaving Wilson in his current rank would have a negative impact on Agency operations. Insofar as the reference to perceptions of subordinate employees refers to their dismay at seeing Koonce and Givens expedite the normal intake process with Webb, those perceptions related only to Koonce and Givens. The evidence did not support the connection of their misdeeds to Wilson beyond his sending Koonce to meet Webb in the DDC lobby. That wrongdoing is addressed below. The statement that the Agency's disciplinary system would be

¹² The Agency's matrix and the Career Service Rules are silent as to whether more than a single-level demotion is permitted, however that action was not challenged by Wilson, therefore, this Decision does not determine whether such penalty is permitted under the matrix or our Career Service Rules..

¹³ Section 20 of the matrix addresses rank as an aggravating factor, but only insofar as rank applies to discipline within the normal parameters of the matrix. [Exh. A-31 et seq.]. Only section 25 applies to circumstances justifying extraordinary discipline, also referred to as discipline "outside the matrix." [Exh. A-27 et seq.].

rendered ineffective by retaining Wilson as Chief is, on its face, a failure to establish a basis for the conclusion as required by the matrix.

The next averment begins by quoting a recommendation in the matrix to consider whether the conduct would have raised substantial questions as to the deputy sheriff's fitness to attain his rank in the first place. The Agency also concluded, in circular fashion, "Wilson engaged in misconduct that would have raised substantial questions as to his fitness to hold the rank of Chief, had his misconduct occurred prior to attaining the rank of Chief." Parroting a proscription does not establish it.

Next, the Agency quoted subsection 25.5.3 from special circumstances justifying extraordinary aggravation. That subsection states the importance of credible and professional performance of duties of the rank, and the importance of leading by example. Weighing in on this provision, the notice of discipline first decried Wilson's "misunderstanding of the basic policies under which the Department operates." While the unspecified "basic policies" intended by this reference may have been the allegedly-violated rules named at the beginning of the notice of discipline, one of them - RR 200.6, "Access to NCIC/CCIC" - cannot be considered a "basic policy," and it is less than certain the other rules may be so classified. In addition, the accusation does not address a failure of leadership as cited by the Agency in the same paragraph.

It is not the responsibility of the hearing officer to sift through the evidence in order to establish wrongdoing stated with circular reasoning. That admonishment is especially important when specific justification is required, as it is here. Moreover, this Agency's justification for extraordinary punishment failed to establish, as required by the matrix, why even a maximum aggravated penalty within the matrix would fail to address the allegedly-improper conduct. "It must be concluded that the matrix fails to appropriately address the conduct..." [Exh. A-35 @ 25.4.2].

The next alleged justification for extraordinary discipline was that Wilson "entirely neglected to consider the possible impact his decisions would have on the morale and careers of the subordinates to whom he owed a measure of supervisory responsibility." To the extent this allegation might relate to a failure of leadership, as is contemplated by special circumstances, there was no evidence of an impact on the morale or career of any subordinate.

The Agency's penultimate reason to assess an extraordinary penalty stated "the interests of justice and the purposes of discipline are most effectively served by ordering the penalty of a reduction in rank/grade from Division Chief to Captain, in lieu of the penalties ordinarily provided by the Matrix." The Agency cited subsection 25.5.4. from the portion of the matrix addressing extraordinary discipline. That subsection states "[a]n involuntary demotion with a reduction in pay may be imposed in conjunction with or in lieu of other appropriate disciplinary sanctions." The overly-broad statements "the interests of justice" and "the purposes of discipline" fail to justify why Wilson is "unfit to fulfill the responsibilities and duties of his rank" as is required to justify the Agency's extraordinary discipline of demotion with reduction in pay. Having determined the Agency failed to establish special circumstances as would justify extraordinary discipline, the next step is to determine an appropriate penalty within the matrix, as is consistent with the Career Service Rules.

Matrix penalty for RR 300.21.2., impartial attitude.

Wilson's conduct violated CSR 16-29 R., as it relates to RR 300.21.2, "impartial attitude," and as it relates to RR 300.11.6, the Agency's "conduct prejudicial" rule. Appendix E in the matrix establishes the penalties for those violations. The Agency's decision-maker begins with the locating each violation according to a pre-assigned category. Some violations are assigned to a single category; others are assigned a range of categories with discretion to assign the category.

RR 300.21.2, impartial attitude, may be assigned to categories A - C. The description of Category C violations declares conduct in this category ...

... has a pronounced negative impact on the operations or professional image of the department or on relationships with other deputy sheriffs, employees, agencies or the public.

[Exh. A-87].

That description is a reasonable assessment of the harm done when Wilson privately negotiated the terms of surrender into custody of the granddaughter of the ex-mayor with a representative of the ex-mayor's family, and when he had his sister, a high-ranking officer who was unfamiliar with the intake process, meet the ex-mayor's granddaughter in the lobby of the DDC in order to take her into custody.

Having established the reasonableness of category C assigned to Wilson's conduct as viewed under RR 300.21.2, the next step was for the decision-maker to determine whether the violation was a first, second or third violation in that category in the past three years. As this was a first violation of a category C violation in the past three years, the matrix assigns disciplinary level "3." [Id]. The mitigated penalty range for level 3 is from a written reprimand to a 1 day suspension; a 2-day suspension is the presumptive penalty; and a 3-4 day suspension is the aggravated penalty. [Exh A-86].

Wilson's long history with the Agency was replete with commendations, awards, highly-rated work reviews and other extraordinary mitigation, along with a total absence of discipline. In the absence of significantly aggravating factors, mitigation should but is not required to be assessed under the matrix. Potentially aggravating circumstances under the Matrix include these non-exclusive factors:

19.9 Aggravating circumstances may include, but are not limited to:

19.9.1 Injury or harm to a member of the public, a deputy, or an employee;

19.9.2 Endangerment to a member of the public, a deputy or an employee;

19.9.3 The existence of an actual and demonstrable legal or financial risk to the Department or the City (including, but not limited to, cases involving allegations of civil rights violations, unlawful search and seizure, excessive use of force, unlawful detention or arrest, or improper care and treatment of an inmate);

None of the factors, above, were established by the Agency's evidence.

19.9.4 The supervisory or command rank of the deputy who committed the violation (See Section 20.0 below);

Under the matrix, the higher the rank, the more is expected of a supervisor in the Agency. [Exh. A-31, 32]. Thus, Wilson's high ranking as Chief was an aggravating factor. Rank alone, however, does not automatically justify a penalty outside the matrix. [Id. @ section 20.3, 20.4].

19.9.5 The deputy's prior disciplinary history (See Section 21.0 below);

- 19.9.6 Actual and demonstrable prejudice to the Department;
- 19.9.7 Jeopardizing the Department's mission and/or relationship with other agencies;
- 19.9.8 Loss or damage to city or private property;
- 19.9.9 A criminal conviction of the involved deputy arising out of the underlying event;
- 19.9.10 Lack of candor, or lack of completeness or full disclosure on the part of the deputy;
- 19.9.11 Prejudicial conduct regarding race, color, creed, national origin, ancestry, gender, sexual orientation, age, religion, political affiliation, physical or mental disability, military status, marital status, or other protected classifications;
- 19.9.12 Harassment or retaliatory conduct;
- 19.9.13 The culpable mental state of the deputy in the commission of the violation; or
- 19.9.14 Unsatisfactory work history.

Exhibit A-29, A-30.

None of the factors, above, were alleged and proven by the Agency. The Agency's mission was not in evidence; prejudice that was both actual and demonstrable was not shown; lack of candor was not charged, and the Agency failed to establish Wilson gave less than full disclosure. His statements were consistent throughout the entire process.

As noted above, rank may be an aggravating factor under the Matrix, but not automatically so. Mitigation must also be considered. [Exh. A-32]. The Agency's parroting of extraordinarily-aggravating factors and overly-broad, circular and conclusory statements, failed to establish any other basis to aggravate Wilson's penalty. Even taking Wilson's rank as an aggravating factor, considering his unblemished and highly-decorated history, no more than the presumptive penalty, a two-day suspension, could reasonably be assessed by an Agency decision-maker under RR 300.12.2.

Matrix penalty for RR 300.11.6, conduct prejudicial.

Under the matrix, the decision maker has the latitude to assess a penalty between category A through F for this violation. The Agency determined Wilson's conduct fell under the description of wrongdoing assigned to category E., which states:

Conduct that involves the serious abuse or misuse of authority, unethical behavior, or an act that results in an actual serious and adverse impact on deputy sheriff, employee or public safety, or to the professionalism of the department.

[Exh. A-91].

The Agency's determination that category E applied was reasonable, based on the same proven misconduct as described above, and as viewed in the context of the category description. It was a "serious misuse of authority" for a chief to negotiate extensively with a public figure as representative of the ex-mayor's family, over the terms of surrender of the ex-mayor's granddaughter. It was also a "serious misuse of authority" for a high-ranking officer to direct his sister, also a high-ranking officer, to meet the representative of the ex-mayor's family to take his charge into custody.

The mitigating and aggravating factors described above apply with equal weight here and with equal effect. No more than the presumptive penalty under the matrix may reasonably apply under the circumstances as dictated by the matrix and as noted above. The presumptive level of discipline for a first-time violation of 300.11.6 as a Category E violation is a 30-day suspension. [Exh. A-86]. The Agency's practice is to assess discipline concurrently for separate violations involving the same conduct, so that the presumed 2-day suspension for Wilson's violation of 300.21.2 does not add to the 30-day presumptive assessment under 300.11.6. The seriousness of the proven violations as measured by the Agency's matrix, as well as Wilson's rank,¹⁴ is consistent with the seriousness of those violations as measured by Career Service Rule 16-41.

B. Prior Record

Wilson's record is uniquely outstanding in the Agency, and the Agency recognized Wilson's record constituted mitigation. [See Agency closing statement; Elwell testimony]. In addition to never having been disciplined in his 25 years of service, Wilson literally provided a suitcase full of commendations and awards given during his 25 years of service, [also produced electronically in Exh. UU], leaving no doubt that Wilson did much to represent and to promote the Agency and the City. He has been nationally recognized for his service, and remains a positive face of the Agency, even to its detractors, by his openness and accessibility to community activists. [See e.g. Calderon testimony, above]. Based on past performance and record, if ever there were a case for extraordinary mitigation under the Career Service Rules and under the Agency's disciplinary matrix, this would be such a case.¹⁵

A. Likelihood of Reform

The Agency provided no valid reason Wilson would be unable to reform the misconduct cited above. To the extent the Agency's RR 300.21.2 did not notify Wilson with crystal clarity as to its prohibition against non-employee preferential treatment, this case should amply serve to notify Wilson of such application.

B. Other factors.

An important factor in Elwell's decision to go outside the Agency's disciplinary matrix to assess a double demotion was her belief that a suspension would be an inadequate remedy for someone who demonstrated a "leadership gap" and lack of concern for subordinates. Even assuming this to be the case - and the evidence manifestly does not justify such a conclusion - a double demotion would have let Wilson remain in a leadership position as Captain, defeating Elwell's stated justification for discipline beyond the guidelines of the matrix.

In addition, the preponderance of the evidence does not support the Agency's principal complaint, that Wilson caused Webb to be improperly expedited through the booking process by Koonce and Givens. That alleged causation depends entirely upon Elwell's assumption that

¹⁴ Under the Career Service Rules, as well as under the matrix, Supervisors are held to a higher standard of conduct because they model behavior for subordinates. In re Khelik, CSB 31-12A (10/3/13), reversed on other grounds, In re Khelik, CSA 31-12 (11/19/12).

¹⁵ as partially offset by aggravation as noted above.

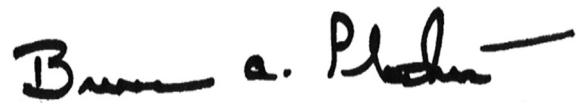
Wilson told Koonce "to walk Webb through the process" or "to take her through the process." Wilson denied saying so, and his credibility was not impeached. Koonce, the only other person who could affirm Elwell's statement, did not testify. It is too much of a leap of faith to conclude "meet Webb in the lobby" could reasonably be interpreted to "shortcut the booking process so that she appears in court today."

Based on the proven seriousness of Wilson's violations and his rank, as balanced against his extraordinary service to the Agency, impeccable disciplinary record, and a strong likelihood of his reform, the discipline assessed by the Agency was clearly excessive and beyond the range of penalties available to a reasonable administrator. A presumptive penalty under the normal application of the Agency's matrix would not be clearly excessive, and would be within the range of penalties available to a reasonable and prudent administrator assessing discipline under the Career Service Rules. In re Ford, CSB 48-14A, 8 (12/17/15).

VII. ORDER

The Agency's demotion of Wilson from Division Chief to Captain on June 8, 2017, is modified to a 30-day suspension. The Agency shall restore Wilson's classification, pay and benefits commensurate with this order.

DONE December 8, 2017.



Bruce Plotkin
Career Service Board Hearing Office

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 § 19-60 et seq., within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery. See Career Service Rules at www.denvergov.org/csa. All petitions for review must be filed with the following:

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.