

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

Appeal No. 28-07, 50-08

DECISION

IN THE MATTER OF THE APPEALS OF:

SHARMAINE NORMAN-CURRY

Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Sharmaine Norman-Curry, appeals her 15-day suspension, assessed May 8, 2007, [case no. 28-07], and her dismissal from employment, assessed June 29, 2007 [case no. 50-07]. Discipline in both cases was assessed for alleged misconduct in violation of Career Service Rules specified below, by her employer, the Denver Sheriff's Department [Agency]. The cases were consolidated, and a hearing concerning the combined appeals was conducted over five days by Bruce A. Plotkin, Hearing Officer, on November 17-20, and December 16, 2008. The Appellant was present throughout, and represented by her attorney-at-law, Eric James, Esq. The Agency was represented by Joseph Rivera, Assistant City Attorney.

Agency exhibits 1-27, and 32-36, 38, and 39 were admitted. Appellant's Exhibits A, B, E, G, and H were admitted. The Agency presented the following 27 witnesses: the Appellant; Capt. Guerrero; Sgt. Sich; Capt. Casorla; Sgt. Rolando; Deputy Fryer; Deputy Mazotti; Capt. Kopylov; Capt. Rastede; Sgt. Swift; Deputy Gordon; Sgt. Collier; Deputy Adcock; Sgt. Robirds; Major Anderson; Deputy Cheney; Deputy Jenkins; Capt. Than; Sgt. Garcia; Officer Avila; Capt. Michael; Director and Undersheriff Lovingier; Officer Austin; Jannie Barizonte; Deputy Brown; Deputy Dolan; and Manager of Safety LaCabe. The Appellant testified on her own behalf and presented the following witnesses: Sgt. Sich; Deputy Gordon; Deputy Kemp.

The hearing was bifurcated into four mini-hearings, based upon the Agency's major claims against the Appellant. My findings and analyses are arranged

accordingly.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules specified by the Agency in each case, below;
- B. if the Appellant violated any Career Service Rule, whether the discipline assessed by the Agency complied with the purposes of discipline under CSR 16-20;
- C. whether the Agency's discipline of the Appellant was motivated by unlawful discrimination, sexual harassment, or retaliation.

III. THE CROCHET NEEDLES CASE

A. Findings.

The Appellant, Sharmaine Norman-Curry, was a deputy sheriff in the Denver Sheriff's Department (Agency) for 15 years. The core function of the Agency is the care, custody, and control of inmates at the Denver City Jail and at the County Jail. The Appellant was a Field Training Officer in the City jail. FTOs teach newer deputies proper procedures and set an example for proper conduct. Consequently FTOs are held to a higher standard of conduct within the Agency. [11/17/08 Casorla testimony 1:26:22; 11/17/08 Rolando testimony 1:49:55].

For many years, the Appellant brought crocheting materials to work. [Vol. II, Exhibit 3, p.641 photo (the pen is for size reference only)]. She regularly crocheted while on duty. [11/17/08 Appellant testimony 10:02:58]. Other deputies have also either knitted, sewed, or loomed while on duty. At times, they were asked by superiors to create items for charitable functions. When the Appellant was not using her crochet needles she left them unattended in an area accessible to inmates.

During 2005, Captain Guerrero ordered the Appellant to cease crocheting while on post. He asked the Appellant "was it my imagination or were you knitting on post?" The Appellant replied "It was your imagination, because I was crocheting, not knitting." [11/17/08 Appellant testimony 10:16:05]. Guerrero allowed the Appellant to crochet in the lunch room, as long as she secured the needles when she was not using them. [11/17/08 Guerrero testimony 11:37:02; Vol. II, Exhibit 3, p. 612].

Sergeant Sich issued two similar orders in 2007. A short time after Sich's order, Sergeant Rolando ordered the Appellant to cease bringing her crocheting needles into the City Jail altogether. On October 26, 2007, Captain Casorla, Sergeant Rolando, the Appellant, and her union representative, Deputy Fryer, met to discuss the Appellant's crocheting in the City Jail. Rolando ordered the Appellant to

take her “knitting needles” immediately to her car and not to bring them back at any time into City Jail. The Appellant’s representative understood the order to encompass any activities resembling knitting, and the Appellant agreed to comply. [Vol. II, Exhibit 3, pp.610, 612; 11/17/08 Fryer testimony 2:12:55].

On January 9, 2008, Captain Kopylov, the watch commander, saw Deputies Mazotti, Barra, Dolan and the Appellant “knitting” in the control center for the female section of the jail. He ordered them to desist from such activities while on duty. The other deputies understood and complied. The Appellant argued with Kopylov. Kopylov asked Sgt. Rastede to witness his direct order to the Appellant to remove her crochet needles. [11/17/08 Kopylov testimony 3:20:23; Rastede testimony 3:57:13]. The Appellant continued to argue. Kopylov repeated his order, stating this was her last chance to comply. She then complied. Later the same night, he specifically ordered Mazotti to cease knitting in City Jail altogether, and told her to share that order with the others present earlier. [Vol. II, Exhibit 3, p.595]. Mazotti, a White female, received a written reprimand for the incident. [11/17/08 Mazotti testimony 3:03:14]. It was her first offense. Dolan, a White female, received a verbal reprimand for the incident. [12/16/08 Dolan testimony 11:34:24]. Dolan stated “I absolutely considered it [Kopolov’s directive] an order not to bring in knitting any more.” [12/16/08 Dolan testimony 11:46:19]. Her testimony was not disputed. The Appellant acknowledged receiving Kopylov’s vicarious order. [See Vol. II, Exhibit 3, p.597]. The next day, the Appellant brought her crocheting materials, including the crocheting needles, [Vol. II, Exhibit 3, p.641], to work. Kopylov and the Appellant submitted reports concerning the incident. [*Id.* pp. 595-597].

Analysis of Crochet Needles Case.

The Agency claimed the Appellant’s conduct violated the following Career Service Rules:

1. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

The Appellant acknowledged leaving her crochet needles unattended in the female control center when she was not using them. The Appellant acknowledged the control center door was always open, [11/17/08 Appellant testimony 10:01:22], and that inmates could gain access. She did not dispute that the needles could easily be converted to lethal shanks. Since one of the Appellant’s primary duties is the safe-keeping of inmates, her failure to secure potentially lethal instruments was a careless performance of that duty.

2. CSR 16-60 E. Any act of dishonesty, which may include, but is not limited to...
3. Lying to superiors or falsifying records with respect to official duties, disciplinary actions....

The Agency claimed the Appellant was dishonest when she denied having been ordered by two superiors, Guerrero and Sich, not to knit on duty on October 3, 2007. [Exhibit 3, p.610; Exhibit 12, p. 739; 11/20/08 Lovingier testimony 3:21:30]. When her

watch commander, Guerrero, asked "was it my imagination or were you knitting on post," the Appellant's retort, "it was your imagination because I was crocheting, not knitting," was dishonest in light of the obvious intent of the question.

The Agency also claimed the Appellant was dishonest in denying Capt. Kopylov ordered her to cease bringing her crocheting materials to work on January 9, 2008. The Appellant replied Kopylov's order concerned only her yarn and not her needles. In view of Kopylov's and other supervisors' unrebutted testimony concerning the potential for harm by use of the crochet needles, it is unlikely Kopylov's order addressed only yarn and not needles. More importantly, Kopylov's directive was a clear order to the other deputies present, and their testimony was not rebutted. I find, therefore, that Kopylov issued an order to the Appellant on January 9, 2008 to cease knitting. Her denial that she was so ordered was dishonest in violation of CSR 16-60 E.

The Agency also alleged the Appellant was dishonest in denying that Sgt. Sich ordered her to cease knitting on post. The Appellant testified Sich never issued her such an order. [11/17/08 Appellant testimony 10:19:17]. Sich testified she ordered the Appellant twice in 2008 to cease knitting on post, the second time while the Appellant, in her FTO capacity, was training a deputy. Sich's order was "please do not do this again." The Appellant acknowledged Sich's words, but claimed the words did not constitute an order. The Appellant's denial is not reasonable in view of the obvious intent of Sich's words and her authority over the Appellant. Consequently the Appellant's denial was dishonest in violation of CSR 16-60 E.

3. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor...

The same evidence which established the Appellant's violation of Departmental Rule 200.13, below (Deputy Sheriffs and employees shall not disobey, neglect, or refuse to obey, any lawful order of a supervisor), also establish a violation of this Career Service Rule.

4. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

a. CSR 15-5 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 County of Denver (City).

The same evidence that established a violation of the specified Department Rules, immediately below, also established the Appellant's violation of this rule.

b. Departmental Rules and Regulations.

200.4. Deputy Sheriffs and employees shall not depart from the truth,

knowingly make misleading statements, or falsify and report, record, testimony or work related communications.

The same evidence that established a violation of CSR 16-60 E., above, also established the Appellant violated this Departmental Order.

200.9. Deputy Sheriffs and employees shall not fail to devote undivided attention to their duties.

The Appellant's crocheting while on post was a violation of this order. The Appellant responses seem to be (1) she was not given a direct order prohibiting her crocheting on post and (2) the Agency permitted such activities for years. First, a standing order such as this one does not require an additional direct order to be enforceable. The Appellant's second response seems to be a notice argument based upon the legal theories of course of conduct and waiver, that is, by permitting a rule to be violated for years, the agency established a precedent that it may not suddenly enforce. A course of conduct argument is a valid defense to a standing order, but only in the absence of a subsequent directive which provides reasonable notice of the intent to enforce it. In this case, once the Appellant was ordered not to crochet on post, she had reasonable notice the standing order would be enforced, even if it had not been enforced previously. It is evident the Appellant's attention to her knitting prevented her from giving her full attention to inmates. For these reasons the Appellant violated Department Order 200.9.

200.13. Deputy Sheriffs and employees shall not disobey, neglect, or refuse to obey, any lawful order of a supervisor.

To sustain the enforcement of departmental rules, the rules must be (1) clear, (2) reasonable, and (3) uniformly enforced.

(a) Clarity. As noted above, several of the Appellant's superiors issued orders for the Appellant either to desist from crocheting while on post or to desist from bringing her crochet needles to work at all. The un rebutted testimony from deputies who were present when the orders were given established that the orders were clear. More importantly, when Casoria ordered the Appellant to desist from knitting on post and not to bring knitting needles into the jail, the Appellant's representative, Fryer, was present and found the directive to be clear. [Fryer testimony].

(b) Reasonableness. The Agency presented two legitimate reasons to support orders against knitting and similar needlework while on post in a detention facility. First, the deputy is not giving her full attention to her post, in violation of post orders. Second, the contraband instructor, Sgt. Swift, testified convincingly how the Appellants' needles could easily be broken in half, and sharpened within seconds on the concrete floor, to create four "shanks." The hollow needles could also be used as injection devices. [11/17/08 Swift testimony 4:27:06; see also 11/17/08 Guerrero testimony 1:17:10; 11/17/08 Kopylov testimony 3:47:52; 11/17/08 Sich testimony

1:17:10]. In light of this evidence, the orders to desist crocheting were reasonable.

(c). Uniform enforcement. Other deputies were present when the Appellant was ordered to desist crocheting. The other deputies were also engaged in needle work. They also received discipline for their failure to devote their undivided attention to their duties. The element of uniformity is established.

The Appellant presented several defenses against the Agency's claims, above. She claimed other, non-minority deputies were allowed to bring in their knitting or sewing without discipline. Her testimony is directly rebutted by Guerrero who testified, with equal credibility, that every time he sees such activities he directs the deputy to stop. His policy is to give two verbal warnings about such activities, then assess discipline for each subsequent violation. [11/17/08 Guerrero cross-exam 1:23:04]. In addition, Deputy Dolan, who was present when Kopylov ordered the Appellant to cease knitting stated the directive was a clear order and the Appellant failed to question Dolan's impression. Dolan, who is White, was also disciplined for knitting that night. Dolan also affirmed the Appellant argued with Kopylov rather than complying with his order. [12/16/08 Dolan testimony 11:34:24, 11:46:19].

Next, the Appellant claimed since the Agency permitted her crocheting and similar activities for years, then she must be permitted to continue. She claimed that, supervisors even asked deputies to create items for charitable functions at the Agency. However, as noted above, the Appellant had been on notice since 2005 that her crochet needles were not permitted. Her hair-splitting distinction between orders regarding crocheting and knitting is without merit, and ignores the reasonable safety concerns expressed by the Agency. The Appellant's argument, that the Agency's previous failure to prohibit crochet needles justifies her continuing to bring them in, is no more persuasive than arguing the previous failure to ticket an individual for running red lights makes the activity legal and safe.

The Appellant also claimed she refused to comply with several directives not to have her needles in the City Jail because, absent the phrase "I order you," the directives were requests, rather than orders. This distinction was not supported by any rule, practice or supervisor.

200.15. Deputy sheriffs and employees shall not willfully or intentionally display any disrespectful, insolent or abusive language or behavior toward any supervisor, department employee, employee(s) of other official agencies of the public, while on duty.

On January 9 and 10, 2008, when the Appellant continued to argue with Kopylov, a superior officer, about his direct and lawful order to leave needles out of the jail, the Appellant violated this Departmental rule.

300.19. Deputy Sheriffs shall not violate any lawful rule, duty, procedure or order. This rule is addressed by the more specific violations alleged by the Agency, above and below.

300.20. Deputy Sheriffs and employees shall not indulge in any conduct that is contrary to Career Service Authority Rules and Regulations. This rule is addressed by the more specific violations alleged by the Agency, above and below.

300.21 All employees of the Department shall read and obey all directives and orders issued by the Mayor, the Manager of Safety, Director of Corrections and Undersheriff, command officers or their designees that relate to the Sheriff Department's duties and assignments. Employees shall also read, maintain familiarity with, and carry out all Departmental Orders, Post Orders, and written procedures relating to their specific duty posts and assignments. This rule is addressed by the more specific violations alleged by the Agency, above and below.

Departmental Order 2440.1

3. Code of Ethics: Employees of the Denver Sheriff's Department should adhere to the following guiding principles while performing their duties: Making reasonable decisions based upon common sense and good judgment.

Setting a positive example for others to follow: having the courage to do the right thing; maintaining self-discipline, control and self-restraint.

5. Standard of Conduct: Public confidence in the integrity of members of the Denver Sheriff's Department demand that we demonstrate the highest standards of conduct at all times. Standards of professional conduct include, but are not limited to: Following all jail policies, procedures and directions.

These directives are cited as "Department Orders," yet the words are aspirational, e.g. "should adhere," "strive for excellence", and the golden rule reference. This is the language of guidance, not orders. Moreover, the directive to be "accountable for everything we do" is too vague to enforce. For these reasons I decline to find Departmental order 2440.1 at ¶¶ 3 and 5 constitute orders.

5. CSR 16-60 V. Failure to use safety devices, or observe safety regulations which results in injury to others, or jeopardizes safety of others.

The evidence which established the Appellant violated Departmental rule 200.9 (undivided attention to duties), above, also established a violation of CSR 16-60 V.

6. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

A violation of this rule requires proof of conduct hindering an agency's effectiveness, i.e., its ability to carry out its mission, or proof of conduct that is prejudicial to an agency's good order, i.e., the internal structure and means by which it achieves its mission. In re Strasser, CSA 44-07, 4 (10/16/07), *affirmed* CSB 44-21 (2/29/08). The Agency did not specify how it believed the Appellant violated this rule in the context of the crochet needles case, and the record does not contain evidence which tends to show how the Appellant violated either of its provisions. The Agency failed to prove this violation by a preponderance of the evidence.

IV. THE BUTTERFLY HAIR STICKS CASE

Findings

Since she began working as a deputy sheriff, the Appellant occasionally wore butterfly hair sticks at work without complaint. The Agency adopted a new uniform policy in 2006. The pertinent portion of the new policy states as follows.

UNIFORM POLICY

6. Personal Appearance Regulations for Officers:

A. Officer Grooming:

1. Hair...

Hair clips, pins or bands used to keep hair up will be minimal in size, plain in design, will match the hair as closely as possible or be dark navy blue or black in color.

[Exhibit 38, p.988].

On October 13, 2006, Sgt. Collier, the Appellant's supervisor, noticed the Appellant was wearing unusual-looking butterfly hair sticks, [Exhibit 38 – the hair sticks], leaned in close to the Appellant, and commented they were interesting. He then left to research the dress code regarding hair adornments. Later that morning, he approached the Appellant again about the hair sticks. Collier told the Appellant to remove the hair sticks as they were not in compliance with dress code. The Appellant refused. Collier relieved the Appellant of duty and an internal investigation into the Appellant's alleged insubordination ensued. [Exhibit 23]. At the same time, the Appellant filed a sexual harassment grievance against Collier. [Exhibit A]. The grievance was denied. [Exhibit 23 p. 902].

Captain Casorla was watch commander the morning of October 13, 2006. Collier approached him about the butterfly stick incident. Word of the incident spread to Chief Wilson who called Casorla and gave him three directives: to see if the Appellant would comply by asking her to remove the butterfly sticks; advising her that her refusal to do so would lead to disciplinary action; and if she then refused, to place her in the control center, out of the public's and inmates' view. Casorla asked the Appellant "is there anything I can do to make you take those out of your hair?" The Appellant replied curtly "no." Casorla told the Appellant her refusal would lead

to discipline. She did not comply. Casorla then re-assigned her to a basement control center.

The following day, the Appellant returned to work wearing the same butterfly sticks. [Exhibit 26; 8/18/08 Casorla testimony 3:29:32]. Captain Casorla ordered her relieved of duty, and ordered her to report to the Major's office. Chief Wilson looked in and told Casorla the hair sticks were non-compliant. Then, in the presence of two sergeants and the Appellant's representative, Casorla ordered the Appellant to remove her butterfly sticks. She complied then was permitted to return to her assigned post. [Exhibit 26; 8/18/08 Casorla testimony 3:29:32]. Casorla had never uttered the words "I order you" in order to obtain compliance by anyone other than the Appellant that day.

An internal investigation into the butterfly hair sticks case followed. On April 26, 2007, the Appellant was ordered to meet, concerning the incident, with Director Lovingier, Captain Kricke, Chief Wilson, Chief Smith, Major Connors, and Sergeant Roland. The Appellant attended and was represented by her attorney-at-law. Following that meeting, the Agency assessed a 15-day suspension on May 8, 2007.

ANALYSIS OF BUTTERFLY STICKS CASE

The Agency claims the Appellant's conduct, above, violated the following Career Service Rules.

1. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor...

The Appellant did not dispute that Collier was a supervisor authorized to issue her orders. Further, the Appellant did not dispute she was subject to the above uniform policy. She disputed, however, that Collier's directive that she remove her butterfly sticks was unlawful because he failed to preface his directive with specific terminology similar to "I order you" or "I give you an order to..." [11/18/08 Appellant testimony 9:32:47]. This claim may have had merit had it also been unclear to others, however not one of her supervisors, at any level of command, agreed with her, [Collier, Casorla, Rolando, Lovingier, LaCabe testimony], and their testimony was not rebutted. I find Collier's directive was reasonably clear as the lawful order of a superior officer. The Agency thus proved this violation by preponderance of the evidence.

2. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

- a. Uniform policy. As a member of the Denver Sheriff's Department, the Appellant was subject to the Agency's Uniform Policy, cited above. It is apparent the butterfly hair sticks worn by the Appellant, [Exhibit 38], did not comply with the above uniform policy concerning minimal size, plain design, and matching or dark color.

The 7" overall length of each hair stick cannot reasonably be considered minimal in size; nor can bright silver, flapping butterflies atop long sticks be considered plain in design. None of the colors in the sticks matched the Appellant's black hair, nor are the sticks black or navy blue, as otherwise permitted by the regulation. By persisting in non-compliance with the Sheriff Department's uniform policy, particularly after being ordered to come into compliance, the Appellant violated the Agency's uniform policy which, in turn, constitutes a violation of CSR 16-60 L.

b. Departmental Order 200.13 Deputies shall not refuse a lawful order. The same evidence that established the Appellant's violation of CSR 16-60 J., for her failure to observe written departmental or agency regulations, policies or rules, also establishes her violation of this Departmental Order.

3. CSR 16-60 O. Failure to maintain satisfactory working relationships with co-workers, other City employees, or the public.

Despite her refusal to follow orders over this incident, the Agency did not advance any evidence that this incident caused a significant degradation in any of the Appellant's working relationships. The deterioration of a working relationship must be proven independently of another rule violation.

4. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

To sustain an allegation of this rule, the agency must prove the Appellant's conduct hindered the agency's effectiveness, i.e., its ability to carry out its mission, or was prejudicial to the good order of the agency, i.e., the internal structure and means by which the agency achieves its mission. *Id.* The Agency failed to demonstrate how the Appellant's conduct diminished its core mission, to provide care, custody or control of inmates. No diminishment in the structure or means to achieve its mission occurred, nor was there evidence the Appellant's conduct brought disrepute on or compromised the integrity of the City. This claim, therefore, fails.

Appellant's Claims Against the Agency in the Butterfly Hair Sticks Case

1. Appellant's Sexual Harassment Claim.

There are two forms of sexual harassment, *quid pro quo* sexual harassment and hostile work environment sexual harassment. *Quid pro quo* sexual harassment occurs when a supervisor conditions a tangible employment benefit upon a subordinate's submission to sexual conduct. See Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir.1987). The Appellant did not advance any evidence that Collier conditioned an employment benefit upon sexual favors or conduct. *Id.*

Hostile work environment harassment occurs where sexual conduct unreasonably interferes with the employee's work performance or creates an intimidating, hostile, or offensive working environment. This form of sexual harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Faragher v. City of Boca Raton, 524 U.S. 775, 805, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

The Appellant's sexual harassment claim was based upon Collier's conduct on October 13, 2006. In support of her claim, she testified that, when Collier ordered her to remove her butterfly hair sticks, he touched her body with his. She summed up her complaint with the statement "I found that to be sexual in nature, I felt that to be very disrespectful of him to touch me like that... that means putting his mouth next to my neck and touching my body, touching the back of [pause] any part of my body." [11/18/08 Appellant testimony 9:53:42]. According to the Appellant, several female deputies witnessed the incident: Deputies Adcock, Gordon, and Forrest. Several factors weigh heavily against the Appellant's assertions.

1. The Appellants assertions were incongruent. She claimed Collier approached her from behind, put his face against or next to her neck, and touched her back, shoulders and buttocks with his body when he whispered his comment into her ear. [11/18/08 Appellant testimony 9:34:48; 9:53:42]. However, she also claimed that Collier approached her head-on and touched her breast or breasts with his body in the same incident. [Exhibit 23, p.897].

2. Deputy Adcock testified she observed the entire interaction between Collier and the Appellant the morning of October 13, 2006. She found Collier was not rude to the Appellant, that while he is a natural "close talker," denied Collier's body came into contact with the Appellant's breasts or buttocks. Adcock's credibility was not questioned. Even though it was apparent from her testimony that Adcock felt much more aligned with the Appellant than with Collier, her testimony stood in clear contradiction to that of the Appellant.

3. Deputy Gordon also observed the interaction between Collier and the Appellant on October 13, 2006. She remembered Collier may have touched the Appellants' elbow, but denied Collier touched the Appellant inappropriately. [11/18/08 Gordon testimony 4:33:22]. Gordon, who is African American, stated she gets along well with Collier. The Appellant did not challenge her testimony.

4. Sgt. Rolando was assigned to conduct an internal investigation into the butterfly hair sticks case. Rolando testified credibly that when he interviewed the Appellant several hours after the incident with Collier, the Appellant did not mention Collier touching her inappropriately. "It would have captured my attention." [8/18/08 Rolando testimony 3:37:29]. His credibility was not challenged.

The Appellant's second basis for her sexual harassment claim was that Collier sexually harassed another female deputy.¹ In a sexual harassment claim, it is a relevant inquiry whether the same supervisor who allegedly engaged in sexual harassment against a subordinate, also engaged in similar behavior toward other subordinates of the same gender. Vinson v. Taylor, 753 F.2d 141 (D.C.Cir.1985), aff'd in part and rev'd in part, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). To that end, on cross-examination, Collier admitted he had been investigated for a claim of sexual harassment regarding another female deputy.² Collier stated the deputy's claim was that he brushed against her shoulder and whispered in her ear. However, that deputy later recanted her claim. [11/18/08 Collier testimony 2:03:14].

The Appellant failed to establish a basis for her sexual harassment claim where: none of the witnesses observed the alleged offensive contact that was the basis for the Appellant's sexual harassment claim; the Appellant failed to mention the offensive contact to the investigator of the incident; and the alleged victim of similar conduct recanted her claim.

2. The Appellant's Butterfly Hair Sticks Racial Harassment Claim.

The Appellant's racial harassment claim was based upon her allegation that Collier targeted minorities about their hair. Several witnesses for the Appellant testified Collier seemed to "pick on" some female deputies about their hair more than others and the Appellant was one of the females he picked on. [Adcock testimony, Kemp testimony, Sich testimony]. The Appellant offered no evidence regarding the frequency of the conduct, its severity, whether it was physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interfered with the deputies' work performance. In the absence of these or similar indicia, the Appellant failed to establish her racial and sexual harassment claims by a preponderance of the evidence. EEOC v. PVNF, L.L.C., 2007 U.S. App. LEXIS 11276 (10th Cir. 2007).

3. The Appellant's Butterfly Hair Sticks Race Discrimination Claim.

The Appellant's evidence concerning this claim mirrors the evidence for her sexual harassment claim, that Collier treats White female deputies more respectfully than African Americans. She averred Deputy Adcock, who is White, once wore one of the Appellant's butterfly sticks and had a conversation with Collier who did not mention the butterfly sticks. Even if true, this statement fails to prove race discrimination. The question to resolve in a race discrimination claim is whether an adverse employment action was taken against the appellant because of her protected status. Fallis v. Kerr-McGee Corp., 944 F.2d 743, 744 (10th Cir. 1991). In other words, the circumstances must establish, by a preponderance of the evidence, a link between the Appellant's 15-day suspension and her race. The following circumstantial evidence weighed preponderantly against the Appellant's claim.

¹ The Appellant claimed these facts indicated bias, [Appellant closing argument], an evidentiary concept regarding the credibility of witnesses; however, I interpret the allegations as consistent with a claim of sexual harassment.

² The deputy's name is omitted for privacy reasons.

The Appellant's 15-day suspension was assessed, not by Collier, but by the Manager of Safety who is African American. The Appellant did not claim the Manager is racist nor did she claim he acquiesced in or ratified Collier's alleged racism. The Appellant also refused to comply with Casorla's order to remove her butterfly hair sticks. The Appellant offered evidence that another African-American deputy claimed Collier targeted her about her hair, but that deputy rescinded her claim. [Collier testimony]. Deputy Adcock testified that Collier seems to target some deputies more than others about their hair, but did not state Collier's focus was race-based. [11/18/08 Adcock cross-exam 2:56:06]. Sgt. Sich testified that several female deputies complained to her that Collier picks on them about keeping their hair up, but Sich did not identify their race. Sich was also asked about an incident when Collier demanded the Appellant fix her hair whereas, immediately afterward, he failed to do so for another deputy; however Sich was not asked the race of the second deputy. Sich also testified several deputies observed that, when Collier briefed a group of deputies about uniform policy compliance, he fixed his gaze on minorities. This evidence fails to establish a connection between the Appellant's suspension and racism as alleged by the Appellant.

4. The Appellant's Butterfly Hair Sticks Sex Discrimination Claim

Sex discrimination is proven by evidence of 1) membership in a protected class, 2) an adverse employment action, and 3) evidence the Appellant was treated less favorably than her male counterparts. In re Felix, CSA 87-06, 4 (1/29/07).2/19/08), citing McDonnell Douglas v. Green, 411 U.S. 792 (1973); Bodaghi v. Dept. of Natural Resources, 969 P.2d 718 (Colo. App. 1998).

The first two elements of sex discrimination were not in dispute. The Appellant is a female who was disciplined for wearing her butterfly hair sticks. The Appellant presented no evidence she was treated less favorably than similarly situated males, therefore, this claim fails.

5. The Appellant's Butterfly Hair Sticks Retaliation Claim

The Appellant claims the Agency assessed a 15-day suspension in this case in retaliation for the Appellant's filing a sexual harassment case against Collier. While discrimination laws seek to prevent injury to individuals based on who they are, retaliation laws seek to prevent harm to individuals based on what they do. See Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405, 2412 (U.S. 2006). To prove retaliation, the Appellant must show 1) she engaged in a protected activity in opposition to discrimination, 2) she was subsequently subject to an adverse employment action, and 3) there is a causal link between the protected activity and the adverse action. *Id.*

There is no question the Appellant met the first two elements of her claim. She lodged a grievance against Collier for sexual harassment on October 13, 2006. [Exhibit A]. She was then assessed a 15-day suspension on May 8, 2007. [Exhibit 20]. The open question is whether the Appellant can establish, by a preponderance

of the evidence, a causal link between the two.

The seven-month lapse in time between the Appellant's grievance and the alleged retaliation is too remote to establish a link between the two. "Unless there is very close temporal proximity between the protected activity and the retaliatory conduct, the plaintiff must offer additional evidence to establish causation...a three-month period, standing alone, is insufficient to establish causation." Marquez v. Baker Process, Inc., 42 Fed. Appx. 272, 275, 276 (10th Cir. 2002)(add'l citation omitted). The Appellant did not offer any additional evidence concerning retaliation, consequently this claim fails.

The Bad Language Case

Findings.

During the course of her employment as deputy sheriff, the Appellant was trained how to de-escalate agitated inmates without resorting to the use of force. That training included being called offensive names. [11/17/08 Appellant testimony 8:56:35]. As a Field Training Officer, the Appellant is charged with training newer deputies in agency policies and is expected to set an example of model behavior. [11/17/08 Sgt Sich testimony 1:05:31; Capt. Casorla testimony].

On October 12, 2007, the Appellant was training another deputy during the book-in of inmate Tyree Brown. [Exhibit 15, p.795]. Brown was secured behind the closed door of the book-in cell. Major Anderson was in his office at the time and overheard the Appellant shouting "'Fucking nigger, sit your fucking, skinny little ass down!" and several variations of the word "fuck." The Appellant was yelling through a crack between the door and wall. The inmate was also yelling obscenities from behind his secured door, and other inmates joined in. The altercation caused a disruption in the operation of the deputies nearby, as they stopped their assignments and came to assist what, to them, was an unknown situation. The loud exchange caused Major Anderson to leave his office some 50-60 feet down the hall, where his son was visiting, to investigate the ruckus. He assumed the noise was due to a use of force application in progress. Anderson had been checking paperwork to track a reported potentially missing inmate.

After the incident, Major Anderson chastised the Appellant about the inappropriateness of her language and conduct with respect to the inmate. The Appellant responded she acted at all times professionally, and the only people who were offended were Major Anderson and his son. She scolded the Major, stating the Major's son had no business in the jail, and added "where did you think you were taking your son, to church?"

Anderson ordered the Appellant to write an incident report, [Exhibit 1, p.82]. Anderson wrote his own report recommending an investigation for possible discipline. [Exhibit 1, p. 79]. He also asked nearby deputies who witnessed the

incident to write reports. [Exhibit 1, pp 80, 81]. All deputy witnesses were interviewed. [Exhibit 1, p.106]. The incident was recorded on the Agency's Diginet® system. [Exhibit 35 – video]. Lovingier recommended a five-day suspension to Manager of Safety Alvin LaCabe, [Exhibit 1, p. 83]. A pre-disciplinary meeting was convened on May 20, 2008. The Appellant attended with her attorney-at-law. The Manager of Safety asked for and received an extension to consider what discipline to assess, [Exhibit 1, p 86], because the use of force case, below, was pending.

Analysis

The Agency alleged the Appellant's interaction with inmate Brown violated the following Career Service Rules.

1. CSR 16-60 L. Failure to observe written departmental regulations, policies or rules.

The Agency specified the following departmental rules.

300.10 Deputy Sheriffs shall not indulge in immoral, indecent, or disorderly performance of duties or cause the public to lose confidence in the Department. The Appellant's actions were disorderly and disruptive to the operations of the book-in area, by causing deputies engaged with other inmates to be distracted, with potentially dangerous results, in violation of this rule.

The Appellant responded inmate Brown was disruptive, and threatening, but, according to witnesses, the disruption was caused by the Appellant's actions which were out of the ordinary, rather than the yelling of the inmate, which was routine. In addition, Brown was secured behind a locked cell door and was therefore no threat. Even if he had been a threat, deputies are trained to take disruptive inmates to a nearby holding cell to cool down.

The Appellant testified inmate Brown "disrespected me the whole time... sometimes you have to talk to inmates in a language they understand... you sometimes have to get on their level, it's part of your training." She referred to a program called "verbal judo." [11/19/08 Appellant testimony 9:28:12]. Her claim was rebutted vigorously by her superiors, and by the captain who oversees the training of deputy sheriffs. [Than testimony]. Anderson testified no deputy can graduate the academy without training in the proper treatment of inmates. He explained verbal judo is a communication skill to diffuse potentially explosive situations, not to escalate them as did the Appellant. [11/19/08 Anderson testimony 9:54:41]. This responsive testimony was not rebutted. Based upon the considerations above, the Agency proved the Appellant's actions toward inmate Brown were disorderly, in violation of Departmental Rule 300.10.

300.19. Deputy Sheriffs and employees shall not violate any lawful rule, duty, procedure or order. It is axiomatic that the primary functions of deputy sheriffs are the care, custody and control of inmates. The Appellant's behavior toward inmate

Brown violated those primary directives, since her tirade was unrelated to his care and she caused other officers to divert their attention from control of other inmates. By screaming at Brown, the Appellant lost control of herself, rather than gaining control of an inmate who was already secured and no threat to her. Anderson testified, credibly, that if deputies treated inmates as the Appellant did, inmates could not be allowed out of their cells, since the language of escalation incites them, and those inmates who back down or comply become the target of derision and assault by other inmates. [11/19/08 Anderson testimony 10:39:43]. The Appellant's conduct breached her primary duties, in violation of Departmental Rule 300.19.

300.20. Deputy Sheriffs and employees shall not indulge in any conduct that that is contrary to the Career Service Authority rules and regulations. The Agency proved the Appellant violated CSR 16-60 L., above.

300.21 All employees of the department shall read and obey all directives and orders issued by the Mayor, the Manager of Safety, Director of Corrections and Undersheriff, command officers or their designees, that relate to the Denver Sheriff Department's duties and assignments. The Agency did not specify what conduct violated this rule. It appears the Appellant's conduct is addressed by other, more specific rules, above, and below. The Agency failed to prove the Appellant violated this rule by a preponderance of the evidence.

400.5. Deputy Sheriffs and employees shall not taunt, embarrass, intimidate, threaten or harass any prisoner or encourage or permit others to do so.

This rule most directly addresses the Appellant's conduct toward inmate Brown. The Appellant claimed she was, at all times, acting professionally, but she was alone in this assessment. She did not dispute the reports or testimony of witnesses, all of whom testified she crossed the line of propriety. [Cheney testimony; Rastede testimony; Jenkins testimony;³ Exhibits 1, pp. 79, 80, 81]. The Appellant failed to justify her threatening and harassing behavior toward Brown. The Appellant's conduct was beyond the pale, in violation of this departmental rule.

Department Orders
2440.1.

3. Code of Ethics. Employees of the Denver Sheriff Department should adhere to the following guiding principles while performing their duties:

Acting with respect to all, including other employees and the public;
Treating other as we would want to be treated;

³ Notably, the recording of the incident showed Deputy Jenkins giving his full attention to booking an inmate, then, when the Appellant began yelling, he walked away from the inmate, half-turning away from him to go to the side of the Appellant, thus creating an obvious security concern with respect to the inmate from whom Jenkins was turned away.

Recognizing the humanity in others, and being able to deal with difficult people and situations with compassion and concern;

Setting a positive example for others to follow; having the courage to do the right thing; maintaining self-discipline, control and self-restraint;

Being accountable for everything we do;

Demonstrating skill, knowledge and competency in carrying out all our assigned duties; striving for excellence and continued self-improvement.

These directives are designated "Department Orders," yet the language of these "orders" is aspirational, e.g. "should adhere," and "strive for excellence", as well as the golden rule reference. This admonishments are the language of guidance, not the language of orders. Moreover, the directive to be "accountable for everything we do" is too vague to enforce. I decline to find the above ethical aspirations constitute enforceable orders.

2. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

The Agency failed to demonstrate how the Appellant's conduct diminished its core mission, to provide care, custody or control of inmates. No diminishment in the structure or means to achieve it's mission occurred, nor was there evidence the Appellant's conduct brought disrepute on or compromised the integrity of the City. This claim, therefore, fails.

The Use of Force Case.

Findings

During the early morning of October 28, 2007, two women who had been arrested for disorderly intoxication and assault at a bar were brought by a Denver police officer to the B-1 sally port in the city jail. A sally port is where police transfer custody of arrestees to the Denver Sheriff's Department. Once patted down and secured in one of the sally ports, the arrestees are taken by elevator to the upper floors of the city jail for book-in and short-term confinement.

Jannie Barizonte, one of the arrestees, was drunk and argumentative, but under the full physical control of the police officer who brought her in and, subsequently by the deputies who took charge of her. When Barizonte arrived, the Appellant was on duty in the control booth connected to sally port B-1. A digital recording system, records the activity in the sally ports.

Barizonte and her friend were yelling at each other, but displayed no physical aggression toward the police officer or deputies, including the Appellant. The

Appellant came out of the control booth to assist. She and Barizonte argued. And argued. And argued. Barizonte, still handcuffed behind her back, kept turning toward the Appellant to argue. At first, the Appellant merely touched a hand on Barizonte's shoulder for Barizonte to turn toward the wall and Barizonte complied; however, Barizonte continued to turn toward the Appellant to argue. The Appellant leaned in close to Barizonte's face as Barizonte continued to argue. The Appellant yelled "don't disrespect me in my house" [11/20/08 Appellant testimony 10:16:35; 12/16/08 Austin testimony 9:06:48], then reached with her right hand to the right side of Barizonte's face and shoved Barizonte's head face-first into the Plexiglas® window she was facing. The Appellant slid her right hand from Barizonte's face and grabbed a handful of Barizonte's hair. With more force than the first time, the Appellant shoved Barizonte's unprotected face into the Plexiglas® a second time. The Appellant then pulled Barizonte's head by her hair about one foot backward and, with more force than the first two times, slammed Barizonte's face into the Plexiglas®, with considerable force. [Exhibit 37 DVD].

During this sequence, a police officer and a deputy sheriff were restraining Barizonte's arms behind her each time the Appellant shoved Barizonte's face into the Plexiglas®. Immediately after her face struck the Plexiglas® for the third time, Barizonte's raised her freed left hand, to her face, in a protective gesture that is consistent with checking for a bloody nose. The Appellant, who had not stopped arguing with Barizonte during the entire incident, then pointed a wagging finger repeatedly at Barizonte, almost touching her face.

Analysis of Use of Force Incident

The Agency claimed the Appellant's interaction with inmate Barizonte violated the following Career Service Rules.

1. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

Departmental Order 5011.1G Use of Force.

1. Policy: It is the policy of the Department that officers use physical force only as prescribed by Colorado Statute, to perform any legitimate law enforcement or detention related function. The amount of force will be proportional in relationship to the threat faced. In all cases, force will be discontinued (brought to control maintenance level), once the legitimate function is achieved or the resistance has ceased.

This rule was the cornerstone of the Agency's use of force case against the Appellant. The Agency relied primarily on the elements of proportional use of force and the discontinuance of the use of force.

Captain Michael teaches protocol in the use of force at the Denver Sheriff

Captain Michael teaches protocol in the use of force at the Denver Sheriff Department Academy. He testified, without rebuttal, that the protocol for being spit on is first, simply to move the head away and call for a spit hood to cover the inmate's head. He admitted that grabbing an inmate's hair to push her face away may be appropriate to avoid being spit upon. However, the Appellant failed to prove Barizonte spit on or at her, and therefore failed to she was justified in grabbing Barizonte's hair and shoving her face into the window. Even if Barizonte had spit on the Appellant, the Appellant did not use a proportional response, and she failed to desist in the use of force, once the "threat" was controlled, in violation of this order.

The Appellant also offered that she simply placed Barizonte's head against the window to gain control of her head. [Appellant testimony]. Even if the Appellant pushed Barizonte's head into the window to gain control because Barizonte kept turning toward the Appellant, once the Appellant gained control, she provided no justification for pulling Barizonte's head backward by the hair a second and third time, and shoving Barizonte's unprotected face into the window again and again. The potential for significant injury to the Barizonte was apparent, and it was disproportionate, in violation of this rule.

The following additional use of force orders were also cited by the Agency.

The use of force may be necessary in situations that cannot be otherwise controlled without it. Force should not be resorted to unless other reasonable alternatives have been exhausted or would clearly be ineffective under the particular circumstances.

The Appellant was not justified in forcing Barizonte's head into the window. Barizonte, while clearly drunk and obnoxious, was not physically resisting more than minimally, and she had just complied with the Appellant's previous hand motion to turn toward the wall. It was apparent the Appellant was simply fed up with Barizonte's persistent argument. Even if Barizonte had spit, the Appellant did not simply turn away Barizonte's head, nor did she call for a spit hood, both established protocol for such behavior. Consequently, even if she was assaulted by spitting, the Appellant failed to use reasonable alternatives in violation this order.

Physical force will not be used as a punishment under any circumstances. Inmates will be protected from personal abuse, corporal punishment, personal injury, disease, property damage, and harassment.

Even if Barizonte spit at the Appellant, the Appellant's response in repeatedly, and angrily slamming Barizonte's face into a window, was punitive for that alleged spitting, in violation of this order. The Appellant's actions in slamming Barizonte's face into the window was personal abuse, and corporal punishment, both in violation of this rule.

Officers are responsible for justification of their actions, in use of force, and must report any use of force incident in accordance with departmental rules and state statute. Officers shall use only those "use of force" techniques and weapons in which the officer has been properly trained and is authorized by the Department to use.

This order contains two distinct components: deputies are required to file a use-of-force incident report which justifies their use of force; and deputies are authorized to use only those use of force techniques in which the deputy was trained and which are authorized. The Appellant used force when she grabbed Barizonte's hair as leverage to slam her face repeatedly into a window. Consequently the Appellant was obligated to file a use-of-force incident report which she failed to do in violation of this rule. The Agency also the Appellant's actions were unjustified, absent an imminent threat of serious bodily injury. For reasons stated above, the Appellant's response, that Barizonte spit at her, was not supported by the evidence. The Agency proved, by a preponderance of the evidence, that it does not teach or approve of the Appellant's conduct. [Michael testimony; Lovingier testimony]. Therefore the Appellant also violated the second prong of this rule.

In response to the Agency's allegation that she used excessive force on Barizonte, the Appellant claimed she did nothing inappropriate and was only trying to gain control of Barizonte by "holding her head against the wall" because Barizonte had been kicking, head-butting, and spitting at other deputies in the sally port. She also argued her actions were appropriate because Barizonte repeatedly tried to kick and spit at the Appellant. [Appellant testimony; Exhibit 2, p. 480].

First, it is apparent, upon viewing the recording of the incident, that the Appellant was much more violent than merely holding Barizonte's head. Second, none of the police officers or deputy sheriffs at the scene corroborated her claims, [12/16/08 Austin testimony 9:30:31, 9:35:27; Avila testimony; Exhibit 3 Stump interview, beginning p.211⁴; Exhibit 3 Lapria interview, beginning p.219;⁵ Exhibit 3 Austin interview beginning p.238;⁶ Exhibit 3 Webster interview, beginning p.297;⁷ Exhibit 3 Brown interview beginning p.322⁸], with one possible exception. The Arresting officer, Johnny Avila, offered that spittle may have emitted from Barizonte's mouth in the course of arguing, but she displayed no intentional spitting ("she didn't hawk a louie"), and was always cooperative with instructions. [11/20/08 Avila testimony 11:27:17]. Barizonte clearly did not make continued efforts to spit at anyone, as alleged by the Appellant. However, for the briefest moment, when the Appellant, still arguing with Barizonte, leaned close to Barizonte's face, the Appellant appeared to raise her right hand reflexively toward her own face, so it is conceivable the Appellant was reacting to spittle emanating from Barizonte's mouth during their argument; however I cannot conclude that was the case by a preponderance of the evidence. Moreover, the Appellant was inconsistent about

⁴ especially at lines 135-138, and 225-251.

⁵ especially at lines 131-134, 221-234, and 303-310.

⁶ especially at lines 215-222, 233-244, 295-321, 427-431, 664-669, and 1283-1288

⁷ especially at lines 160-171, 260-264, and 270-277.

⁸ especially at lines 252-255, 261-293, 497-503, and 1303-1308

whether Barizonte spit on her. In testimony, the Appellant was certain Barizonte spit on her, and continued to try to spit on her [11/20/08 Appellant testimony 8:57:04], whereas in her internal investigation interview she did not know if Barizonte spit on her. [Exhibit 3, p. 410 @ lines 2538-2553].

The Appellant also claimed that, because an inmate's spit may contain the AIDS virus, the Agency provides a six-week course of treatment after a deputy is spit upon. As stated previously, the video recording of the incident was inconclusive as to whether Barizonte spit on the Appellant. [Exhibit 36, camera 10]. What is telling here is that, although the Appellant claimed Barizonte spit on her, she did not seek the prophylactic treatment she described.

The Agency also claimed the Appellant's actions toward Barizonte violated the following Agency rules.

200.2. Deputy Sheriffs and employees, if witness to the use of force, shall not fail to report the use of force to a supervisor, not fail to make a complete report to a supervisor.

The plain language of this rule makes it applicable to a witness to use of force, rather than the person who used force. The Agency's apparent interpretation, that the Appellant was required to file a use of force report as a witness to herself is illogical. I decline to find this rule applies to the actor in a use of force incident, particularly as another rule requires the person using force to report the same.

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

The Agency claimed the Appellant was dishonest about her interactions with Barizonte in several ways. (1) The Appellant claimed she was justified in using force against Barizonte in response to Barizonte's "kicking and head-butting Austin in the chest" and that Austin had a "very hard time controlling [Barizonte]." [Exhibit 2 p.480]. Austin testified he possessed complete control over Barizonte and that she did not kick or head butt him. The Diginet recording of the incident supports Austin's testimony, and fails to sustain the Appellant's justification. This claim is therefore proven by a preponderance of the evidence.

(2) The Agency also claimed the Appellant violated this rule when she stated Barizonte spit at her. As I stated above, There is insufficient proof to conclude, one way or the other, whether Barizonte, intentionally or not, spit at the Appellant. Therefore the Agency's claim that the Appellant lied about Barizonte spitting at her (the Appellant) is not sustained by a preponderance of the evidence.

(3) Finally, the Agency claimed the Appellant was dishonest in stating she simply held Barizonte's head against the window. The recording of the incident clearly

sustains the Agency's allegation that the Appellant repeatedly slammed Barizonte's head into the window. This allegation is sustained.

300.10 Deputy Sheriffs shall not indulge in immoral, indecent, or disorderly performance of duties or cause the public to lose confidence in the Department.

The Appellant-deputy sheriff's unjustified violence against an inmate was disorderly performance of her duty of the safekeeping of inmates.

300.19. Deputy Sheriffs and employees shall not violate any lawful rule, duty, procedure or order. This allegation is addressed by more specific allegations above and below.

300.20. Deputy Sheriffs and employees shall not indulge in any conduct that that is contrary to the Career Service Authority rules and regulations. This allegation was addressed by the Agency's reference to more specific Career Service Rules, above and below.

300.21 All employees of the department shall read and obey all directives and orders issued by the Mayor, the Manager of Safety, Director of Corrections and Undersheriff, command officers or their designees that relate to the Denver sheriff Department's duties and assignments. This allegation was also addressed by the Agency's reference to more specific Career Service Rules and Agency orders and rules, above.

2. CSR 16-60 E. Any act of dishonesty, which may include, but is not limited to:
 3. Lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions....

The same evidence which established the Appellant's violation of Departmental rule 200.4, above, also establishes the Appellant's violation of this Career Service Rule.

3. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

The Appellant's treatment of Barizonte, repeatedly slamming her face into a Plexiglass® window, was careless performance of her duty of the care of inmates.

4. CSR 16-60 M. Threatening, fighting with, intimidating, or abusing employees or officers of the City, or any other member of the public, for any reason.

The same evidence that sustained the Appellant's violation of the excessive use of force order, above, also supports the Agency's claim under this rule.

5. CSR 16-60 Y. Conduct which violates the Rules, the city charter, the Denver Revised Municipal Code, Executive Orders, or any other applicable legal authority.

This allegation was addressed by the Agency's reference to more specific Career Service Rules and Agency orders and rules, above.

6. CSR Z. Conduct Prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

This rule establishes two independent violations: harm to the agency and harm to the city. *In re Simpleman*, CSA 31-06, 10 (10/20/06), *affirmed* CSB 31-06 (8/2/07). To sustain an allegation of harm to the agency, the agency must prove the appellant's conduct hindered the agency's effectiveness, i.e., its ability to carry out its mission, or was prejudicial to the good order of the agency, i.e., the internal structure and means by which the agency achieves its mission. *Id.* The Appellant's conduct toward Barizonte violated a core tenet of Agency, the safe care of inmates, and in doing so, hindered the Agency's mission and effectiveness.

As a result of the Appellant's conduct, Barizonte brought a legal action against the city. The City agreed to a financial settlement of her claim. The resulting negative publicity brought disrepute on the City in violation of the second part of CSR 16-60 Z.

VIII. DEGREE OF DISCIPLINE

In determining the degree of discipline, appointing authorities must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-20. Alvin LaCabe is the Manager of Safety. In that role, he was the ultimate decision maker for the discipline of the Appellant.

A. Severity of the offenses.

1. Use of force. The Appellant's use of force was the most egregious violation. The Agency proved the Appellant engaged in the unjustified use of force against an inmate, the result of which was a significant financial cost to the city. This, alone, is sufficient to justify the Appellant's dismissal. In addition, the Appellant was dishonest concerning her treatment of an inmate. This too would justify dismissal.

2. Bad language case. The Appellant's unexcused berating of an inmate, alone, would not justify dismissal. However, her open defiance of, and challenge to a superior officer, Major Anderson, in that case would justify a significant penalty or dismissal.

3. Crochet needles case. The Appellant's defiance of lawful orders, if considered alone, would not justify her dismissal. However, for reasons stated below, her pattern of defiance to authority escalated the significance of her actions in this case.

4. Butterfly sticks case. The Appellant's defiance of lawful orders in the butterfly hair sticks case, if considered alone, would probably not justify her dismissal. As stated above, however, her pattern of defiance changes the equation in the present case.

B. Past Disciplinary Record.

Anderson had already counseled Appellant about abuse of inmates, notably for yelling at an inmate to "sit your bony nigger ass down." [11/19/08 Anderson testimony 11:05:47] She had also been disciplined and counseled about her abuse of authority.

The Appellant's current cases demonstrate a continuing and escalating pattern of similar misbehavior. In 2002 she received a written reprimand for demanding a vehicle control agent not to write a parking ticket to her as a professional courtesy. She also received a verbal reprimand in 2002 for attempting to use her authority to have a parking ticket dismissed in the Parking Referee's Office. [Exhibit 4]. In that case, the Appellant, in uniform, became belligerent toward two employees, was overheard by members of the public calling the employees "stupid," and when a security guard attempted to calm her down, told the guard she (Appellant) did not have to listen because the Appellant had more power than the guard. The Appellant falsely claimed she remained calm and professional.

In 2005, the Appellant interfered with the Denver Police Department at a family gathering. She incited the gathered crowd to a near riot, and sought special treatment for her relative by identifying herself as a deputy sheriff. Only the calm intervention of an African American police officer prevented the Appellant from being arrested for interference with the police, even though she later claimed discrimination. [LaCabe testimony]. The Appellant did not challenge LaCabe's assessment. The same incident began when the Appellant, in uniform, went to her sister's house to intervene in her eviction. The Appellant, attempted to intimidate the manager. She later denied that she was in uniform and falsely claimed she acted calmly and professionally, in violation of dishonesty rules. In the same incident, the Appellant preemptively lodged a complaint against the Denver police officers, calling them all liars, and stated their conduct was retaliatory. Her complaint was investigated, found to be totally unfounded, and concluded the Appellant was the instigator. [12/16/08 LaCabe testimony 2:50:28].

In 2006 the Appellant was issued a verbal reprimand for calling an inmate "cow" and telling her "I'm tired of you black bitches." [Exhibit 6]. On April 2, 2007 she received another verbal reprimand for abuse of an inmate.

Almost every prior incident involved the Appellant abusing her authority as a deputy sheriff, then denying she was ever unprofessional. Also, the Appellant consistently failed to take responsibility for her misdeeds, claiming instead that the other parties were hostile toward her. None of the cases was appealed or overturned. I agree with Manager LaCabe's conclusion that these incidents establish a pattern of the Appellant's uncontrolled hostility when faced with a perceived challenge to her authority. She has been unwilling to acknowledge fault or responsibility. Almost all the discipline assessed against the Appellant for her disrespectful treatment of inmates began with the Appellant's hot-button reaction to feeling she was shown insufficient respect for her authority.

C. Penalty most likely to achieve compliance.

It is apparent the Appellant's past discipline has not corrected her ongoing defiance to authority and abuse of inmates. In addition, the Appellant denied all responsibility for her actions throughout her prior and current cases, indicating that amelioration of her conduct is unlikely.

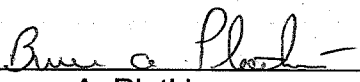
Additional Considerations

In a paramilitary organization such as the DSD, there is little room for disobeying a lawful order, so unlike the Appellant's assertion, disobedience in refusing to remove a non-complying hair clip, is less relevant than the Appellant's defiance of a superior's direct and lawful order. Although the underlying incidents regarding the hair sticks and crochet needles are perhaps not worthy of dismissal, what was at stake for disobedience in the Sheriff's Department was the real possibility of a weakening of the command structure. The failure to mete significant discipline could well influence the apparent authority of a supervisor vis a vis other deputies and inmates, and thus impact the core mission of the agency, safekeeping of inmates.

Before assessing discipline in these cases, LaCabe met with his command staff, met with the Appellant, considered her behavior-modeling function as a Field Training Officer, and considered public perception of trust in the department. LaCabe also considered the potential for civil liability if he retained the Appellant. LaCabe also weighed the Appellant's claim that Collier is racist in the butterfly hair sticks case. The last consideration is due additional comment. Even if the Appellant's racial harassment claim against Collier had been sustained, she nonetheless violated Career Service Rules for disobeying the legitimate orders of other officers against whom she did not claim racial harassment. There is ample evidence to support the Agency's conclusion that the Appellant is "a rogue employee that the department cannot tolerate." [11/20/08 Lovingier testimony 3:25:55].

- A. The Agency's 15-day suspension of the Appellant, assessed May 8, 2007, [case no. 28-07], is AFFIRMED.
- B. The Agency's dismissal of the Appellant from employment, assessed June 29, 2008 [case no. 50-08], is AFFIRMED.
- C. The Appellant's discrimination, harassment and retaliation claims are DISMISSED.

DONE February 27, 2009.



Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with CSR 19-60, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail or by hand delivery to:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202