

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 70-07

DECISION

IN THE MATTER OF THE APPEAL OF:

RUSSELL STONE, Appellant,

vs.

DEPARTMENT OF LAW, PROSECUTION AND CODE ENFORCEMENT,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Jan. 10 and 11, 2008 before Hearing Officer Valerie McNaughton. Appellant Russell Stone was present and represented by Robert Goodwin, Esq. The Agency was represented by Cathy Havener, Esq., and its advisory witness was Agency Director Vincent A. DiCroce. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following order:

I. STATEMENT OF THE CASE

Appellant Russell Stone appeals his three-day suspension dated Oct. 5, 2007 by the Department of Law, Prosecution and Code Enforcement (the Agency). Appellant filed a timely appeal of the action on Oct. 16, 2007 pursuant to the jurisdiction provided in the Career Service Rules (CSR) § 19-10 A. 1. b.

The parties stipulated to the admissibility of Exhibits 1 – 11 and A. Exhibits 22, 23 and 25 were admitted during the hearing. Exh. 12 was rejected for admission.

II. ISSUES

The following issues are raised in this appeal:

1. Did the Agency prove by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules, and
2. Was a three-day suspension within the range of discipline that could be imposed by a reasonable administrator?

III. FINDINGS OF FACT

Appellant Russell Stone has been employed as an attorney with the Denver City Attorney's Office since 1998. At all times relevant to this appeal, Appellant held the title of Associate City Attorney, and was assigned to Courtroom 105A of the Denver County Court Traffic Division.

The suspension at the heart of this appeal is based on plea offers made by Associate City Attorney Russell Stone in two speeding tickets issued to Kenyon Martin of the Denver Nuggets basketball team. The facts involving those pleas are in large measure undisputed. The first ticket was issued on Jan. 26, 2006, and alleged speeding 101 miles per hour (m.p.h.) in a 30 m.p.h. speed limit zone and careless driving at the 1400 block of East First Avenue in Cherry Creek ("Ticket One"). [Exh. 5.] The second ticket dated Sept. 7, 2006 charged speeding 103 m.p.h. in a 55 m.p.h. zone, as well as reckless driving, at Interstate Highway 25 and the Yale exit ("Ticket Two"). [Exh. 7.]

Ticket One was assigned to Courtroom 105A, where Appellant was the assigned prosecutor. The City immediately added a charge of reckless driving and speeding over 40 m.p.h. in exceed of the limit. The Colorado Department of Motor Vehicles (DMV) may suspend a motorist's driving privileges if he accumulates 12 points in the space of one year, or 18 points within two years. C.R.S. 42-2-127. Under the point system, Ticket One then charged Mr. Martin with a maximum of 20 points¹, enough to suspend his driving privileges.

On June 12, 2006, Appellant offered the attorney for Mr. Martin a plea to a six-point speeding violation and a 3-point moving violation in return for dismissal of all other charges in Ticket One. The plea offer was based on the representation of Mr. Martin's attorney, Jonathan Rosen, Esq., that his client already had two points against his driving privileges. The intent of the plea offer was to allow defendant to maintain his driving privileges if he obtained no more points until one year from the date of the ticket, Jan. 24, 2006. [Testimony of Appellant, Jonathan Rosen, Esq.; Exh. A-2.]

Mr. Rosen is Of Counsel with the law firm of Recht & Kornfeld, P.C., which firm represents many of the members of the Denver Nuggets, the city's professional basketball team, including Mr. Martin. The firm derives a large portion of its revenue from its clients in the Nuggets organization. Mr. Rosen has been a criminal defense attorney since 1993, and conflict counsel for the Colorado Public Defender's Office for four and a half years.

On Sept. 28, 2006, Daniel Recht of Recht & Kornfeld informed Mr. Rosen that their client Kenyon Martin had received a notice from the D.M.V. that his license was

¹ A speeding charge in excess of 40 m.p.h. over the limit carries 12 points, and reckless driving is an 8-point traffic offense. Since careless driving is considered a lesser included offense of reckless driving, a conviction on that offense would not subject Mr. Martin to additional points.

about to be suspended based on his accumulation of 15 points within one year. The nine-point plea entered on Ticket One caused the suspension notice. Mr. Rosen then realized he had failed to include a four-point violation which occurred on April 19, 2005 in calculating the points already on his client's driving record. [Exhs. 11-2; A-15.] Mr. Rosen was acutely embarrassed by his mistake, and was prepared to file a motion to withdraw the plea for ineffective assistance of counsel. He believed that the court would grant the motion based on the constitutional right to counsel.

The next day, Mr. Rosen sought to rectify his mistake by presenting the circumstances to Appellant with a request that he consent to withdrawing the plea in order to save Mr. Martin's license. Appellant was sympathetic to Mr. Rosen's situation, and believed based on his experience in Courtroom 105A that the motion would be granted by County Court Judge Brian Campbell. He agreed to join in the motion to withdraw, and to renegotiate the plea. [Testimony of Mr. Rosen; Exhs. 2-2, A-7, A-15.]

Within the hour, Mr. Rosen and Appellant appeared on a joint motion to withdraw the plea in the chambers of Judge Campbell. The judge agreed to hear the matter in chambers to protect Mr. Rosen's reputation as an attorney. Mr. Rosen explained his mistake and its unforeseen consequences to his client, and the judge agreed to grant the motion to withdraw the plea. Appellant and Mr. Rosen then informed the judge that they had agreed to a plea on a three-point and a two-point violation, for a total of five points, in order to preserve the intent of the original plea agreement: to save Mr. Martin's license but place him at 11 points until Jan. 24, 2007.²

Judge Campbell reviewed Mr. Martin's driving record, considered the statements of both attorneys, and concluded that the plea agreement was appropriate and consistent with the City Attorney's Office's philosophy that "reasonable efforts should be made to prevent individuals from losing their driving privileges." He also concluded that "the ends of justice were served by the disposition." [Exhs. A-21, 22, letter of Judge Brian Campbell.] The matter was then formally called onto the record and tape-recorded. During that hearing, Appellant supported the plea by arguing that Mr. Martin's community service and donations to charities as a member of the Nuggets justified the motion. "We feel it's the right thing to do, Judge." [Exh. 10-3, transcript of hearing on motion to withdraw plea.] The judge granted the motion to withdraw the plea, approved the new guilty plea, and set the fine and costs as identical to that already entered and paid at the June disposition hearing.

On Sept. 7, 2006, about three weeks before the hearing on the motion to withdraw, Mr. Martin was charged with Ticket Two. Appellant testified he was not

² Up until that date, Mr. Martin would still have all eleven points on his license, since the points are counted as of the date of the violations. Thus, four points from April 19, 2005, two points from June 8, 2005, and the reduced five points from Jan. 24, 2006 are included for the year measured from Jan. 24, 2005 to Jan. 23, 2006.

aware of this case when he agreed to the five-point plea in late September. On Nov. 26, 2006, Mr. Rosen from the Recht law firm entered his appearance in Courtroom 104B as counsel for Mr. Martin in that case. [Exh. 7-1.] Cases are assigned to courtrooms based on the officer who wrote the ticket in order to expedite officers' appearances for trial. [Exh. A-16, letter of Jonathan Rosen, Esq.] The matter was then set for disposition on April 10, 2007. On that day, Janice Tonz, the prosecutor assigned to that courtroom, amended the charges over Defendant's objection to reflect that the speeding offense carried 12 points, since it alleged speed in excess of 40 m.p.h. over the speed limit under D.R.M.C. 54-156.³ In addition, the reckless charge under the state statute was dismissed, and a charge of reckless under the Denver ordinance was added. [Exh. 7-1.]

The testimony regarding the plea negotiations made in this case is disputed. Ms. Tonz testified that she offered Mr. Rosen a plea to an 8-point reckless charge, but that they also discussed a plea to six points plus 100 hours of useful public service. On Sept. 19, 2007, Mr. Rosen submitted to Appellant's attorneys in this disciplinary action a five-page statement detailing his representation on these two tickets, including the progress of plea negotiations in Ticket Two over the course of six months. [Exh. A-14.] Therein, Mr. Rosen recalled that Ms. Tonz first offered him either a 6-point speeding and she would actively seek jail, or an 8-point reckless with no recommendation of jail. Mr. Rosen knew that Judge Rudolph in 104B tended to order jail on charges alleging speed in excess of 100 m.p.h. Therefore, he reset the matter for disposition in order to discuss the offers with Mr. Recht and the client. [Exh. A-16.] On the next disposition date, the judge assigned to the courtroom was the newly-appointed Judge Gonzales. The departure of Judge Rudolph changed Mr. Rosen's assessment about the dangers of accepting the 6-point plea in which Ms. Tonz would argue for jail. However, Ms. Tonz withdrew her offer of a plea to 6 points, and tendered instead an 8-point reckless with 100 hours of useful public service. Since eight points would suspend Mr. Martin's license when combined with the 5 points from the Sept. 2007 plea, Mr. Rosen rejected that offer, and the matter was set for trial on May 30, 2007.

Mr. Rosen's near-contemporaneous written recitation of the case histories is more persuasive than Ms. Tonz' testimony from memory, since Ms. Tonz did not have access to her notes in the case file prior to her testimony. In addition, Mr. Rosen is more likely to recall the details of the two cases, since they were important to his firm, and his initial oversight raised issues about the quality of his representation.

While Ticket Two was pending in 104B, Mr. Rosen discussed his dissatisfaction with Ms. Tonz' plea offer with Appellant when he saw him in 105A on other traffic matters. Appellant informed him that if it were in his courtroom, he could do no better than the initial 6-point offer, but that he would leave the question of jail

³ Such amendments are made to clearly show the nature of the charge because the Denver Uniform Traffic Summons and Complaint form provides no space to indicate a speed in excess of 40 m.p.h. over the limit. [Exhs. 1-2, 5-2.]

up to the judge. Appellant considered his offer consistent with the offers made by Ms. Tonz. Appellant agreed with Mr. Rosen that the case was in essence a speeding offense, and that, seen in that light, a 6-point plea would "take it down" to half of the points charged in the speeding count. [Exh. A-17.]

On April 24, 2007, Mr. Rosen and Mr. Recht met at the courthouse on other matters. When they learned that Magistrate Faragher was assigned to Courtroom 105A, they decided to request a transfer of Ticket Two to that courtroom. Mr. Rosen worked with Magistrate Faragher in the Public Defender's office for four years, and believed the magistrate, along with most of the judges in Denver, would be unlikely to order a jail sentence on a 6-point speeding ticket, regardless of the speed on the original ticket. He also knew she would be unaware of Mr. Martin's status as a sports celebrity, and thus unlikely to treat him more harshly than other defendants in order to avoid a perception of favoritism. [Exh. A-18.] Mr. Rosen then confirmed with Appellant that he would still offer a plea to a 6-point speeding offense. The clerk in 104B agreed to the transfer, and Mr. Rosen brought the file to 105A, where it was added to that day's docket. Mr. Rosen testified that in his experience it is routine to transfer cases for an agreed-to disposition, as the officer who wrote the ticket did not need to appear for a plea. Appellant renewed his offer to a 6-point speeding offense. The magistrate accepted the plea tendered by Mr. Rosen on his client's behalf, and entered a fine of \$999, \$650 of which was suspended, and \$66 in costs and fees. [Exh. 7-1.]

Appellant testified he had no authority to approve a transfer of a case from one courtroom to another, as that is a matter decided by the courts and their clerks. He stated that case transfers between courtrooms are routine, and that he saw nothing unusual about this transfer. He recalled that Magistrate Faragher approved this transfer to her courtroom. Appellant assumed Ms. Tonz was in 104B when Mr. Rosen obtained the file from the clerk, and that she had agreed to the transfer. For his part, Appellant stated he readily agrees to the transfer of any of his cases to other courtrooms, since his own caseload is approximately 22,000 cases per year.

Ms. Tonz testified that she began to prepare for hearing in Ticket Two after plea negotiations ended. She was aware of Ticket One, the first excessive speeding case, and considered moving for permission to introduce the details of that case as an aggravating factor in the present case. She was not aware that her case had been transferred to 105A and disposed of by plea agreement until she discovered that the file was missing while attempting to issue subpoenas and prepare for trial. Ms. Tonz was unhappy with the transfer of the case to a different courtroom because she considered it attorney shopping, which she believes undermines plea discussions. Ms. Tonz also noted that she had made extensive notes in preparation for this hearing, and considered it a high-profile and aggravated case. Ms. Tonz was aware that there are no guidelines for what a plea agreement should be in every case, but added that she considered Appellant's plea offer not harsh enough under the circumstances.

Amanda Wiley, a law student at the University of Denver, was an intern and later an employee with the City Attorney's Office, where she served as Appellant's courtroom partner from Jan. to Aug. 2007. Ms. Wiley received a Trial Notebook similar to Exh. 4 when she began her internship. Her notebook contained the Seth memo, from which she learned that the usual plea guideline was to cut the points charged in the ticket in half. [Exh. 8.] She also assisted Ms. Tonz in preparing Ticket Two for trial in 104B. Ms. Wiley recalled that in late April or early May 2007, Appellant remarked to her as they were leaving the courthouse, "[t]hat's the last time I do anything for Kenyon Martin." Appellant testified he made the statement to Ms. Wiley because he felt that Mr. Martin wasn't getting the message, despite Appellant's effort to do what he thought was right.

Assistant Section Director John Poley is the director of the Prosecution and Code Enforcement (PACE) Unit within the City Attorney's Office. In that capacity, he supervises nine PACE prosecutors, including Appellant. He has been employed by the City Attorney's Office since 1985, and was promoted to his current position in Feb. 2004. About 80,000 traffic tickets are filed in PACE each year, most of which are resolved by plea agreement. While prosecutors are expected to exercise discretion in evaluating each case to determine an appropriate plea offer, that discretion is also governed by the policies developed by the PACE unit.

The Trial Notebook given to each PACE prosecutor contains about 500 pages of material, including law, rules, regulations, published material, memos, forms, contacts, and other information to assist the PACE prosecutors in doing their job. [Exh. 4.] The notebook was originally assembled by Ms. Tonz some time after 1998, the year she was hired. At Mr. Poley's direction, a copy of that notebook was distributed to all prosecutors, who are expected to update it with new material as needed. Appellant testified that he received his copy of the Trial Notebook from John Redmond, and updated it with anything others gave him that they wanted him to have. [Exh. E.]

Policy for the PACE unit is also developed by consensus after discussion with staff members. The PACE unit holds monthly staff meetings to discuss problem cases, and those discussions are summarized by memos distributed to the staff. A memo stating guidelines may be considered a policy if it defines the expectations of how a prosecutor will handle certain matters. Mr. Poley encourages consistency in plea offers, as modified by aggravating factors such as injury-causing accidents, excessive speed, or circumstances presenting a danger to the public. At one staff meeting, he recalled that Appellant suggested adding a reckless charge in cases alleging excessive speed.

Mr. Poley testified that he learned from Ms. Tonz that Ticket Two was transferred to Appellant's courtroom and resolved by a plea that Mr. Poley considered inconsistent with their plea guidelines for the type of charges alleged. Mr. Poley stated it was standard practice to require defensive driving class in cases alleging excessive speed, or to obtain a plea to a 12-point offense, depending on the

driving history. On June 4, 2007, Mr. Poley asked Appellant about the Kenyon Martin case. Appellant interrupted him, stating, "I've learned my lesson. Martin was in two week later on a similar ticket, and I made him plead to the charges on the face of the ticket." Mr. Poley investigated this statement, and could not find any ticket issued after the date of the plea. He asked Appellant to find it, and he could not. Appellant testified that Mr. Poley did not ask him to produce the second ticket, but admitted his statement was inaccurate. Appellant was in the middle of his docket, and believed Mr. Poley was talking about Ticket One. Appellant concedes that he did not make Mr. Martin plead to the points on the face of Ticket One.

It appeared to Mr. Poley that Appellant's plea offers in Tickets One and Two were based on Mr. Martin's status as a sports celebrity, in violation of the office's policy to ensure like treatment of similarly situated individuals. Mr. Poley is concerned that if preferential treatment for celebrities becomes known, it will become more difficult for his office to reach agreements with average persons in accordance with the usual plea criteria. He also believes that Appellant's acceptance of the transfer of Ticket Two encourages prosecutor shopping, which undermines his staff's authority to obtain plea agreements. Mr. Poley considers it common courtesy to inform other prosecutors about any transfers of cases from their courtroom in order to save them case preparation time.

Mr. Poley ultimately determined that Appellant violated the policies stated in the 2002 memo from PACE Unit Leader Michael Seth addressed to "Skip" [new PACE prosecutor Skip Hibbard] entitled "Pleas Guidelines" included in the Trial Notebook. [Exh. 4-0198.] That memo states as follows:

Normally, a moving violation will be cut in half in terms of points .
. . . Mitigating factors such as [defendant's] driving record and the
circumstances of the violation may be considered . . .
Aggravating factors such as driving history, accident, actual
speed and the number of pending cases may also be considered.
Use of a driving class to further reduce a plea bargain by another
point is common . . .

[Exh. 4-0198].

The 2002 Seth memo is not included in Appellant's copy of the Trial Notebook. [Exh. E.] Appellant testified he did not receive a copy of that memo until the date this discipline was issued. Thereafter, he searched for the memo in both the Trial Notebook in Courtroom 104B and the one given by Mr. Poley to contract city attorney Tammy Bauer, but did not find it. However, Appellant acknowledged in his testimony that the usual practice is to offer to cut in half the points charged in traffic tickets.

Vincent DiCroce has been the Director of Prosecutions at the City Attorney's Office since Feb. 2004. He began his tenure with a mandate to raise the

performance standards in the office, and to ensure that the exercise of prosecutorial discretion was done toward the end of achieving consistency in plea offers for persons under similar circumstances.

Mr. Poley informed Mr. DiCroce that Appellant had taken a case from Ms. Tonz' courtroom, and that as a result she had wasted case preparation time. Mr. Poley also told him that Appellant had said he made Mr. Martin plead to the face of a later ticket, a statement Mr. Poley determined was untrue after searching Mr. Martin's driving record. Mr. DiCroce agreed with Mr. Poley that the pattern shown by these two plea offers evidenced prosecutor shopping. He was also very concerned about the truthfulness of Appellant's statement to Mr. Poley, given his need as a supervisor to rely on the word of his prosecutors.

On Aug. 22, 2007, Mr. Poley delivered a notice that discipline was being considered based on the two plea agreements. The notice included a copy of the Seth memo and Appellant's 2003 written reprimand for failing to advise a crime victim of the status of her case. [Exh. 1.]

Mr. DiCroce was designated by the appointing authority under C.S.R. § 16-70 to take disciplinary action in this matter. Mr. DiCroce presided over the Sept. 20, 2007 pre-disciplinary meeting. At that time, Appellant submitted a written response, and letters from Mr. Rosen and Judge Campbell. [Exh. A-1 to A-22.] In his response, Appellant states that he told Mr. Rosen if Ticket Two was in his courtroom he would consider the circumstances, but would not go below Mr. Tonz' first offer, and would not recommend jail. After Mr. Rosen noticed in April 2007 that a more lenient judicial officer was in 105A, Appellant agreed to "honor his word" with a 6-point offer. As to the allegation that he was not truthful to his supervisor, Appellant conceded that he was confused and made the statement without checking the records. [Exh. A-8, A-9.] Mr. Rosen's statement corroborates Appellant's response as to their conversations on Ticket Two. [Exh. A-17, A-18.]

Based in large part on Appellant's failure to correct or explain his inaccurate statement made to Mr. Poley, Mr. DiCroce concluded that it was necessary to impose a suspension of longer than one day. At hearing, Mr. DiCroce testified that he considered Appellant's past written reprimand as a prior notice of the need to follow the instructions of his supervisor.

On Oct. 5, 2007, Mr. Poley and Mr. DiCroce issued a three-day suspension to Appellant based on their determination that Appellant violated the unit's policy on plea bargains, made an untruthful statement to his supervisor, and facilitated prosecutor shopping which undermines the credibility of other attorneys in the City Attorney's Office. [Exh. 2.]

III. ANALYSIS

1. Discipline under the Career Service Rules

In an appeal of a disciplinary action, the Agency has the burden to prove the action was taken in conformity with Rule 16 of the Career Service Rules, and that the degree of discipline was reasonably related to the seriousness of the offense, taking into consideration the employee's past record. CSR § 16-20.

A. CSR § 16-60 E. Dishonesty

Dishonesty is the knowing communication by an employee of a false statement within the employment relationship. In re Dessureau, CSA 59-07, 6 (1/16/08).

Appellant concedes that his June 4th statement to Mr. Poley was not accurate. Appellant states that he did not make Mr. Martin plead to the face of the points on a later ticket, as there was no later ticket. Appellant explained that he was in the middle of his courtroom docket when approached by Mr. Poley, and, "believing that he was due for some criticism, volunteered a statement that he made without checking the record." Appellant considered the question "an attempt to discredit his character and professionalism in order to set him up to retirement because of his age." [Exh. A-10.]

Given the size and unrelenting nature of Appellant's daily caseload, confusion in answering a question about a specific case, while in the middle of working that day's docket, is easily understood. Appellant denied that Mr. Poley later asked him to furnish a copy of the later ticket. However, even if he had not, Appellant's failure to correct the inaccurate statement resulted in leaving Mr. Poley with a false impression of Appellant's prosecutorial actions. That false impression related to a significant matter within Appellant's job responsibilities which could have a substantial effect on his supervisor's faith in his word and the public's perception of the office as fair and impartial. The issue then is whether Appellant's failure to correct his statement proves a knowing or intentional communication of a false statement.

The fact that information provided to a supervisor is incorrect is not enough to sustain a charge of dishonesty. In addition, an agency must prove that the employee "knowingly supplied wrong information with intent to deceive." See In re Butler, CSA 78-06, 5 (1/5/07); Tackett v. Dept. of Air Force, 80 M.S.P.R 624, 629 (1999). Appellant stated he was concerned about the criticism inherent in Mr. Poley's question, but that Mr. Poley asked him no further questions about the matter. Absent testimony that Mr. Poley confronted him with the conclusion that Mr. Martin received no later ticket, Appellant's failure to follow up may as easily be attributed to other causes rather than an intention to deceive. Appellant testified convincingly about his reasoning process supporting each plea offer: that he believed the charge

was in essence as 12-point speeding case, and so a six-point offer was within the office's guidelines. There is no evidence supporting a conclusion that Appellant had any reason to conceal either plea agreement, given a prosecutor's reasonable discretion in making plea offers. The Agency failed to establish by a preponderance of the evidence that Appellant was motivated by a desire to mislead his supervisor by his June 4th statement to Mr. Poley.

B. CSR § 16-60 L. Failure to observe agency regulations

The Agency charges that Appellant violated its policy on plea agreements contained in an Aug. 12, 2002 memo entitled "plea guidelines." [Exh. 4-0198.] In order to establish a violation of the Career Service Rule requiring employees to adhere to agency guidelines under penalty of disciplinary action, an agency must establish that what is being enforced is in fact a policy, and that employees have notice of that policy. In re Gagliano, CSA 76-06, 7-8 (1/2/07).

The threshold question is whether the Seth memo can be construed as a policy. It is entitled "Plea Guidelines", and states the practice of halving points as done "normally", dependent on a number of circumstances, including an incomplete list of aggravating or mitigating factors. The apparent intent of the memo and its intended placement in the Trial Notebook is to give prosecutors some parameters for their plea offers, rather than to limit the exercise of discretion altogether. The memo must be interpreted consistently with that intent. In re Gagliano, CSA 76-06, 6 (1/2/07), *citing* United States v American Trucking Assns., Inc., 310 U.S. 534, 543 (1940), 73 Am.Jur.2d Statutes § 134. Since it does not define the action that must be taken under specific circumstances, it is not enforceable as a policy.

The evidence reveals that the Seth memo was not issued with the original Trial Notebook, but was authored and distributed in 2002. Appellant never received a copy of that memo until this disciplinary action. In any event, Appellant understood and acted upon the core of that memo by using as a guidepost the plea practice of halving the points of the ticket, subject to aggravating and mitigating factors. He argued that he complied with that practice by halving the points associated with the Martin tickets, since they were in essence 12-point speeding cases. He offered five points in Ticket One in light of his driving record and in order to save Mr. Martin's license, and six points in Ticket Two. The judges in each case agreed with Appellant's analysis, and accepted the pleas.

Even if the Seth memo were to be considered enforceable policy, I find that Appellant's plea offers did not violate them. There was no evidence that Appellant acted outside office practice in interpreting either ticket as in essence a speeding charge where the only evidence to support the added reckless counts was the speeding itself. Therefore, the Agency failed to establish that Appellant violated Agency policy by his plea offers.

C. CSR § 16-60 Z. Conduct prejudicial to good order and efficiency

To sustain a violation of this rule, the Agency must prove Appellant's conduct hindered the Agency mission, negatively affected the structure or means by which the Agency achieves its mission, or endangered the integrity of the City. In re Hill, CSA 14-07, 7 (6/8/07).

The Agency asserts that both the plea offers and Appellant's inaccurate statement to his supervisor violated this rule. Mr. DiCroce testified that he was entrusted at the time of his promotion with a goal of enhancing performance in the office, and that a large part of that task is ensuring that prosecutions treat similarly situated individuals charged with traffic violations in a similar manner. The Agency asserts that Appellant hindered its mission by facilitating prosecutor shopping.

In support of this allegation, the Agency established that Appellant knowingly offered a better plea deal to Mr. Rosen after learning of the offer extended by another prosecutor, which was a plea to a 6-point offense with an argument for jail time. Appellant promised Mr. Rosen that he would not seek jail on that same plea. As an experienced prosecutor, Appellant knew it was the philosophy of the respective courtroom judicial officers that would determine if his offer was superior. When the judges changed assignments, and Appellant's magistrate was unlikely to sentence to jail on such an offense, Mr. Rosen took the opportunity to obtain a transfer of the case to Appellant's courtroom. Under these circumstances, Appellant was aware that his offer was more favorable than that of his fellow prosecutor. Despite that knowledge, he proceeded with his offer. Mr. Rosen's client benefited from an immediate disposition of a ticket alleging a second above-100 m.p.h. charge in the space of nine months. By virtue of Appellant's plea offer, he avoided a trial with a prosecutor who was preparing to use the first ticket as aggravation. As a result, Mr. Martin obtained a better outcome in his traffic matter than that offered by the original prosecutor.

The Agency notified Appellant of its intention to promote equal treatment for those in similar circumstances by comments in his 2006 performance evaluation. "[Appellant's respectful treatment of defendants] is offset by Mr. Stone's reputation as a prosecutor who is more willing than others to deviate from the plea offer guidelines established by this office. This causes a problem as it tends to promote attorney shopping." [Exh. 3-533.] Appellant's conduct in consciously undercutting the plea offer of another prosecutor hindered the Agency mission to mete out equal treatment on traffic tickets. His more-favorable offer also adversely affected another prosecutor by undermining her ability to plea bargain with effectiveness in this case. The "good order and efficiency" of the Agency within the meaning of this rule is its ability to accomplish the work of the office. The Agency established that achieving substantial consistency in plea agreements is a large part of that work. Appellant's knowing offer of a more favorable offer prejudiced the good order and effectiveness of the Agency.

The Agency also alleges that Appellant's unintentionally inaccurate statement

to his supervisor was prejudicial to the good order and efficiency of the Agency. Appellant told his manager on June 4th that he had learned his lesson, and had made Mr. Martin plead to the face of a later ticket. Mr. Poley testified that he investigated and found there had been no other ticket. Appellant admitted at hearing that he was mistaken, and must have been thinking of another ticket. Mr. Poley and Mr. DiCroce both testified that Appellant's failure to correct the inaccurate statement for three months concerned them greatly regarding his honesty. Mr. DiCroce pointed out that, given the unit's large caseload, he needs to be able to rely on Appellant's statements about individual cases without checking the records.

The false impression created by Appellant's failure to correct his misstatement for three months related to a significant matter within Appellant's job responsibilities. It had a negative effect on his supervisor's trust in the truthfulness of his statements, and thereby affected his ability to supervise Appellant. Under these circumstances, Appellant's failure to correct his inaccurate statements was prejudicial to the good order and effectiveness of the agency, in violation of this rule.

2. Penalty

The final issue is whether the penalty of a three-day suspension was warranted under Rule 16 of the Career Service Rules, which requires discipline to be corrective, "reasonably related to the seriousness of the offense and take into consideration the employee's past record." CSR § 16-20.

The Agency has established that Appellant violated CSR § 16-60 Z by his knowing facilitation of prosecutor shopping, and by failing to correct an inaccurate statement made to his manager. Appellant's prior disciplinary history consists of but one written reprimand, issued in 2003. [Exh. 1-7.] The Agency argues that more than a one-day suspension was called for by Appellant's unwillingness to acknowledge the effect his behavior had on the operation of the office, including his supervisors' ability to monitor cases handled by Appellant without checking the original court or city attorney files. The Agency points to its statements in Appellant's 2006 evaluation as giving Appellant notice to avoid encouraging attorney shopping.

A three-day suspension is not outside the range of punishment that a reasonable administrator may impose based on the foregoing conduct.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency suspension dated October 5, 2007 is AFFIRMED.

Dated this 25th day of February, 2008.


Valerie McNaughton
Career Service Hearing Office

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing above. 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, hand delivery, or fax as follows:

BY MAIL:

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

BY PERSONAL DELIVERY:

Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, First Floor
Denver CO 80202

BY FAX:

(720) 913-5995

Fax transmissions of more than ten pages will not be accepted.

I hereby certify that a copy of this decision was sent on Feb. 25, 2008 to the following:

Robert E. Goodwin, Esq. cheslerlawfirm@yahoo.com (via email)
Russell Stone, Esq., Russell.Stone@denvergov.org (via email)
Cathy H. Greer, Esq. cgreer@warllc.com (via email)
City Attorney's Office at Dlefilng.litigation@denvergov.org (via email)
City Attorney, David Fine, David.Fine@denvergov.org (via email)
Vincent DiCroce, Prosecution & Code, Vincent.DiCroce@denvergov.org (via email)

