

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

Appeal No. 131-05

DECISION

IN THE MATTER OF THE APPEAL OF:

ALLAN G. MERGL,
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Deputy Allan Mergl, appeals a thirty-day suspension by his employer, the Denver Sheriff's Department (Agency), on November 10, 2005. The Appellant filed a timely appeal, under the Career Service Rules, on November 14, 2005. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearings Officer, on February 14, 2006¹. The Agency was represented by Joseph A. DiGregorio, Assistant City Attorney, with Major Deeds serving as advisory witness. The Appellant was present and was represented by Deputy Gregg Reynolds. Agency Exhibits 1-10 were admitted without objection.

II. ISSUES

The Following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules (CSR): 15-10, 16-50 A. 3), 17), 20), or 16-51 A. 5), or 11);
- B. if the Appellant violated any of the aforementioned CSRs, whether the discipline imposed was in conformance with, and fulfilled the purpose of discipline, CSR 16-10.

¹ No LogNotes were made due to a computer network problem.

III. FINDINGS

The Appellant is a Deputy Sheriff at the Denver Sheriff's Department (Agency). On April 12, 2005, at about 11:00 p.m., Lone Tree Police Officer Jon Miller was called to the Brunswick Zone Bowling Alley, located at 9255 Kimmer Dr., Lone Tree, Colorado, regarding a theft complaint. Upon his arrival, Miller was advised an adult male served himself a beer and failed to pay for it. The Appellant was identified as the suspect by Ms. Klemmetsen, the Brunswick Zone Manager. Klemmetsen stated the bartender told her the Appellant asked for a beer. The bartender told him he had to change a keg first. As the bartender returned, he saw the Appellant leaving the bar, with a beer in hand, return to bowl. The bartender then radioed to Klemmetsen. Klemmetsen reviewed the security tape of the incident. She observed the Appellant reach over the bar, take a 23 oz. cup, pour beer into it, and leave, without paying.

Officer Miller stated he went to the lane where the Appellant was bowling. After exchanging some information, he escorted the Appellant back to the bar. As they approached, the bartender and the Appellant then exchanged verbal hostilities. The Appellant walked over to the bar, raised himself up over the bar railing and began to yell, pointing aggressively at the bartender, and leaning increasingly toward him. The officers pulled back the Appellant, applying a wrist lock to bring the Appellant's arm behind his back. The Appellant resisted until Vandenberg began to draw his Taser and yelled "Taser" several times. The Appellant then complied with officer commands to stop resisting and to submit to being handcuffed.

Miller reported the Appellant stated with slurred speech and alcohol on his breath, "what are you guys doing?" "Look at my I.D." "I'm a deputy sheriff, how about some professional courtesy?"

The Appellant was then escorted outside the front doors and placed in the back seat of a patrol car. At the Appellant's request, Officer Miller looked through the Appellant's wallet and found a Denver Sheriff I.D. badge. The Appellant then told the officers that it was all a mistake, and that he had paid the bartender \$5.00, placing the money on the bar. The Appellant then asked the whereabouts of his \$5.00.

Klemmetsen advised Miller she had a security tape of the incident. Miller viewed the tape and saw the Appellant serving himself a beer without paying, and saw no evidence of the Appellant paying at any time. Miller returned to the bowling alley where three other deputy sheriffs had been bowling with the Appellant. Miller told them the Appellant had to leave the property, and told them to make sure the Appellant did not drive. Miller then issued the Appellant a summons, and released him to the care of his fellow deputies.

After receiving the summons, the Appellant began to point at the officers, yelling obscenities, and questioning their experience and time on the job. The Appellant's fellow deputies then pushed him back and escorted him away. The Appellant continued to deride the officers as his friends were moving him across the parking lot.

On August 25, 2005, the Appellant appeared at the City of Lone Tree Municipal Court and pled guilty to disorderly conduct, in exchange for dismissing the original theft charge. He received a deferred judgment of six months and a fine of \$200.00. The Appellant's previous discipline includes a verbal reprimand on July 4, 2005, for improper conduct.

A pre-disciplinary meeting was held on November 1, 2005. The Appellant appeared with his attorney, Don Sisson, and provided a taped statement. At the meeting, the Appellant apologized for his lack of good judgment, stating "I know what I did was wrong, but it wasn't done with malicious intent." The Appellant also admitted being placed in handcuffs by the responding officer. He also admitted when the officer asked for his name, he gave his name as "Deputy Allan Mergl." The Appellant's Attorney concluded by stating the Appellant took full responsibility for his actions and was sorry for what he did.

On November 11, 2005, the Appellant was served with written notification of his thirty-day suspension. He filed his appeal on November 14, 2005.

IV. ANALYSIS

A. CSR 16-50 A. 3) Dishonesty, including...lying to superiors...with respect to disciplinary actions...using official position or authority for personal profit or advantage...

Alvin LaCabe is the Manager of Safety for Denver, and therefore the Appellant's second level supervisor. LaCabe testified the first reason he found the Appellant violated this rule was his dishonesty about whether he was intoxicated at the bowling alley on April 12, 2005. Both Lone Tree Police Officers testified they have significant experience in dealing with intoxicated subjects. They both affirmed the Appellant was intoxicated when they contacted him. Andreas said "very much so," [Andreas testimony], and Vandenberg stated he believed the Appellant was intoxicated from the time he lunged across the bar, and by his "up and down" level of cooperation. Klemmetsen also believed the Appellant was intoxicated." Finally, the internal investigator, Deputy Kafadi, testified during a May 2, 2005 interview, the Appellant admitted that he had consumed four beers at the bowling alley. [Kafadi testimony]. The Appellant testified he had consumed only one beer at the bowling alley on April 12, 2005, and none beforehand that day. [Appellant testimony]. As Klemmetsen's and the police officers' observations were not impeached, but the Appellant had much to lose from acknowledging if he were intoxicated, the Hearings Officer finds it more likely Klemmetsen's and the police officers' observations concerning the Appellant's lack of sobriety were more credible than the Appellant's recollection.

Next LaCabe stated the Appellant was dishonest regarding stealing a beer at the bowling alley. [LaCabe testimony]. Both Klemmetsen and Andreas viewed the security tape of the event, and both affirmed when the bartender left, the Appellant reached over the bar, took a 23 oz. cup, served himself a beer, and walked away without leaving money then or later. The Appellant did not impeach either witness. The Appellant testified when he asked the

bartender for a beer, the bartender handed him a cup, but then told him to wait while he changed kegs. "I was mildly irritated." "I poured the beer, bowled [two balls], and as soon as I got done, I was leaving the bowling area, when I intersected with the Lone Tree Police Department." "[The police officer] asked me if I had paid for this beer that I had, and I said no I hadn't, but I was on my way to the bar to go pay for it." The Appellant's time line is not credible. He asks we believe that he fully intended to pay for the beer in view of the following. The Appellant waited until the bartender was out of sight, served himself a beer and walked away with it, but was prevented from returning to pay for the beer by the police intercession. In order to find the Appellant's view more credible, one of these two time sequences must be true: (1) the bartender notified Klemmetsen of the alleged theft, Klemmetsen went to the general manager's office, logged on to the security system, searched the proper time sequence, reviewed the time pertinent to the incident, then called to the police, who dispatched officers, officers then drove to the bowling alley, communicated with the bartender and Klemmetsen about the incident, went to the lane where the Appellant was bowling, and then questioned him, all occurring, by the Appellant's timeline, within the time the Appellant said he left the bar to bowl two balls and then tried to return to pay for his beer before police stopped him; or (2) the Appellant took at minimum of fifteen minutes, and more feasibly, one half hour, to bowl two balls while all the above took place. Neither scenario is credible. Klemmetsen is all-the-more credible, as she took pains not to accuse the Appellant falsely, by reviewing the security tape to check her bartender's allegations before calling police. Incongruously, in addition to claiming he intended to pay for his beer, the Appellant also claimed he returned to the bar and threw a five dollar bill on the bar before he was stopped by police. Both Klemmetsen and Andreas reviewed the security tape, and their observations belie that statement.

LaCabe also deemed the Appellant dishonest regarding the circumstances under which he identified himself to the Lone Tree Police Officers. Klemmetsen said she observed the officers pull the Appellant away from the bar when he tried to lunge toward the bartender. At that moment he yelled "I'm a Denver Sheriff. Look at my I.D." She added later, when they escorted him outside, he said "have some courtesy, I'm a Denver Sheriff." Officer Vandenberg testified as he pulled the Appellant away from the bar and attempted to handcuff him, the Appellant yelled "I'm a cop, I'm a cop. We're on the same team." Later, when asked his identification, the Appellant identified himself as a Denver Sheriff. [Vandenberg testimony]. In his written report, [Exhibit 4], Officer Miller said when he pulled the Appellant away from the bar and assisted in handcuffing him, the Appellant yelled "What are you guys doing? Look at my ID. I'm a Deputy Sheriff. How about some professional courtesy." *Id.* While the quotations from the three observers are not identical, it is clear the Appellant identified himself as a Denver Sheriff and in doing so, was seeking an advantage to which he was not otherwise entitled.

LaCabe also stated the Appellant was dishonest regarding his approaching the bartender aggressively, necessitating being pulled away and restrained by the police. [LaCabe testimony]. The security tape made clear the Appellant tried to reach over the bar toward the bartender and police officers pulled him away, contrary to the Appellant's assertion "the bartender became very aggressive with me, and I felt that I was being threatened, and at that point I approached closer to the bar, and he was talking to me in a very threatening manner, so I wasn't able to go right up to the bar, because they had a lot of chairs pushed up close

together in front of the bar, so I just flipped a five dollar bill out onto the bar.” Klemmetsen also stated the Appellant was sufficiently aggressive that, even with police present, she took refuge behind the bar when he lunged at the bartender. [Klemmetsen testimony]. For this, and for reasons stated above regarding the security tape proof, the Hearings Officer finds Klemmetsen and the officers’ testimony more credible.

LaCabe also claimed the Appellant was dishonest about his resisting and failing to cooperate with police. [LaCabe testimony]. Klemmetsen stated the Appellant resisted police for between five and ten minutes. [Klemmetsen testimony]. Vandenberg stated when he pulled the Appellant away from the bar “he struggled hard” so that Vandenberg felt compelled to draw his Taser. Andreas stated the Appellant resisted significantly.

Q: Was he struggling?

Andreas: Yes he was.

Q: Was it a considerable struggle?

Andreas: Yes it was. I’m certainly not as big as Mr. Mergl and I was doing all could to keep a hold of the arm that I had.

[Andreas testimony]. The Appellant replied he admitted he resisted initially, but only because he didn’t realize it was police who were pulling him away from the bar. First, this admission contradicts the Appellant’s earlier assertion that he did not reach over the bar toward the barkeeper. Also, the Appellant previously acknowledged he was stopped by police before he returned to the bar to pay for his beer, so he knew police were behind him as he was accompanied back to the bar. The Appellant’s denial is therefore unconvincing.

The witnesses to the Appellant’s dishonesty had no motive to be less than honest. The objective evidence in the security tape supported their statements. On the other hand, the Appellant’s statements were contradictory, and not credible in light of the objective evidence and times involved in the incident. For these reasons, the Agency has proven the Appellant’s violation of CSR 16-50 A. 3) by a preponderance of the evidence.

B. CSR 16-50 A. 17) Conduct which violates the Charter of the City and County of Denver or the Revised Municipal code of the City and County of Denver.

Article IV. Code of Ethics

Section 2-51. Legislative intent.

It is the intent of the city that its officers, officials, and employees adhere to high levels of ethical conduct so that the public will have confidence that persons in positions of public responsibility are acting for the benefit of the public. Officers, officials and employees should comply with both the letter and spirit of this ethics code and strive to avoid situations, which create impropriety or the appearance of impropriety.

LaCabe stated the Appellant violated this rule under the city's Code of Ethics when he improperly attempted to use his position for personal advantage. [LaCabe testimony]. The same facts which proved the Appellant's violation of CSR 16-50 A. 3), above, also apply here. It has already been established that the Appellant appealed for special treatment by the Lone Tree Police when he sought "professional courtesy." The Appellant therefore created the impropriety by seeking favorable treatment to which he was not otherwise entitled. As such, he violated this rule by a preponderance of the evidence.

C. CSR 16-50 A. 20) Conduct not specifically identified herein may also be cause for dismissal.

The Agency identified the specific conduct described above as its basis for discipline. No other basis for discipline is found. Therefore the Hearings Officer declines to apply this rule.

D. CSR 15-10 Employee Conduct. Every employee in the Career Service shall conscientiously fulfill the duties and responsibilities of his or her position. The conduct of every employee during work hours or at any time while representing the agency, department, or City shall reflect credit on Career Service and the City and Country of Denver (City).

Before police arrived, none of the Appellant's activities at the bowling alley on April 12, 2005 was related to his duties or responsibilities. It has already been established that the Appellant attempted to use his status as deputy sheriff to gain an undue advantage with the police. When the Appellant attempted to use his status as a shield, the obligations inherent to that status were invoked. He thereby transformed a non-sheriff matter into a sheriff matter, and in so doing, discredited the City of Denver, as evidenced by Klemmetsen and the police. Klemmetsen said she "couldn't believe that any law enforcement could try and use [his title] as an excuse." All three Lone Tree Police Officers affirmed the Appellant's inappropriate use of his status. By his inappropriate use of his status to avoid prosecution, the Appellant violated CSR 15-10.

E. CSR 16-51 A. 5) Failure to observe departmental regulations.

LaCabe cited six department rules he claimed the Appellant violated. [Exhibit 1, LaCabe testimony]. Each is analyzed in turn.

200.4 Deputy Sheriffs and employees shall not willfully depart from the truth, knowingly make misleading statements or falsify any report, record, testimony or work related communication.

It has already been established that the Appellant was untruthful about a host of facts, described above, at CSR 16-50 A. 3), including his sobriety, theft of a beer, his seeking preferential treatment by using his title of Deputy Sheriff, aggressiveness

toward the bartender, and his resisting police. In addition, he told the investigator he had four beers, not one as he claimed later. The investigator's testimony was credible and not rebutted. For these reasons the Appellant violated this rule.

300.2 Deputy Sheriffs and employees will not display any badge or identify themselves as Sheriff Department employees for any purpose, except when necessary for identification purposes in furtherance of an official duty, or in the course of authorized activities, or off duty employment.

The evidence has already established the Appellant identified himself to Lone Tree Police officers as a Deputy Sheriff in order to gain an undue advantage. None of the exceptions to the rule apply here. He therefore violated this rule.

300.11 Deputy Sheriffs and employees shall not become involved in activities involving violations of the law. Flagrant or repeated violations of State Statutes or Ordinances shall constitute grounds for disciplinary action or dismissal.

For purposes of administrative discipline, the standard of review to determine if the Appellant broke a law is a preponderance of the evidence. This determination must be made independently of any criminal investigation. The Appellant argued he was not convicted of the original theft charge, however, it is irrelevant that he entered a plea to another violation for two reasons: first, he stands convicted of a crime under rule 300.11, above. Second, the evidence above, establishes the Appellant flagrantly stole a beer on April 12, 2005 at the Brunswick Zone bowling alleys, in Lone Tree, Colorado, in violation of rule 300.11. The Appellant is therefore in violation of rule 300.11.

300.19 Deputy Sheriffs and employees shall violate any lawful rule, duty, procedure or order.

LaCabe stated the Appellant violated this rule by his violations of the other rules stated *supra* and *infra*. Without establishing the Appellant committed a distinct violation, LaCabe's statement fails to establish a violation here, that is not already covered by the other rules.

300.20 Deputy Sheriffs and employees shall not indulge in any conduct which is contrary to Career Service authority rules and Regulations.

By his violations of CSR 15-10, 16-50 A. 3), and 17) the Appellant violated this Sheriff's Department Rule.

F. CSR 16-51 A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

The Agency identified the specific conduct described above as its basis for discipline. No other basis for discipline is found. Therefore the Hearings Officer

declines to apply this rule.

V. LEVEL OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior or performance. CSR 16-10. The degree of discipline depends upon the seriousness of the offense, taking into consideration the employee's past record. *Id.* LaCabe spoke at length about the egregious nature of the Appellant's violation regarding his attempt to use his status as deputy sheriff to gain an advantage not otherwise due.

That's something we begin in the Academy with. That's something that is, unfortunately, endemic to the culture of police work, and that is what I talk... a lot about in both the Police Academy and the Sheriff's Academy - this sort of culture of entitlement - and that is, because you are a law enforcement officer, you are entitled, culturally, or implicitly, to be treated differently. And it happens - it's no big secret - it happens anywhere from a traffic stop all the way to an arrest situation.

I can tell you, based upon my experience, both as a police officer, and investigator and a prosecutor, there is no case worse to a uniformed officer, than being called to the scene involving another police officer who is... drinking and uncooperative, and wants to assert that he be treated differently because he is a law enforcement officer.

Most police officers don't want any part of that kind of case. You get there and you want to walk away. You want to figure out how not to get involved, because you know the consequences: you're going to have to take some action. If you don't take action, there is the possibility of some complaint being made against you... At the same time you're trying to... be at least as fair as possible to the police officer. But sometimes you go a little overboard attempting to do that.

It's the kind of case that, as I said, most police officers wish they were not involved in, because they find themselves in these kinds of hearings where THEIR credibility is now being questioned and - there is a real issue here - because they are now in the position of having to come in and testify against another police officer. They're uncomfortable doing that, they don't want to do that, and yet their...so-called "brother officer" puts them in that position.

It's something that we begin to talk about from day one in law enforcement, and that is curtailing this improper use of your position because of the prejudice that it has to you, to other officers, to the relationships between the departments - all of those things. This is not a small matter. It's something that I think that systemically has to be dealt with...

[LaCabe testimony].

The Appellant minimized the gravity of the offense, stating it was only an ordinance violation. [Exhibit 1, p.6]. He was evasive and untruthful during his interview for the internal investigation of the incident.

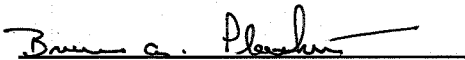
As a representative of law enforcement, the Appellant is under a higher duty to uphold standards of equal treatment under the law. That he sought an undue advantage for himself under the guise of his status as deputy, is an aggravating factor in considering the level of discipline.

LaCabe considered the Appellant's past record, acknowledging his otherwise "solid work record," and considered a range of discipline, including dismissal. The Hearings Officer concludes the violations committed by the Appellant were serious enough to warrant dismissal, so that LaCabe's decision to suspend him for thirty days was within the range of reasonable alternatives, was taken after due consideration of the Appellant's record, and was reasonably calculated to correct the inappropriate behavior, all in conformance with the purposes of discipline. CSR 16-10.

VI. ORDER

The Agency's suspension of the Appellant for thirty days, without pay, beginning November 20, 2005, is AFFIRMED.

DONE this 13th day of March, 2006.



Bruce A. Plotkin
Hearings Officer
Career Service Board

CERTIFICATE OF MAILING

I certify I have forwarded a correct copy of the foregoing **DECISION**, by depositing it in the U.S. mail, postage prepaid, this 14th day of March, 2006, addressed to:

Deputy Allan G. Mergl
6734 So. Winnipeg Circle, #103
Aurora, CO 80016

I further certify I have forwarded a correct copy of the foregoing **DECISION**, by depositing it in interoffice mail this 14th day of March, 2006, addressed to:

Deputy Gregory Reynolds
Denver Sheriff's Department

Joseph A. DiGregorio, Esq.
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