

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

Appeal No. 99-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

PATRICIA GABEL, Appellant,

Agency: DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,
And THE CITY AND COUNTY OF DENVER, a municipal corporation.

A hearing in this matter was held by Hearing Officer Joanna Lee Kaye on October 23, 27 and 28, 2003 in the Career Service Authority Hearings Office. Assistant City Attorney Mindi L. Wright represented the Department of Safety, Denver Sheriff's Department (Agency). Major Gary Anderson served as advisory witness for the Agency. Patricia Gabel (Appellant) was present and was represented by David R. Osborne, Esq. and J. Reid Elkus, Esq.

MATTER APPEALED

Appellant, a Sergeant in the Denver Sheriff's Department, appeals a two-day suspension the Agency issued as a result of Appellant's alleged improper comment to a co-worker.

For the reasons set forth below, the Agency's action is REVERSED.

ISSUES

1. Whether the Agency has shown by a preponderance of the evidence that Appellant engaged in the action alleged.
2. If so, whether the action shown constitutes cause to discipline Appellant.
3. If so, whether Appellant's two-day suspension is reasonably related to the seriousness of the offense in question, taking into consideration Appellant's past employment record.

FINDINGS OF FACT

Based on the evidence presented at the hearing, the Hearing Officer finds the following to be fact:

1. Appellant is a Sergeant for the Denver Sheriff's Department. At the time of the incident giving rise to the disciplinary action in this case, she was assigned to the Training Department training new recruits. She is a career-status employee with one prior written reprimand and an excellent work record. Appellant received the written reprimand in October of 1998. It was, therefore, four and a half years old at the time of the incidents giving rise to this appeal.
2. The door to Appellant's office in the Training Department was directly to the side of the front desk. The front desk is a large, inverted u-shaped arrangement of work surfaces with a podium in the center. There is a wide post between the podium and the door to Appellant's office that partially obscures a person's body when standing at the visitor's side of the desk next to the podium. Directly across from Appellant's door, to the other side of the front desk, there is a door to a hallway where the elevator is located (Exhibit 10).
3. Sheriff's Deputy Kerdie Bates (Bates) and Appellant were personal friends at the time of the incident in this case. They are both Caucasian women of medium-heavy build with reddish-blond hair. Both were on duty and therefore wearing uniforms on the day of the incident in question.
4. Administrative Support Assistant IV [REDACTED] is an African-American woman. She does not know either Bates or Appellant on a personal basis. She knows of them from the workplace only.
5. On the morning of March 24, 2003, [REDACTED] returned to work after a prolonged medical absence. She came from the vicinity of the elevator to the front desk of the Training Department, where Bates was working at the time.
6. [REDACTED] was standing at the front desk as Appellant stepped from her doorway and walked around behind the desk to retrieve work items. The post partially obscured Appellant's view of [REDACTED] and she did not recognize [REDACTED] until Appellant was behind the desk. The only three people in the area of the front desk at that moment were [REDACTED], Bates and Appellant.
7. Appellant first noted it was [REDACTED] who was standing at the front desk while Appellant was behind the desk. She stated to [REDACTED] that she had not seen [REDACTED] since before Christmas.
8. Either Bates or Appellant then made the following statement to [REDACTED] "You were gone an awfully long time just for a boob job."

9. [REDACTED] is suffering from a severe, potentially terminal medical condition which she intended to keep confidential. This illness was the reason for her extended absence. [REDACTED] believes the comment indirectly referenced this condition, and was very upset by this comment.
10. On Wednesday, April 2, 2003 [REDACTED] filed a grievance about the comment with her supervisor (Exhibit 5). The supervisor forwarded the complaint to Internal Affairs that same day (Exhibit 4).
11. Internal Affairs Investigator, Captain Jodi Arndt-Blair (Arndt), was assigned to investigate this case the day the complaint was filed. Appellant was out of town at the time Arndt initiated her investigation.
12. On April 2, 2003 Arndt spoke with [REDACTED], who told her Appellant was standing in front of the desk, called [REDACTED] into the front desk from the elevator by saying "Hey you, get in here," and made the objectionable statement. [REDACTED] told Arndt that Bates was present at the front desk when Appellant made the statement (Exhibit 4).
13. Arndt spoke with Bates the day [REDACTED] filed the complaint. Arndt first had Bates sign a Garrity Advisement, directing her to tell the truth or face possible disciplinary action if she failed to do so. Arndt asked Bates if she recalled Appellant making the statement to [REDACTED] about having a boob job. Bates denied recalling who made the objectionable statement. Bates provided a fairly extensive explanation for why the comment was a joke made during light conversation and should not be taken seriously. She stated during the interview that nobody was really sure why [REDACTED] was off. It was an FMLA leave but [REDACTED] didn't want anybody to know. Thus the joke about the boob job. She then stated that it "sounded like something [Appellant] would say." Bates could not recall anyone stating, "Hey you get in here" at any point during the conversation that morning. Arndt was left with the impression that Bates was holding something back during the interview. (Exhibit E, track 2.)
14. Appellant returned to work the following Monday, April 7, 2003. Bates told Appellant that morning that IA wanted to talk to her. Appellant was surprised to hear IA was investigating. Bates told her [REDACTED] was making allegations that Appellant asked her if she had a boob job. Appellant said "I didn't say that, you did." Bates responded, "I did?" Bates did not tell Appellant that IA had already interviewed Bates during this conversation.
15. Appellant became alarmed at being accused and called Arndt's number that day. Appellant knew Arndt personally, but did not know at the time she called that Arndt was the investigator assigned to the case. Monday was Arndt's day off and she was not at work. Arndt's personal message at home included her husband's cell phone number. Appellant called the number and spoke with Arndt about the incident. Arndt told Appellant she would need to have a formal interview the following day and they set up a time.

16. Arndt conducted an interview of Appellant under Garrity Advisement the following day. Appellant stated the allegations were "totally false." She said she did not call [REDACTED] in from the elevator, but that she was behind the desk getting work materials (not in front of it) during the conversation. She stated [REDACTED] was already standing at the desk next to the post at that time. She confirmed the statement was made, but not by her. Appellant stated that Bates made the statement. Appellant did not indicate during this interview how many times Bates made the statement. Appellant told Arndt the only comments she made to [REDACTED] were to welcome her back and that Appellant had not seen her since before Christmas. Appellant told Arndt she thought others, possibly Ellen Lamar, might have been present, but was not sure. Appellant described her conversation of the day before when she said Bates was the one who made the objectionable comment, and Bates responded "I did?" (Exhibit E, track 4.)
17. Arndt spoke with Lamar who said she was not at the desk at the time of this incident.
18. Arndt re-interviewed Bates under Garrity Advisement on April 11, 2003. Arndt told Bates that she was now the subject of the investigation, and asked her again who made the statement. Bates appeared shocked, and responded that Appellant made the statement. When Arndt asked her why she did not disclose this during the first interview, Bates responded that it was such a non-event that she did not think much of it. Bates stated the only three people present during the conversation were her, [REDACTED] and Appellant. Bates also recounted the conversation with Appellant in which Appellant said Bates made the statement, and that Bates thought she was joking. Bates said this is why she said "I did?" Bates then requested a polygraph examination. (Exhibit E, track 5.)
19. Of the individuals she interviewed, Arndt felt that the only one who was inconsistent in her statements was Bates.
20. The Agency prepared a letter informing Appellant of its Contemplation of Disciplinary Action dated May 27, 2003 (Exhibit 3). A predisciplinary meeting was held on April 8, 2003. Present were Appellant, Undersheriff Fred J. Oliva (Oliva), Division Chief Smith, Majors Anderson, Connors and Lovinger, and Arndt. During the meeting, Appellant again stated that she did not make the statement, but that Bates made the statement. Appellant further stated that Bates repeated the statement a second time.
21. A polygraph was administered to Bates in-house by Sergeant Kelly Bruning, who was qualified as an expert in polygraphy during the hearing. Bruning interpreted the data to suggest Bates was being truthful. Oliva was aware of this interpretation during his deliberation, and placed some weight on it in determining that Appellant made the statement in question (see, Exhibits 2 and 3)

22. Arndt offered Appellant a polygraph as well. Before the polygraph was arranged, Appellant spoke with her attorneys who advised her not to take a polygraph because they are inherently unreliable.
23. Oliva was aware that Appellant was offered a polygraph and declined it. Oliva considered this information in the process of his deliberation, but did not know she declined on advice of counsel. He placed some weight on it in determining that Appellant made the statement in question (see, Exhibits 2 and 3).
24. Oliva believed Appellant originally told the investigator she did not remember who made the statement. Based on this belief he found her statement during the predisciplinary meeting that Bates made the statement inconsistent and lacking in credibility. He based his determination that Appellant made the statement "mainly" on this perceived inconsistency in Appellant's statements.
25. The Agency prepared a letter dated June 17, 2003, notifying Appellant of her two-day suspension (Exhibit 2). Appellant timely appealed on June 27, 2003 (Exhibit 1).
26. Polygrapher David Henigsman was qualified as an expert in polygraphy during the hearing. He reviewed the data from Bates' polygraph and interpreted the data to suggest deception. This review was done after Oliva made his decision in this case and he did not know about it.
27. After listening to Appellant's IA interview tape during the hearing, Oliva admitted that the inconsistencies he previously believed existed between Appellant's IA interview and her pre-disciplinary meeting did not in fact exist.
28. In October of 2001, [REDACTED] saw co-worker Tanya Mason (Mason) entering her work area with another worker. They passed by a sergeant who made a comment to Mason's companion that the companion should be careful about the company she keeps (meaning Mason). Before Mason left the area, [REDACTED] called her over and asked if Mason were not offended by the sergeant's comment. Mason said that she was not and thought it was a joke. [REDACTED] told Mason that she should make a report if she were offended, that [REDACTED] herself had made a harassment report against the sergeant, that she was being made to feel like a complainer by the Agency, and that her attorney had told her the complaint lacked strength because it was isolated. [REDACTED] suggested that she should at least document the encounter, and told Mason that others who had made harassment complaints and had gotten "tons of money" or "thousands of dollars" in doing so. (See, Exhibit H.) These comments made Mason feel uncomfortable because she thought it was inappropriate for another employee to urge her to document such an event when she perceived no impropriety.

DISCUSSION

1. Jurisdiction.

The Hearing Officer finds she has jurisdiction to hear this case as a suspension pursuant to CSR 19-10 b), which states as follows in relevant part:

Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- ...b) Actions of appointing authority: Any action of an appointing authority resulting in ...suspension... which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

2. Burden of Proof.

The City Charter, C5.25 (4) and CSR 2-104 (b) (4) require the Hearing Officer to determine the facts of the case "*de novo*." This means that she is mandated to make independent determinations of the facts and resolution of factual disputes. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.) In *de novo* administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence*. This means that the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

The Agency responsible for disciplining a career-status employee bears the burden of showing cause for the disciplinary action. CSR 5-62. The Hearing Officer must also find the severity of discipline is reasonably related to the nature of the offense in question, in light of the employee's past record. CSR 16-10; see, Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

3. The Agency has not proven by a preponderance of evidence that Appellant made the objectionable statement in question.

After careful consideration of all the evidence and testimony in this case, the Hearing Officer still does not know what happened on the morning of March 24, 2003. Everyone agrees that the statement was made. But the Hearing Officer does not find it is more likely than not that Appellant was the one who made it.

The Agency asserts that Kerdie Bates has no motivation to fabricate allegations against Appellant, and that the two were friends before this incident occurred. The Hearing Officer is not persuaded that Bates has no motivation to be untruthful. She would be motivated to do so, if she were the person who made the statement, in order

to avoid discipline. In fact, if she were the person who actually made the statement, it is equally likely that once confronted with the situation wherein someone else was being implicated during her first IA interview, Bates hesitated, and although under a Garrity advisement, allowed the original allegation to stand as against another. This may have left Bates somewhat backed into a corner when the investigator later confronted her directly with the allegations.

Close scrutiny of the evidence in this case tends to lend weight to the hypothesis that Bates made the statement herself. There are suspicious inconsistencies between the first and second interviews. Bates first denied being able to recall who made the objectionable comment. Yet she has been consistently clear that there were only three people who were at the desk at the time of the conversation: herself, [REDACTED] and Appellant. Therefore the Hearing Officer finds Bates' claims that she could not recall specifically who made the statement during her first IA interview as damaging to her credibility as her unwillingness to concede the inconsistencies between her first and second statements. Either way Bates lied under Garrity advisement, at the very least about hearing Appellant make the statement, if not about the fact that she may have made it herself.

But perhaps most damaging is Bates' long, detailed explanation for the comment during her first IA interview highly suspicious. Bates stated during this interview that in essence, nobody was really sure why [REDACTED] was off. It was a light conversation and should not be taken too seriously. They knew it was an FMLA leave but [REDACTED] didn't want anybody to know. Thus, the joke about the boob job. These were the reasons the objectionable comment was made. The Hearing Officer has serious doubts about an innocent individual offering a lengthy, unsolicited explanation to justify a comment which she denies making herself.

Finally, the Hearing Officer finds Bates' demeanor both on the stand and in the interview tapes suspicious and lacking in credibility. During the hearing, she persisted in anticipating questions and jumping in prematurely with answers, despite several admonishments by the Hearing Officer. She denied being untruthful during the first interview by Arndt even though she admitted "knowing" Appellant made the statement at that time. In general, the witness appeared defensive.

The Hearing Officer found the demeanor of both Appellant and [REDACTED] while on the stand more persuasive and reliable than that of Bates. [REDACTED] might have restored the Agency's evidence against Appellant, were it not for some concerns with [REDACTED] testimony as well. [REDACTED] stated she is certain it was Appellant who made the statement. However, [REDACTED] also stated that Appellant called her in from the elevator by saying, "Hey you get in here." The Hearing Officer finds this statement unlikely, based on Appellant's work record, which includes excellent performance ratings noting Appellant's interpersonal communications skills as one of her strengths. Further, there is no clear evidence to corroborate [REDACTED] assertion that Appellant stated "Hey you, get in here." If this portion of [REDACTED] testimony is not reliable, then it raises some question as to the rest of her testimony.

Furthermore, several considerations raise the question of how reliable [REDACTED] certainty is that Appellant made the objectionable statement. There are some physical similarities in the appearances of [REDACTED] and Bates, which could have been further compounded by the fact that both were in uniform. Both are medium-heavy build Caucasian women with strawberry-blond hair.

Finally, the Hearing Officer is somewhat troubled that [REDACTED] tried to persuade another co-worker to pursue harassment charges against another supervisor by pointing out that such actions against the Agency can bring "thousands of dollars." This tends to suggest an interest on [REDACTED] part to slant her account of the incident toward a supervisor in order to give it greater weight.¹

There are additional problems with the Agency's decision in this case. In making his decision to discipline Appellant, Oliva considered evidence that was unreliable and inaccurate. Oliva believed Appellant's statements from one interview to the next were inconsistent, but then had to admit, once hearing her first interview tape during the hearing, that he was mistaken in this belief. Oliva stated these inconsistencies were the "main reason" for his conclusion that Appellant was the guilty party. In fact, Appellant's statements have been entirely consistent with the exception of failing to state during the first interview how many times the objectionable statement was made.² Oliva's description of inconsistencies more closely characterizes the statements of Bates, not those of Appellant.

Oliva further considered a polygraph in the course of examining the evidence. While polygraphs are by their nature inherently unreliable, Appellant offered testimony from an expert witness whom the Hearing Officer found had greater expertise and was more persuasive than the Agency's expert witness. The testimony of Appellant's expert witness suggests this particular polygraph may have been beyond inherently unreliable; it may actually be outright misleading.

The Hearing Officer acknowledges that as the appointing authority, it is Oliva's prerogative to consider the information he thinks is appropriate in deliberating during a disciplinary action. However, the Hearing Officer must still find the decision he makes is supported by a preponderance of admissible, reliable, accurate evidence. In this case, Oliva misconstrued Appellant's statements as inconsistent and Bates' statements as consistent. He placed some weight on a polygraph, which examinations are inadmissible because of their inherent unreliability. In this case the result might actually

¹ During the hearing, the Hearing Officer overruled several objections by the Agency that this evidence was inadmissible evidence of prior acts to show conformity under C.R.E. 404 b). The Hearing Officer allowed the evidence because it tends to go to [REDACTED] motive and intent in fingering a supervisor. The Hearing Officer now further finds this evidence was admissible under C.R.E. 404 a) 3) and C.R.E. 607 as raising a question about the witness's credibility due to a influence of a pre-existing bias, conscious or otherwise. See, Knowles v. Board of Educ., 857 P.2d 553 (1993); U.S. v. Abel, 469 U.S. 45, 52 (1984).

² The Hearing Officer does not perceive Appellant's failure to specify how many times the objectionable statement was made during the first interview as inconsistent with her doing so during the predisciplinary meeting. Clearly, the focus during the first interview was on who said the statement, not how many times.

have been misinterpreted, making this particular exam even more misleading than usual. Finally, he pointed out that Appellant declined the polygraph, yet he did not know she did so on the advice of counsel.

For all these reasons, the Hearing Officer finds it is, at best, equally likely that Bates made the objectionable statement rather than Appellant. Whether Appellant made the statement thus cannot be determined by a preponderance of the evidence. The Agency therefore has not shown cause to discipline Appellant.³

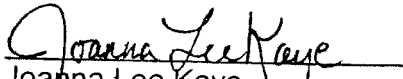
CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction to hear this case and render a decision.
2. The Agency has not demonstrated by a preponderance of evidence that Appellant made the objectionable statement in question.
3. The Agency has not shown cause for disciplining Appellant.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Agency's decision to suspend Appellant for three days is REVERSED, with two days back pay restored.

Dated this 18th day of November, 2003.


Joanna Lee Kaye
Hearing Officer for the
Career Service Board

³ Since the Agency has not shown cause the Hearing Officer does not reach the issue of whether the discipline was within the range of reasonable alternatives, as this issue is rendered moot.

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 18th day of November, 2003, addressed to:

David Osborne
Reid Elkus
1600 Broadway, Suite 500
Denver, CO 80202

Patricia Gabel



I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the interoffice mail, this 18th day of November, 2003, addressed to:

Mindi L. Wright
Assistant City Attorney
Employment Law Section

Alvin LaCabe
Department of Safety

Fred J. Oliva
Denver Sheriff's Department

