

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

Appeal No. 25-08 A.

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**FINDINGS AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**BOBBY ROGERS,**

Appellant/Petitioner,

vs.

**DENVER SHERIFF'S DEPARTMENT, DEPARTMENT OF SAFETY,** and the City and  
County of Denver,

Agency/Respondent.

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This matter is before the Career Service Board on Appellant's Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Hearing Officer's Decision of March 13, 2009, on the grounds outlined below.

**I. FACTUAL BACKGROUND**

On February 24, 2007, Appellant was working a shift at the county jail between 1:55 a.m. and 6:00 a.m. As part of his duties, Appellant was to conduct two rounds per hour to check on the welfare of the inmates housed in Building 8. At approximately 6:15 a.m., an inmate discovered that another inmate in Building 8 had hung himself in his cell.

At approximately 6:25 a.m., Sergeant Robert Petrie arrived at the scene and discovered the inmate in a seated position, propped next to the bunk in his cell, with a makeshift noose around his neck. The body had no pulse and was cold to the touch. Sgt. Petrie was unable to open a breathing airway because the tongue was protruding out of the mouth and he could not move the neck due to muscle rigidity. The arms and legs were also rigid so that the body remained in a seated position after being cut from the noose.

The Agency conducted an investigation into the manner in which Appellant had carried out his duties during the shift in question and, as a result, Appellant was terminated from employment. He appealed his termination to the career service hearing office. The Hearing Officer affirmed the termination and this appeal to Board follows.

## II. FINDINGS

Appellant's arguments all focus on the sufficiency of the evidence supporting the Hearing Officer's findings and conclusions. CSR 19-61 D. provides:

Insufficient evidence: the Hearing Officer's decision is not supported by the evidence. The Board may only reverse a decision on this ground if the Hearing Officer's decision is clearly erroneous.

This standard does not permit the Board to act as a second fact-finder. Rather, the Hearing Officer's findings of fact and conclusions must be affirmed unless they are clearly erroneous and not supported by evidence in the record. When the evidence is conflicting, the Board cannot substitute its own conclusions for those of the Hearing Officer simply because there may be credible evidence in the record supporting a different result. *See, Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008). It is the Hearing Officer's responsibility to judge the credibility of witnesses and decide the weight to give to conflicting evidence. As discussed below, the Board finds that the Hearing Officer's decision is supported by evidence in the record and is not clearly erroneous.

### **CSR 16-60 A. (Neglect of duty).**

After the Hearing Officer decided this case, the Board was called upon to interpret the level of proof required for neglect of duty in a career service appeal. CSR 16-60 A. is violated when an employee neglects to perform a job duty which the employee knows he or she is supposed to perform. The relative importance of the work duty and the degree to which the neglect may result in potential or actual harm are factors to be considered in assessing an appropriate level of discipline, if any, for a violation of the rule. *In re Compos, et. al*, Consolidated Appeal Nos. 56, 57, 58 and 59-08 A. (6/4/09).

Here, it is undisputed that Appellant was required to conduct two rounds per hour during his night shift for a total of eight rounds. It is also undisputed that the purpose of the rounds was to check on inmate security (custody), health problems (care), and to provide inmates an opportunity to communicate any needs. Decision, p. 3.

Appellant argues that the Hearing Officer incorrectly required him to prove that he completed all eight of his rounds. The Board disagrees. When disciplinary action is being appealed, the Agency always has the burden of proof. However, unlike a criminal trial where a defendant has a constitutional right to remain silent, in a career service hearing, either party may call an appellant as a witness and rely on his statements. Appellant not only testified at the hearing, he also provided statements to the Agency during its internal affairs investigation. The fact that the Hearing Officer found Appellant's testimony at the hearing in conflict with his prior statements does not mean the Hearing Officer shifted the burden of proof to Appellant; it simply means the Hearing Officer did not find Appellant to be a credible witness. Decision, p. 4.

The Agency was required to prove that Appellant neglected to conduct eight rounds during his shift. In its case in chief, the Agency relied on Appellant's statement to internal affairs that it was his practice to write "appears okay" in the building log book after completing a round, along with the log book showing only five separate entries of "appears okay." Appellant testified at the hearing that he completed eight or nine rounds, but in prior statements he admitted that at most he completed only seven rounds.<sup>1</sup> Although there was conflicting evidence about the number of rounds Appellant conducted, the Hearing Officer's conclusion that Appellant neglected to conduct eight rounds on his shift is supported by evidence in the record and is not clearly erroneous.

**CSA 16-60 B. (Carelessness in performance of duties)**

As the Hearing Officer correctly noted, this rule focuses on performing a job duty below minimum job expectations as opposed to neglecting to perform the duty at all.

Based on the testimony of Major Deeds, the Hearing Officer found that the minimum requirement for a deputy's round is to make sure the inmate is alive, and the only way to fulfill that obligation is to look into each cell to verify the presence and breathing of each inmate. Decision, p. 5. When the inmate was found by Sgt. Petrie at 6:25 a.m., he was already dead and the large muscles of his body were stiff and unmovable. Although there was testimony from various witnesses that the body was in rigor mortis, the evidence was conflicting as to time of death. Dr. Amy Martin, Chief Medical Examiner and Coroner for the City and County of Denver, concluded that the inmate had been dead for several hours prior to discovery. Transcript, Oct. 23, 2008, pp. 163-168. Dr. James Wilkerson, Appellant's medical expert, could not say within a reasonable degree of medical probability when the inmate had died, but admitted that the inmate could have been dead as long as four hours prior to discovery. Transcript, Oct. 23, 2008, p. 256. Thus, even if Appellant had conducted all eight rounds on his shift, his failure to notice a dead body propped in a seated position on any of his rounds supports the Hearing Officer's conclusions that he failed to make the most basic inspection of each inmate's welfare and therefore conducted his rounds in a careless manner.

**CSA 16-60 L. (Failure to observe department policies) and 16-10 Z. (Conduct prejudicial).**

Appellant's failure to check the well-being of all inmates on his rounds also supported the Hearing Officer's conclusions that Appellant failed to observe various departmental policies and that his conduct violated the very mission of the Agency: the safekeeping of inmates. In other

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<sup>1</sup> One of Appellant's prior inconsistent statements was made by his attorney at the pre-disciplinary meeting. Appellant contends that the Hearing Officer could not attribute to him the admission of his counsel that he had conducted only seven rounds. The purpose of a pre-disciplinary meeting is to correct any errors in the information relied upon by the Agency and to allow the employee to tell his side of the story before any discipline is imposed. Record, p. 159. Contrary to Appellant's argument, this statement is not like opening or closing remarks made by counsel at trial; it is a statement that counsel made as Appellant's representative for the purpose of telling Appellant's version of events prior to the imposition of discipline. As such, it is an admission by a party opponent under Colorado Rules of Evidence, Rule 801 (d)(2). The pre-disciplinary meeting was recorded and introduced as evidence, (Exhibit 8); therefore, the Hearing Officer could rely on it as a prior inconsistent statement.

words, the same evidence supported more than one rule violation, and for the same reasons discussed above, there is factual support in the record for the Hearing Officer's conclusions regarding CSR 16-60 L. and 16-60 Z., and those conclusions are not clearly erroneous.

### **Due Process Claims**

Appellant argues that his due process rights were violated because the Agency's Appointing Authority, Mary Malatesta, went to the jail to view the area where the inmate's body was found prior to imposing discipline. The Hearing Officer correctly determined that Appellant's reliance on *Woodard v. Brown*, 770 P.2d 1373 (Colo. App. 1989) was misplaced.

*Woodard* involved a claim of medical malpractice by a physician. Pursuant to state statute, disciplinary proceedings against physicians are conducted by two separate panels of the state board of medical examiners. If a case is referred to one panel for investigation and the filing of formal charges, it must then be referred to the other panel for a final hearing and determination of those charges.

The City of Denver, however, is a home rule city and its disciplinary proceedings are not subject to the state statute at issue in *Woodard*. Under the Denver City Charter and Career Service Rules, a City employee has the right to a post-termination hearing before a career service hearing officer, who functions independently of the City agency that imposes discipline and has the authority to affirm, modify or reverse the agency's disciplinary action. The fact that Ms. Malatesta took part in the Agency's pre-termination fact-finding does not implicate Appellant's due process rights; those rights were protected by a post-termination hearing before an impartial hearing officer.

Similarly, because Appellant was afforded a post-termination hearing, his pre-termination due process rights were limited to notice of the charges against him, an explanation of the Agency's evidence, and an opportunity to tell his side of the story. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 535 (1985).


Finally, the Board finds that Appellant's remaining arguments – the Agency's rebuttal case, sequestration of witnesses and the admission of Exhibit 19 into evidence – all involve issues that were within the Hearing Officer's discretion in conducting the hearing and do not implicate Appellant's due process rights or any other grounds for appeal to the Board.

### **III. ORDER**

**IT IS THEREFORE ORDERED** that the Hearing Officer's Decision of March 13, 2009, is **AFFIRMED**.

SO ORDERED by the Board on July 2, 2009, and documented this 16<sup>th</sup>  
day of July, 2009.

BY THE BOARD:



Luis Toro, Co-Chair

Board Members Concurring:

Nita Henry  
Tom Bonner  
Felicity O'Herron  
Patti Klinge

**CERTIFICATE OF DELIVERY**

I certify that I delivered a copy of the foregoing **FINDINGS AND ORDER** on  
July 17, 2009, in the manner indicated below, to the following:

Bobby Rogers, 15395 East 7<sup>th</sup> Circle, Aurora, CO 80011 (via U.S. mail)

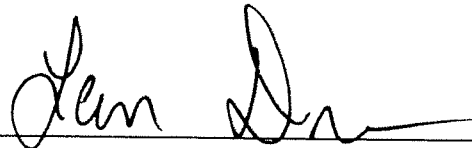
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