

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

Appeal No. 75-02

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**PHILIP J. SWIFT**, Appellant,

Agency: DEPARTMENT OF SAFETY, DENVER SHERIFF DEPARTMENT, and  
THE CITY AND COUNTY OF DENVER, a municipal corporation

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**INTRODUCTION**

This matter comes before the Career Service Board on appeal by Deputy Sheriff Philip J. Swift (hereinafter "Appellant") filed April 12, 2002. Appellant challenges the Denver Sheriff Department's (hereinafter "Agency") decision to issue him a written reprimand for allegedly engaging in a discussion with an inmate on trial about the substance of his case, in violation of department regulations and CSR rules.

The Agency contends that the inmate responded to the discussion between Appellant and the other officer, including questions Appellant asked his partner about the inmate's case. Appellant continued to talk to his partner about the case even after the inmate had begun to participate. The Agency asserts that Appellant therefore participated in a "discussion" with the inmate for purposes of the rule. Appellant contends that he only actually spoke with his partner during the conversation. After the first comment during which Appellant advised the inmate to talk to his attorney, he never asked the inmate any questions and otherwise did not speak directly with him. Appellant contends that therefore, he did not violate the rules and regulations alleged by the Agency.

A hearing in this matter was held before Personnel Hearing Officer Joanna Lee Kaye ("hearing officer") on June 17, 2002 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Robert D. Nespor, with Internal Affairs' Sergeant Elias Diggins present for the entirety of the proceedings and serving as advisory representative for the Agency. Appellant was present and represented himself.

Agency witnesses included Sergeant Silver Gutierrez, Major Ronald D. Foos, and Division Chief Walter R. Smith.

Witnesses for Appellant included Captain Phillip A. Deeds, Major Gary Anderson, Sgt. Diggins, and Appellant himself.

Appellant and the Agency stipulated to the admission of Exhibits 1 through 14. No additional exhibits were offered or admitted.

For purposes of this Order, the rules of the Career Service Authority shall be abbreviated as the "CSR" with a corresponding numerical citation.

## PRELIMINARY MATTERS

### 1. The Hearing Officer's Jurisdiction

#### *a. Timeliness*

The Agency previously contested the timeliness of Appellant's grievance in its Motion to Dismiss filed May 1, 2002 based on the date appearing on the second-level grievance denial. Appellant responded to that Motion on May 3, 2002. In his Order of May 7, 2002, Hearing Officer Michael Lassota denied the Motion and found Appellant's filings timely based on the date of mailing which appeared on the envelope.<sup>1</sup> That Order is adopted herein by reference.

#### *b. Subject-matter jurisdiction*

The hearing officer finds she has jurisdiction to hear this case as an appeal of a grievance of a written reprimand, pursuant to the following CSR rules:

#### Section 16-40 Disciplinary Action following Pre-disciplinary Meeting

...C. A verbal warning may not be grieved or appealed. An employee may file a grievance on a written reprimand in accordance with **Rule 18, Dispute Resolution** but may not file an appeal, except as permitted under **Rule 19, Appeals**...

#### Section 18-12 Grievance procedure

4...If the employee still feels aggrieved after receipt of (the second-level grievance) decision...and the grievance concerns an alleged violation of... the Career Service Rules, and the employee wants to pursue the grievance further, the employee must appeal to the Hearings Officer of the Career Service Board in accordance with the provision of **Rule 19 APPEALS**...

#### Section 19-10 Actions Subject to Appeal

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

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<sup>1</sup> The second-level grievance denial did not include a certificate of mailing as required under the CSR rules.

- ...d) Grievances resulting in rules violations: Any grievance which results in an alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career Service, or the Career Service Personnel Rules. The grievance must be in conformance with and processed pursuant to the requirements of Section 18-12 Grievance Procedure...

Subject-matter jurisdiction was not contested by either party to this case.

## 2. **Burden of proof**

In civil administrative proceedings such as this one, the level of proof required in order for a party to prove its case is by a *preponderance of the evidence*. In other words, to be meritorious, the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

It has been previously established that the Agency responsible for issuing a written reprimand to a career service employee affirmatively bears the initial burden of establishing, by a preponderance of the evidence, that it had just cause for the written reprimand. *See, In the Matter of the Appeal of Martha Douglas*, Appeal No. 317-01 (Order entered 3/22/02); *citing In the Matter of the Appeal of Mary L. Shafer*, Appeal No. 117-00 (Hearing Officer Michael L. Bieda, 10/30/00). The Agency must also demonstrate that the severity of discipline is reasonably related to the offense in question. *See, In the Matter of Leamon Taplan*, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99).

The issue of burden of proof was not disputed by either party to this case.

## **ISSUES**

1. Whether the Agency has shown just cause for disciplining Appellant:
  - a. Whether the Agency has shown the acts Appellant engaged in constitute a violation of any department or CSR rule or regulation.
  - b. If so, whether the Agency has demonstrated that Appellant knew or should have known the acts in question constituted such a violation.
2. If so, whether the Appellant's written reprimand is reasonably related to the seriousness of the offense in question.

## **FINDINGS OF FACT**

1. Appellant has been a Deputy Sheriff for the Denver Sheriff Department since 1998. His regular assignment is currently in the Receiving Unit at the Pre-Arrestment Detention Facility ("PADF" or City Jail). In that capacity he is responsible for the intake and release of inmates, coordinating their transportation to and from court or transfer to other

jurisdictions, handling their property and bonds, and other elements of inmate activity. Appellant has received no prior disciplinary actions.

2. In addition to his regular assignment, Appellant is a member of two special units: the Gang Unit for which he collects and condenses gang intelligence, and the Emergency Response Unit or "ERU," an elite SWAT-type unit specializing in high-risk activities and weapons use. Appellant and other members of this unit serve on an on-call basis as needed at times of crisis or for special projects.
3. The ERU Unit is headed by a captain who acts as the commanding officer for the entire 36-member unit. There are six sergeants who function as squad leaders for squads of six members each. However, this structure is generally for the purposes of large ERU operations only. Squad members otherwise generally do not answer to their sergeants, nor do the sergeants generally answer to the captain other than directly in the line of ERU duty, and then only if that duty requires the involvement of this chain of command. Any ERU member can consult with any sergeant in a supervisory capacity when necessary. All ERU members are otherwise directly supervised and evaluated by the supervisors in their regular assignments.
4. As a member of the ERU, Appellant has received extensive training in special weapons and tactics. This training is in addition to his regular Academy training. One of the special projects of the ERU is transportation and special security for inmates who are considered high-risk. Both Academy and ERU training include classroom and field training in the transport of prisoners. Inmate transfer training for the ERU specifically includes reference to Regulation 400.1 of the Denver Sheriff Department Rules and Regulations (hereafter 400.1). That regulation prohibits officers from "discuss(ing) with a prisoner, matters pertaining to that prisoner's crime...except when necessary in the line of duty."
5. During Academy training, all cadets receive a copy of the Agency's Personnel Policy Manual, which contains the Agency's rules and regulations. All sheriff's deputies are responsible for knowing the regulations and applying them properly in the course of duty.
6. On February 6, 2002, the date of the incident in question, Appellant and his partner, Deputy Sheriff Timothy Deasy, another ERU member, were assigned the ERU transport of inmate Gintear Howard to and from court for his trial. Howard was on trial for the attempted murder of fellow Peace Officer Pace, was known to be extremely dangerous, and was considered high-risk.
7. After court recessed, Appellant and Ofcr. Deasy loaded Howard into the back of the van. Appellant and Ofcr. Deasy got into the front. Appellant was in the driver's seat with Ofcr. Deasy riding "shotgun." The seating area directly behind the cab of the transport vans is separated by a steel wall with two portals made of Plexiglas incased in wire mesh. While generally inmates behind the Plexiglas cannot hear conversations between the officers in the cab of the transport vans unless they raise their voices, the Plexiglas in this particular van was broken, making it possible for inmates and officers to hear one another without raising their voices.

8. During his testimony and in his written statement (Exhibit 10), Appellant described the following events and portions of the ensuing conversation that occurred on February 6, 2002. The hearing officer therefore finds as fact the following:

Before Appellant started the engine, Howard said something to the effect of "So how do you think it's (his trial) going?" Appellant and Ofcr. Deasy responded by saying something to the effect that some of it didn't make a whole lot of sense. Appellant then started the van and they pulled away from the loading port. Howard then said something to the effect that he had to decide whether to take the stand, and that his lawyer told him that if he did, he would have to testify that another individual was in the car with him (presumably at some time relevant to the allegations against him).<sup>2</sup> Appellant then told him something to the effect that he should listen to his lawyer, but whatever he decided he "should think long and hard about it." Appellant and Deasy further periodically conversed about the evidence in Howard's case "in general terms." Howard "would both volunteer information as will (*sic*) as answer question (*sic*) that were asked of him." (Exhibit 10) Appellant maintains that all questions directed at Howard were asked by Ofcr. Deasy, and that Appellant asked Howard no questions pertaining to his case. Appellant and Ofcr. Deasy began discussing the fact that the gun Ofcr. Pace had testified he'd seen fired at him was a SIG .226. Ofcr. Deasy, who carries a SIG .226, said something to the effect that he did not understand how the gun would have jammed (as apparently had allegedly happened in the Howard case). Howard overheard this statement and responded to Ofcr. Deasy's comment stating that the gun he used was a Ruger, not a SIG .226. Howard further stated that the gun did not fire because the magazine fell out. Ofcr. Deasy then asked Howard what would have happened if the magazine had not fallen out, and Howard responded that Ofcr. Pace "would be dead." Ofcr. Deasy said something to the effect of "All this because you didn't want to go back to jail." Howard responded that he didn't want to go back because he'd been locked up most of his juvenile life. Appellant observed that the fact that Ofcr. Pace almost cried while on the stand was not helpful to Howard's case because the jury appeared to sympathize with him. Howard responded to this statement saying something to the effect that Ofcr. Pace was scared. Appellant stated to Ofcr. Deasy that Howard's lawyers had argued some bullets that had been found in a cup in the garage where Howard had been arrested might have been planted there for the owner of the garage to find later. Howard said the DA had noted that the bullets in the cup, which were 9mm, did not match his gun, but that he had put them in there. Appellant also stated to Ofcr. Deasy that if Appellant were working the street and saw two men riding one behind the other, he would think they were about to do a drive-by on somebody. Ofcr. Deasy then asked Howard what they were up to with all those guns in the car and Howard told him they were looking to do a robbery. Ofcr. Deasy further asked Howard why he and another suspect, Abrams, had split up. Howard responded that the plan was to stay together but that Abrams had jumped the fence, and that if they had stayed together they'd have gotten away.<sup>3</sup>

9. Appellant maintains that after he told Howard he should talk to his attorney about testifying and think long and hard about it, he made no further statements directly to Howard. Every

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<sup>2</sup> In Appellant's written statement (Exhibit 10) he states that "This was a fact that (Howard) had not admitted to the police up to this point."

<sup>3</sup> In Appellant's written statement (Exhibit 10) as well as his testimony, he stated that he does not recall the sequence of these statements.

statement he made thereafter during the conversation described above in paragraph 8 was directed at Ofcr. Deasy. Appellant was focused on driving the van and surveillance of the surroundings from a security standpoint, not on the nature or content of the discussion.

10. It is undisputed that Howard was not re-Mirandized prior to the transport in question on February 6, 2002, and that his lawyer was not in the van.
11. Ofcr. Deasy's written statement (Exhibit 11) corroborates Appellant's assertion that Ofcr. Deasy asked Howard the direct questions. It reiterates essentially the same statements by the same individuals about the same topics as are set forth in Appellant's written statement (Exhibit 10).
12. When they arrived back at the City Jail, Appellant and Ofcr. Deasy exited the van. Appellant asked Ofcr. Deasy something to the effect of, "Do you realize what just happened?" Appellant maintains that he was referring to the fact that Howard had just volunteered information about his guilt, and that this did not dawn on him until he no longer had to concentrate on driving. (See, Exhibit 12, p. 7.) Ofcr. Deasy reportedly responded that he did, referring specifically to the fact that Howard had just admitted to the attempted murder of Ofcr. Pace. (See, Exhibit 11, p. 2.)
13. At approximately midnight on February 6, 2002, Ofcr. Deasy called Sergeant Silver Gutierrez, who works in the Bureau of Internal Affairs as his regular assignment, as well as being a member of the ERU. Sgt. Gutierrez was awakened by this call. Ofcr. Deasy presented a hypothetical situation to Sgt. Gutierrez about what an officer should do if an inmate spontaneously makes statements about his case in the presence of the officer. Sgt. Gutierrez was disoriented from having been asleep and was unclear about what Ofcr. Deasy was asking him. Ofcr. Deasy asked Sgt. Gutierrez what he would do if an inmate made statements containing previously disclosed information about his case. Eventually during the conversation, Sgt. Gutierrez came to understand that an inmate had made specific disclosures in Ofcr. Deasy's presence during transport about the ammo or magazine of a gun the inmate used in a crime.
14. Sgt. Gutierrez testified that based on what Ofcr. Deasy had told him, he thought that the inmate had made unsolicited disclosures to Ofcr. Deasy without any prompting or participation by Ofcr. Deasy whatsoever. He advised Ofcr. Deasy as a friend rather than a supervisor that the right thing to do morally would be to "tell someone" about the disclosures.<sup>4</sup> Sgt. Gutierrez specifically recalls telling Ofcr. Deasy that he was advising him as a friend to do so, not ordering him as a sergeant. Sgt. Gutierrez testified he did not specifically recommend telling the District Attorney. Sgt. Gutierrez had no further involvement in this case.<sup>5</sup>
15. The next day, February 7, 2002, apparently on Sgt. Gutierrez' advice, Appellant and Ofcr. Deasy verbally reported the incident to Court Services' Captain Phillip Deeds, whose duties

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<sup>4</sup> Sgt. Gutierrez testified that he was not one of the supervising sergeants in the ERU as of February 6-7, 2002.

<sup>5</sup> Apparently Appellant's name did not come up during this discussion.

include arranging inmate transportation. Capt. Deeds testified that based on the way the incident was initially described to him, he had presumed the inmate made the disclosures spontaneously without any interaction or participation on the part of Appellant or Ofcr. Deasy.

16. Capt. Deeds consulted with Court Services' Operations Major Ronald D. Foos, who was in charge of court transport at the time, about the incident.<sup>6</sup> He advised Capt. Deeds to have the officers report this incident to the District Attorney. Capt. Deeds in turn advised Appellant and Ofcr. Deasy to do the same.
17. The same day, Appellant and Ofcr. Deasy did report to Asst. Dist. Atty. Joseph Morales, the attorney prosecuting the Howard case. He advised them to make written statements of the incident. Appellant and Ofcr. Deasy then promptly prepared their written statements that day (Exhibits 10 and 11).
18. Upon review of the written statements, Mr. Morales apparently grew concerned about the nature of the interaction and relayed the reports back to Maj. Foos and Capt. Deeds. Both testified they did not understand the true nature of the incident (specifically the nature of the participation in the conversation by Appellant and Ofcr. Deasy) until reading these statements.
19. On February 12, 2002 Maj. Foos sent a request for a disciplinary investigation to Major Gary Anderson of Internal Investigations (Exhibit 7). Maj. Foos testified he did this because he perceived the events described in the written statements (Exhibits 10 and 11) as violations of regulation 400.1. Internal Affairs' Sergeant Elias Diggins took the initial complaint report (Exhibit 8). Maj. Foos had no further participation in this case.
20. On February 13, 2002 Sgt. Diggins initiated an investigation. He engaged in a written question session with Ofcr. Deasy on February 13 and with Appellant on February 14 (Exhibits 12 and 13). Sgt. Diggins had both officers sign a "Garrity" advisement before questioning them (p. 1 of Exhibits 12 and 13). The "Garrity" advisement indicates the statements may be used against the declarant in administrative proceedings, but that failure to give a statement or answer questions might result in disciplinary action. Appellant's union representative, John Camozzi, was present during Appellant's written question session.
21. Appellant testified that he was upset during this interrogation and felt he had been ambushed for reporting as he had been told to do by a supervisor. However, he did not request a break or rescheduling. At some point early during the interrogation, Appellant objected that Sgt. Diggins should not be the investigator in this case since he functions as a supervising sergeant in ERU, of which Appellant is a member. Sgt. Diggins has never supervised Appellant in ERU and Appellant has never consulted with him as a supervisor in that or any other capacity. Appellant was not in Sgt. Diggins assigned squad. The ERU squads and squad leaders are reassigned regularly, and only serve in that structure occasionally for high-

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<sup>6</sup> Maj. Foos also testified that Capt. Deeds characterized the incident as spontaneous utterances on the part of the inmate.

risk situations.<sup>7</sup> Sgt. Diggins determined that he did not perceive any conflict and proceeded with the investigation. Sgt. Diggins asked Appellant several questions directly implying that Appellant asked Howard questions about his case. Appellant consistently denied asking Howard any questions about his case.<sup>8</sup> However, Appellant implicitly admitted not distinctly recalling the essence of 400.1 until this incident brought it to his attention. (*See*, Exhibit 12, p. 2.)

22. The documents in the record tend to suggest that Ofcr. Deasy was not aware of 400.1 until this incident, that he had no intention of engaging in an "interrogation" of Howard during the conversation in the van and did not think of it as such while it was occurring, but that he had in fact asked direct questions of Howard about evidence in his case to which Howard responded. (*See*, Exhibits 11 and 13.)
23. During his testimony at hearing, Sgt. Diggins repeatedly responded to Appellant's questions that Appellant had "asked Ofcr. Swift" and made other statements tending to suggest Sgt. Diggins had periodically confused Ofcr. Deasy's actions with Appellant's.<sup>9</sup>
24. Sgt. Diggins did not interview Maj. Foos, Capt. Deeds or Sgt. Gutierrez in the course of his investigation. After interviewing Appellant and Ofcr. Deasy, he forwarded his report to Division Chief Walter R. Smith, the commanding officer in charge of the "downtown division," which includes transport between court and the City Jail.<sup>10</sup> The report included the Complaint Summary (Exhibit 8), Sgt. Diggins' Internal Investigations Case Summary (Exhibit 9), the written statements prepared by Appellant and Ofcr. Deasy for the DA (Exhibits 10 and 11), and the written interrogation sessions of Appellant and Ofcr. Deasy (Exhibits 12 and 13).<sup>11</sup> After reviewing these documents, Div. Chief Smith determined to sustain the complaint that Appellant and Ofcr. Deasy had engaged in a discussion with Howard about the details of his case in violation of 400.1. By memorandum of February 18, 2002 (Exhibit 6), he recommended to Maj. Anderson that both officers receive written

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<sup>7</sup> Sgt. Diggins further testified that he is about to complete his term at IA and will be reassigned thereafter. He testified that because of the nature of the assignments at the Agency, he or any other sergeant could be reassigned as Appellant's direct supervisor in his regular assignment at any time. This is true of all the sergeants at IA, not just Sgt. Diggins.

<sup>8</sup> Appellant has underscored several times that any admissions to "questions" asked of Howard were either in reference to questions asked by Ofcr. Deasy, or questions Appellant asked during unrelated small talk. Appellant has consistently maintained that he never asked Howard any questions about his case. There is no evidence in the record to rebut this assertion.

<sup>9</sup> Because the hearing officer's conclusions and decision in this case rest on Appellant's version of events, and because the hearing officer is reviewing the evidence *de novo*, any confusion on Sgt. Diggins' part between Appellant's role in the discussion and Ofcr. Deasy's is harmless error and has been disregarded.

<sup>10</sup> Div. Chief Smith is not in Appellant's chain of command. He was the disciplining authority in this case because he was in charge of downtown transportation at the time.

<sup>11</sup> There is a memo in the record from Mr. Morales which details his assessment of the potential damage which could have accrued to the case as a result of the incident (Exhibit 14). The memo is dated February 26, 2002. It is presumed that this memo was generated at the request of IA after the case was already reviewed by Div. Chief Smith, since he had already determined to sustain the complaint as of February 18, 2002. (*See*, Exhibit 6.)

reprimands or other appropriate progressive discipline. Maj. Anderson reviewed the investigative file, and concurred with Div. Chief Smith's recommendation.

25. At hearing, Div. Chief Smith testified that a law enforcement officer could reasonably be expected to construe the term "discussion" in 400.1 to include talking to another officer about an inmate's case where the inmate was overhearing and responding, even if the officer's statements are not directed at the inmate. Maj. Anderson testified that he felt 400.1 was self-explanatory and required no interpretation. He testified that the rule plainly prohibited activity such as that in which Appellant engaged in this case.
26. On March 21, 2002 the Agency issued Appellant a written reprimand (Exhibit 2).<sup>12</sup> The written reprimand alleges that Appellant "did admit that (he) asked Inmate Howard several questions pertaining to his case to which he responded."
27. On March 28, 2002 Appellant filed his grievance, alleging that there was no evidence that he conversed directly with Howard at any time after telling him he should consult with his attorney. Appellant maintains that the evidence therefore did not sustain allegations of the violations (Exhibit 3). The grievance also alleged that investigation by Appellant's "direct supervisor" presented the appearance of a conflict.
28. Sergeant C.W. DeNovellis denied Appellant's first-level grievance on March 28, 2002 (Exhibit 4).
29. Appellant's grievance was forwarded to Director Fred J. Oliva and denied on April 1, 2002 (Exhibit 5).
30. Appellant timely appealed this case on April 12, 2002 (Exhibit 1).

## DISCUSSION

### **1. Rules the Agency alleges Appellant violated.**

The Agency posits Appellant's conduct violated the following CSR rules and departmental regulations:

#### Section 16-50 Discipline and Termination

##### A. Causes for Dismissal:

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant...

- ...20) Conduct not specifically identified herein may also be cause for dismissal.

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<sup>12</sup> While nobody can recall who actually prepared Exhibit 2, it was prepared at Div. Chief Smith's request and he reviewed it as well as the entire investigative file before signing it.

Section 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline...

- ...5) Failure to observe departmental regulations (*set forth below*).
- 6) Carelessness in the performance of duties and responsibilities.
- ...11) Conduct not specifically identified herein may also be cause for progressive discipline.

The departmental regulations the Agency alleges Appellant violated are as follows:

Denver Sheriff Department Rules and Regulations

- 300.19 Deputy Sheriffs and employees shall not violate any lawful rule, duty, procedure or order...
- ...400.1 Deputy Sheriffs and employees shall not discuss with a prisoner, matters pertaining to that prisoner's crime or situation or the crimes or situations of other prisoners, except when necessary in the line of duty.

**2. Analysis of the arguments.**

*a. Allegations of a conflict of interest.*

The hearing officer first disregards Appellant's argument that he was prejudiced by an alleged conflict arising from an investigation by his "direct supervisor." First, testimony established that Sgt. Diggins has never directly supervised Appellant nor issued him a direct order in the line of ERU duty. Furthermore, the evidence suggests that it is not any more likely that Sgt. Diggins might become Appellant's direct supervisor in the future than any other sergeant who might have performed the investigation. Therefore, the conflict is a potential one at best and has not been considered in this decision. Finally, it is not uncommon for a supervisor to investigate alleged rule violations by a subordinate, and Appellant offered no authority prohibiting as much.

*b. Allegations that the report to the DA constituted an aggravating factor.*

Appellant stresses that he went to the DA and reported this incident under direction of Capt. Deeds and Maj. Foos, but that the Agency later characterized this as an "aggravating factor" despite he was told to do so by superior officers. The Agency responds that this allegation was later disregarded and was not included in the written reprimand. However, the memorandum including that allegation remains in the documentation.

The hearing officer finds, based on the totality of evidence, that the Agency ordered the officers to report based on an incomplete understanding of the nature of the incident, because the initial verbal report by Appellant and Ofcr. Deasy excluded details of their participation in the conversation.<sup>13</sup> It is more likely than not that this happened because, in the beginning, Appellant and Ofcr. Deasy were more focused on the nature of Howard's disclosures rather than any role they might have played in the conversation. This all came across to the hearing officer as an innocent and understandable miscommunication, rather than any intent by Appellant and Ofcr. Deasy to mislead the Agency, or any intent by the Agency to sabotage the officers. Neither party apprehended the misunderstanding until the written reports revealed the troubling details. Therefore, the allegations that the report should be considered an aggravating factor have been disregarded and should be removed from Appellant's personnel files.

*c. Whether Appellant's actions violated CSR rules and departmental regulations.*

Appellant's contention is that with the exception of suggesting he consult with his attorney and "think long and hard" about testifying, none of his statements were directed at Howard. Therefore he did not "discuss" Howard's case with him in violation of 400.1. Since that alleged violation is the basis for the other violations alleged in the disciplinary action, Appellant contends the action is unjust. He posits that it was Ofcr. Deasy, not he, who spoke directly with Howard during the conversation, and Ofcr. Deasy has admitted as much. He argues the Agency has confused his participation in the discussion with Deasy's, and that this confusion has further contributed to the wrongfulness of the disciplinary action against him.

It is apparent that a primary impetus behind 400.1 is the seminal case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In that case the United States Supreme Court prohibited the interrogation of a suspect of a crime while in custody of the police without first advising him of his Fifth Amendment right against self-incrimination. Under Miranda, the decisive stage for the warnings is "custodial interrogation." "Custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444. Thus, the two prerequisite conditions of applying Miranda are 1) that the suspect is in custody, reasonably believing he is not free to leave at the time of questioning, and 2) that questioning takes place without the suspect being informed he has the right to remain silent until he seeks the advice of an attorney.

At first blush, both these requisites would appear to have been present in this case. There initially appears to be no dispute that Howard was in police custody. He was being transported to and from jail during a trial in which he was the defendant. He was clearly not free to leave at the time of the conversation. Furthermore, he responded to statements about his case which Deasy and Appellant were at least directing to one another, in addition to questions Deasy directly asked him.

However, upon review of the Colorado, Tenth Circuit and U.S. Supreme Court case law applying Miranda, there may be some question whether or not the conditions giving rise to

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<sup>13</sup> The question of what action would have been ordered if the Agency had known the officers participated in the conversation the way they did was never addressed.

Miranda were present. First, all the case law clearly establishes that the point of Miranda is to prevent an individual from being *compelled* to bear witness against himself in violation of his Fifth Amendment rights. While Miranda originally presumed that the combination of custody and interrogation naturally creates a coercive, compelling environment, (*see, e.g., People v. Robledo*, 832 P.2d 249 (Colo. 1992)), there is substantial subsequent case law clarifying what constitutes "custody," "interrogation," and "voluntariness."

A "voluntary" disclosure may not fall within Fifth Amendment Miranda protections, even if the suspect makes the disclosure while in custody during discussion with a law enforcement official. Whether a disclosure is "voluntary" depends on the "*totality of the circumstances*." People v. Breidenbach, 875 P.2d 879 (Colo. 1994). Factors to be considered include:

[W]hether the defendant was in custody or was free to leave and was aware of his situation; whether Miranda warnings were given prior to any interrogation and whether the defendant understood and waived his Miranda rights; whether the defendant had the opportunity to confer with counsel or anyone else prior to the interrogation; whether the challenged statement was made during the course of an interrogation or instead was volunteered; whether any overt or implied threat or promise was directed to the defendant; the method and style employed by the interrogator in questioning the defendant and the length and place of the interrogation; and the defendant's mental and physical condition immediately prior to and during the interrogation, as well as his educational background, employment status, and prior experience with law enforcement and the criminal justice system.

People v. Lopez, 946 P.2d 478 (Colo. App. 1997); *citing* People v. Gennings, 808 P.2d 839, 844 (Colo. 1991).

While one might initially think Howard was clearly "in custody, there are some cases in which even prisoners are not considered "in custody" for purposes of determining Miranda application. The traditional test of "custody" may be inapplicable in a jail setting "because it would lead to the conclusion that all prison questioning is custodial because a reasonable person would always believe he could not leave the prison freely." State v. Parsons, 15 P.3d 799, 801 (Colo. App. 2000); *citing* People v. Denison, 918 P.2d 1114, 1116 (Colo. 1996). "[I]n the prison setting, [restriction] implies a change in the surroundings of the prisoner that results in an added imposition on his freedom of movement." *Id.* Again, "In determining whether an inmate being questioned has been additionally restricted to the extent that he or she is 'in custody' within the meaning of Miranda...a court must consider the *totality of the circumstances*..." Parsons, *above*, at 801 (emphasis added).<sup>14</sup>

Similarly, the determination of whether an individual is being "interrogated" within the meaning of Miranda "hinges on whether a reasonable person in the suspect's position would consider himself or herself deprived of freedom of action in a significant way at the time of the interrogation." Once again, "[t]his determination requires the trial court to consider the *totality*

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<sup>14</sup> On the other hand, in the cases this principle represents, the inmates had committed new crimes while in jail that were not related to the crime for which they were already incarcerated. *See, Parsons, above; Denison, above.* That is not the case here. Howard was in custody for the allegations which were the substance of the discussion at issue.

of the circumstances surrounding the interrogation." *Id.* at 801 (emphasis added); citing People v. J. D., 989 P.2d 762 (Colo. 1999).

Perhaps Appellant was aware of some of this case law, and believed he was taking no risk by simply letting Howard participate voluntarily in a conversation such as the one in this case without asking any questions. Since Howard's confinement was incidental to the van ride and *not* for the purpose of questioning him about his case, under the Parsons test, perhaps he should not be considered "in custody" for Miranda purposes. In addition, no promises or threats were made; the length and place of the discussion were not inherently coercive. There appeared to be no pressure on Howard to initiate the discussion and offer up the information he did. Therefore it arguably might not qualify as "interrogation" under J. D. Furthermore, it is unclear from the case law how immediately before any given conversation an inmate must be re-Mirandized. Howard had presumably been Mirandized in this case at some point, had already obtained and been advised by counsel, and therefore presumably was already made aware of his rights by that point. Finally, in light of Howard's apparent criminal record and past experience with the system, he should have known better than to start gossiping with the officers about his case. Howard's participation in the discussion therefore could arguably be considered "voluntary" under the totality-of-circumstances test set forth in Lopez, Howard having presumably waived his rights under Miranda.

However, perhaps most important to an understanding of the significance of 400.1, as distinct from Miranda, are the following ramifications which apparently did not enter Appellant's mind. "Purported waivers of constitutional rights are subject to the most stringent scrutiny." United States v. Geittmann, 733 F.2d 1419 (10<sup>th</sup> Cir. 1984); citing In re Bryan, 645 F.2d 331, 333 (5<sup>th</sup> Cir. 1981). It is the prosecutor, not the defendant, who affirmatively bears the burden of proof that the confession was not obtained in violation of the defendant's Fifth Amendment rights. People v. Sparks, 748 P.2d 795, 797 (Colo. 1988). Moreover, beyond the potential Miranda ramifications, any conversation, voluntary or otherwise, which takes place after the defendant has procured counsel when counsel is not present, is equally if not more offensive to the defendant's *Sixth Amendment right to representation*. And again, it is the prosecutor, not the defendant, who bears the affirmative burden of demonstrating his claim that the right to representation has not been violated. Brewer v. Williams, 430 U.S. 387, 402 (1977).

In Brewer, the suspect had already been arraigned on the murder of a child, and was in transport to the location of his trial. During the long ride, the officers began with general conversation, which then became very specific about evidence critical to the suspect's case (specifically the whereabouts of the child's body). While the officers asked no questions, one of them made specific statements to the suspect, including comments about the child's parents being entitled to a "Christian burial." Eventually the suspect disclosed the whereabouts of the body. This conversation took place in the absence of the suspect's attorneys, who had just advised him not to speak to the officers during the trip. *Id.* at 391.

Even though no formal "interrogation" had taken place, the United States Supreme Court required no less than an *express waiver* of the suspect's right to have his attorney present. *Id.* at

387. The Court found that in the absence of such an express waiver, the conversation violated his Sixth Amendment right to counsel. *Id.* at 388-401.<sup>15</sup> The Court said:

Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him — "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

*Id.* at 388; *citing Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

It is undisputed that in this case, Howard did not have the opportunity to consult with his counsel immediately before the specific statements he made during this discussion. In terms of his psychological state, he was probably nervous and overly talkative about the events at trial that day. He was not re-Mirandized before the discussion took place. He was already in the midst of his trial, and his attorney was not in the van when the discussion in question occurred. There is no evidence that Howard expressly waived his *Miranda* rights immediately prior to the conversation. Any waivers by Howard of his right against self-incrimination, as well as his right to counsel during this particular conversation, are at best circumstantially implied.<sup>16</sup>

This area of law is obviously more complex than it might initially appear. But that the present case could apparently at least be argued either way is precisely the point. The very occurrence of such a conversation puts the prosecution on the defensive, potentially requiring it to affirmatively justify the actions of officers and prove those actions did not offend an inmate's constitutional rights in some way. This is the reason for the existence *and strict enforcement* of 400.1. As the old adage goes, "a little knowledge is a dangerous thing." The distinctions made in the various circumstances of these cases are fine, and each set of circumstances is unique, calling for new and unique interpretations and applications of the law. 400.1 is intended to prohibit officers from engaging in a case-by-case legal judgment call and second-guessing whether they may or may not be correct at the time, only to find out for certain after the inexorable legal process is applied to their actions, when it is too late and the prosecutor is forced to prove that judgment correct, or worse, is unable to do so. Strict adherence to 400.1 is therefore necessary to protect the Department of Safety and the prosecuting authorities as well as inmates. The reasonableness of the broad prohibition it sets forth is clear when viewed in this light.

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<sup>15</sup> In all fairness, the officers in the *Brewer* case deliberately elicited information from the suspect, who was an escaped psychiatric patient and deeply religious person, by applying guilt tactics and religious pressure. What occurred in the present case does not appear to have been deliberate, at least on Appellant's part. The hearing officer was unable to find a case directly on point, where the discussion was apparently prompted primarily by the custodial suspect. However, that the hearing officer could not find it does not mean that such a case does not exist. Once again, the point is that these distinctions are fine and should not be made by officers.

<sup>16</sup> The hearing officer would not presume to reach any final conclusions about whether the interaction was in violation of Howard's constitutional rights. Aside from the fact that she herself remains uncertain, she further does not have jurisdiction over the issue. The hearing officer can only apply the CSR and departmental rules and regulations. This speculative dictum is only for the purposes of illustrating the necessity of the strict application of 400.1, as well as to elucidate the hearing officer's understanding of Appellant's arguments and intentions.

Appellant's focus on the fact that at no time did he ask Howard any direct questions is misplaced. 400.1 exists *independently* from constitutional protections and requirements. It does not prohibit *questioning*. It prohibits *discussion*. According to Merriam-Webster Dictionary (home and office edition) to "discuss" means 1) "to argue or consider carefully by presenting the various sides;" 2) "to talk about." Again, Appellant is clearly thinking Miranda, not 400.1. And for the reasons set forth above, while Miranda is likely the origin of 400.1, a showing of a Miranda violation is not required to show a 400.1 violation.

Thus, while Appellant did not directly ask Howard any questions about his case, he nonetheless clearly "talked about" the case in Howard's presence. Howard clearly heard what he said and responded with information not theretofore disclosed. It is undisputed that Appellant heard Howard's responses, and therefore knew from the beginning that Howard could clearly hear what was being said between Appellant and Ofcr. Deasy. Appellant continued to talk further about the case even after he knew Howard was overhearing his statements and responding to them. Appellant therefore participated in a "discussion" specifically pertaining to the "crime or situation" which was the subject of Howard's trial.

This is precisely the type of information exchange 400.1 was designed to prevent. The fact that Appellant was not directing his face and voice at Howard became an irrelevant technicality after Howard's first response to the conversation, when Appellant became aware Howard was participating. The hearing officer concludes Appellant engaged in a discussion with Howard about his case in violation of 400.1.

***d. Whether Appellant knew or reasonably should have known his actions violated CSR rules and departmental regulations.***

Appellant argues that because he did not directly discuss "with" Howard events pertaining to his case, his conduct was not a violation of the plain language of the regulation. Alternatively, Appellant argues that if an officer can be guilty of violating the regulation even if his discussion was not "with" (*i.e.*, not directed at) the inmate, that language is impermissibly vague because it did not put him on notice that his conduct would be considered a violation. He underscores that various Agency witnesses disagreed on whether 400.1 required "interpretation," or whether the "plain meaning" of the regulation clearly prohibited the conduct complained of.

The hearing officer observed Appellant to be highly intelligent and capable. He has received training in the transport of inmates both in his regular Academy training and in special ERU transport training. While Appellant may have interpreted 400.1 narrowly based on his understanding of Miranda or otherwise, the regulation does not state that an officer shall not discuss the case unless he is not speaking directly with the inmate, or unless the discussion includes questions not directed at the inmate, or unless what is taking place arguably is not technically a discussion "with" an inmate. Appellant should have known, as a peace officer and a member of an elite unit such as the ERU, that he must err on the side of caution at all times. His duty is to broadly apply and strictly follow orders and regulations governing his conduct. He should have known that the regulation exists to protect both suspects as well as officers, and must be applied to all types of interaction where information is being exchanged, to avoid precisely this type of event.

In addition, during the written interrogation (Exhibit 12) Appellant's first response to the very first question, "Are you aware of departmental rule 400.1?" was, "I am now." This indicates that Appellant either had overlooked this critical regulation in his training, or that he had never assimilated its significance despite evidence he was trained on its application. This suggests carelessness on his part. In light of all these considerations, the hearing officer concludes based on the totality of evidence that Appellant should have realized his actions more likely than not constituted a violation of 400.1. His failure to recognize his participation in the discussion was such a violation constitutes carelessness in the performance of his duties, in violation of CSR 16-51 A. 6)

### **3. Severity of the Discipline.**

The seriousness of this violation is mitigated by the obvious lack of intent on the part of Appellant to interrogate Howard or otherwise violate the spirit of a regulation. The hearing officer finds Appellant's and Ofcr. Deasy's repeated assertions, that neither intended to interrogate Howard, very credible. Clearly, the situation literally took both men off guard and they failed to recognize at the time the discussion was occurring that it was unacceptable. The hearing officer further finds credible that Appellant's focus on driving and security concerns further detracted from his attention to the nature of the discussion. Appellant's own utterance when getting out of the van, "do you realize what just happened?" evidences Appellant's realization that Howard had just disclosed significant information. The hearing officer does *not* find this utterance to evidence Appellant's realization that he violated any rule as the Agency has implied. Rather, what had only then dawned on Appellant was that Howard had basically admitted his own guilt of attempted murder charges.

The written reprimand alleges as part of its basis that Appellant admitted to directly questioning Howard about his case. This allegation is unsupported by the evidence. However, Div. Chief Smith's testimony clearly illustrated that he would have decided on the same severity of discipline even if he had realized Appellant did not ask any specific questions, given Appellant's own characterization of the nature of his participation in the discussion.

Thus, while the violation may have been inadvertent, once again, Appellant was responsible for knowing the regulation, enforcing its spirit, and avoiding the violation. When considering the seriousness of the potential consequences of such an oversight (i.e., the prosecution being forced to defend the officer's actions, mistrial/retrial, needless expense, potential exclusion of critical evidence and/or witnesses, and ultimately the release of a man who allegedly made an attempt on a peace officer's life) the hearing officer finds the level of discipline to be well within the range of reasonable alternatives in this case.

### **CONCLUSIONS OF LAW**

1. The Agency has shown just cause for disciplining Appellant:

- a. The Agency has shown the acts Appellant engaged in constitute a violation of departmental regulations 300.19 and 400.1, and CSR 16-51 5) and 6).

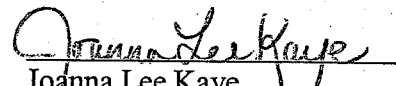
- b. The Agency has demonstrated that Appellant reasonably should have known the acts constituted such a violation.
2. Appellant's written reprimand is reasonably related to the seriousness of the offense in question.

### DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Appellant's written reprimand is AFFIRMED and MODIFIED as follows. Any and all references to Appellant admitting he asked Howard any questions shall be DELETED from all existing copies of the written reprimand as not sustained. Further, all copies of the memorandum dated February 18, 2002 in all existing files shall be AMENDED to omit paragraph 4 which characterizes the report to the Assistant District Attorney as an aggravating factor in this disciplinary action.

This case is hereby DISMISSED

Dated this 24<sup>th</sup> day of June, 2002.

  
Joanna Lee Kaye  
Hearing Officer for the  
Career Service Board

**CERTIFICATE OF MAILING**

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**, by depositing same in the U.S. mail, postage prepaid, this 25<sup>th</sup> day of June, 2002 addressed to:

Phillip J. Swift  
5193 E. 97<sup>th</sup> Dr.  
Thornton, CO 80229

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the interoffice mail, this 25<sup>th</sup> day of June, 2002, addressed to:

Robert D. Nespor  
Assistant City Attorney  
Employment Law Section

Tracy Howard  
Manager of Safety's Office

Fred J. Oliva  
Denver Sheriff's Department

Virginia Granado