

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

STEVEN CREWS, Respondent-Appellant,

v.

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

On January 4, 2018, Denver Deputy Sheriff Steven Crews (Appellant) was assigned to work at the Denver Detention Center (DDC) in Pod 3D. Appellant was working side by side with (former Deputy) Joshua Kuchta. Pod 3D is a special management pod which houses inmates requiring special attention due to mental health issues or behavioral misconduct. Appellant has worked in special management for much of his career.

On this day, before Appellant started his 10-hour shift at 4:00 p.m., inmate, KH got into a fight with another inmate, and as a result, was designated as a SEP ALL inmate. A SEP ALL designation meant that the inmate was to be kept separate from all other inmates.

Appellant and Kuchta locked down the Pod at 9:00 p.m., requiring all the inmates to be in their cells, save for inmates who, for a specific reason, needed to be out of their cells. One such inmate was inmate MM, who had earned the privilege of being a tier porter. A tier porter is an inmate who is selected, based on good behavior, to perform duties in the pod.¹ Another such inmate was inmate KH, who, because of his prior fight, needed to go to the medical station, also housed on the DDC's third floor.

Appellant and Kuchta arranged for KH's transfer to the medical station. Appellant or Kuchta notified corridor deputies of KH's need to be transferred to the medical station as well as his SEP ALL designation.² The corridor leading out of the Pod towards the direction of the medical station was cleared of other inmates and KH's transfer to the medical station occurred without incident.

¹ Hearing Officer Decision, p. 1, n. 4.

² The Hearing Officer did not resolve whether it was Appellant or Kuchta who actually notified the corridor deputies of KH's SEP ALL status.

In less than one hour, inmate KH was eventually medically cleared by the nurses at the medical station. He was escorted back to Pod 3D by two deputies (Williams and Colbert).³ Deputy Williams notified Appellant and Kuchta that KH was ready to enter the Pod. KH entered the sally port leading to the Pod appearing agitated and pacing.

While inmate KH was entering the sally port, Deputy Kuchta was working on the computer at the officers' desk and Appellant was facing the desk, leaning on it with his left arm. Also present, however, was the tier porter, inmate MM, who was cleaning the desk and conversing with Appellant and Kuchta.

Inmate MM left the desk to retrieve a broom and in doing so, encountered KH. MM asked KH if he was okay and KH responded in the affirmative. MM turned and started walking back towards his work area. After taking a few steps, inmate KH went after MM and hit MM in the back of the head with his fist, knocking MM forward and off balance, in the direction of and eventually past Appellant. KH continued swinging at MM and probably hit MM a second time.⁴

Appellant stopped the assault. Kuchta assisted Appellant and also called for backup. Deputies Williams and Colbert, along with nine other deputies, responded to the scene. KH was escorted back to his cell. MM was taken to medical to check for injuries.

A complaint was lodged against Appellant as a result of the incident. As part of the investigation of the complaint, Appellant was questioned by a Sgt. Mazzei from the Sheriff Department's Internal Affairs Bureau (IAB). Appellant initially told Sgt. Mazzei he believed KH had been designated SEP ALL for an earlier incident. Appellant then claimed that he was confused regarding SEP ALL policy, noting that the *Housing* SEP ALL policy requires SEP ALL inmates to be segregated from other inmates at all times, while the *Classification* SEP ALL policy requires SEP ALL inmates to be kept separate from others if feasible (emphasis added). Appellant told Mazzei that he had used his judgment and decided not to secure inmate MM from KH.

Eventually, the Denver Sheriff Department (Agency) brought charges against Appellant for his conduct which permitted KH to attack MM and scheduled a meeting to discuss the incident. At this meeting, Appellant stated that he had made a judgment call (in failing to keep KH separate from all other inmates) based on his perception that KH was not a threat to MM. Appellant also claimed difficulty in working under what he referred to as conflicting SEP ALL policies.

The Agency ultimately determined that Appellant's failure to keep a SEP ALL inmate separate from all other inmates violated Career Service Rule 16-29R (Conduct which violates Career Service Rules, City Charter, Denver Revised Municipal Code,

³ Deputy Colbert was a recent graduate of the Academy and Deputy Williams was serving as his Field Training Officer.

⁴ Again, the Hearing Officer did not determine definitively whether KH actually made contact with MM a second time, though he obviously believed a second strike most probably occurred.

Executive Orders or agency regulations, policies or rules) pertaining to Agency regulation RR-300.19.1 (Employees shall not fail to perform the required duties of their assignments) as applied to DSD Housing Post Order X. Separation From All (SEP ALL)⁵; as well as Post Order 4142.1A-Classification/Housing, 6. Restrictive/Special Housing ... 3.Separation from all -SEP FROM ALL (a)⁶.

The Agency's Civilian Review Administrator (CRA) determined Appellant's misconduct to fall within Category D of its Disciplinary Matrix. Accordingly, after considering potential mitigating and aggravating circumstances, the CRA issued Appellant a Matrix-presumptive penalty of 30 suspended days.

Appellant appealed his suspension to a Hearing Officer. The Hearing Officer determined that Appellant failed to carry his burden of proving that the Agency's disciplinary decision was clearly erroneous and also that he failed to prove that the penalty imposed was in any way contrary to the Matrix or otherwise, inappropriate, or erroneous. Appellant has appealed the Hearing Officer's decision to this Board. We AFFIRM the Hearing Officer's decision.

Appellant first argues that the Hearing Officer erred in determining that Appellant knew that inmate KH had been designated as SEP ALL. Appellant claims this finding is unsupported by record evidence warranting reversal of the Hearing Officer's findings. We disagree.

Appellant cites to a portion of a paragraph found at page 6 of the Hearing Officer's decision, claiming that the Hearing Officer's stated rationale for concluding that Appellant knew of the SEP ALL was nothing more than speculation. We believe this mischaracterizes what the Hearing Officer did. Rather, it is clear the Hearing Officer was drawing reasonable inferences from record evidence, not making up things out of whole cloth, as did the hearing officer we criticized in the *Bosveld* case, cited by Appellant.

In addition, we note the record contains additional evidence tending to prove that Appellant knew, at the time of KH's assault on MM, that KH had been designated as SEP ALL. For example, Deputy Kuchta wrote in his report of the incident that he knew KH had been designated SEP ALL. Deputy Kuchta worked side by side with Appellant that day. In addition, there is no way that Appellant could have been in any position to implement or enforce any SEP ALL post orders unless he was aware of who among the inmates on the Pod, had been designated SEP ALL. Appellant needed to know who, if anyone, had been designated SEP ALL, if he was to properly perform his duties.

Further, we note that the record reflects that corridor officer Williams told IAB that someone from the 3D pod (it would have been either Appellant or Kuchta) radioed that they had a SEP ALL going to medical. If Appellant made the radio call, then, obviously,

⁵ "Inmates designated [as] Separation From All (Sep All) shall not have contact with other inmates at any time. All other inmates shall be secured and separated prior to the Sep All inmate being removed from their cell for designated out of cell time or other activities."

⁶ "Separated from all other inmates whenever feasible."

he knew of KH's SEP ALL designation. If Kuchta made the call, Appellant would have been in a position to hear Kuchta, since they worked at the desk side by side; and it further demonstrates that information concerning KH's SEP ALL designation was open, available, and accessible to Appellant.

Appellant, after all, does not allege that KH's SEP ALL status, information which numerous other people were privy to, was somehow hidden from or otherwise made unavailable to him. Appellant's knowledge of KH's status is a reasonable inference drawn from record evidence indicating that Appellant's work partner knew of the designation and that a radio announcement advising of KH's status emanated from the desk at which Appellant was working.

But there is also, non-inferential, direct evidence tending to prove that Appellant knew of KH's SEP ALL designation, and that evidence came directly from Appellant. First, we note that Appellant told Sgt. Mazzei from DSD's IAB, who was investigating the incident, that he believed KH had been designated SEP ALL.⁷ Second, in explaining his actions to IAB, Appellant stated that he was confused by allegedly conflicting SEP ALL policies, between the Housing Post Order which required SEP ALL to be separated from all other inmates at all times, and the Classification guidelines, which referenced SEP ALLs being separated when feasible.⁸ Appellant went on to explain that in not keeping KH separate and apart from MM, he was utilizing his judgment and, because he did not believe KH posed a threat to MM and did not want to leave Kuchta alone with KH, he determined it was not feasible to keep KH separated from MM.

Setting aside the fact that Appellant was engaged in a Housing function and not a Classification function and, therefore, should have complied with the Housing SEP ALL requirements, the fact that Appellant made a SEP ALL analysis regarding the situation at all is proof that he knew that KH had been designated SEP ALL.

If Appellant was unaware of KH's SEP ALL designation, there was no reason for him to be considering which SEP ALL policy would apply to the situation and there is no reason for him to be considering whether an action is or is not "feasible" under one of the SEP ALL policies. The record contains substantial evidence supporting the Hearing Officer's finding that Appellant knew of KH's SEP ALL designation.

Appellant next argues, at page 10 of his brief, that this whole thing just wasn't his fault, pointing his finger at the corridor officers (Williams and Colbert), claiming that because they allegedly did not do their job properly, they caused the incident. Appellant claims that the corridor officers were responsible for telling the housing officers "which inmates are coming back into the pod,"⁹ and because the corridor officers allegedly failed to advise the housing officers that they were bringing back a SEP ALL inmate,

⁷ Hearing Officer's decision, p. 3; see also, Transcript pages 353:99-354:105.

⁸ Hearing Officer's decision, p. 3; see also, Transcript pages 354:117-357:178.

⁹ Appellant's brief, page 10, lines 1-2 of the second paragraph.

“Deputy Crews did not know who was coming back into the pod.”¹⁰ We reject this argument for multiple reasons.

First, we note that it was the Appellant’s burden to prove before the Hearing Officer that the Agency’s action was clearly erroneous. The Hearing Officer specifically found that Appellant had not met his burden. We do not see how Appellant’s attempt to shift the blame for KH’s assault of MM onto the corridor officers provides evidence that the Hearing Officer committed reversible error under our rules. In any event, we do not see where this theory of defense was advanced before the Hearing Officer.¹¹ Accordingly we deem it has been waived.

Even if this argument had not been waived, we would not engage in the re-weighing of evidence that it would require for us to give it serious consideration. It is the province of the Hearing Officer to weigh evidence, resolve conflicts in evidence and draw reasonable inferences from the evidence. Appellant’s argument asks us to make factual findings and decide the case anew, as if the Hearing Officer had never weighed in. We decline.

We find all of the Hearing Officer’s factual findings and inferences supported by record evidence and eminently reasonable. His legal conclusions are sound. We see no reason to disturb his findings and conclusions to replace them with Appellant’s alternative theory of his case.

Plaintiff’s argument also fails because record evidence directly contradicts his conclusion that he did not know who was entering the Pod. As the Agency noted in its Answer Brief¹², Appellant told IAB “Inmate KH went out – I think it was, like, a neuro-check or something like that for something that maybe happened previously. And **he was coming back.**” (emphasis added).

Appellant did not tell IAB that KH went out and then some guy came back, some stranger, I don’t know who. He plainly indicated to Sgt. Mazzei that he knew it was KH that went out – and that he knew it was KH who was returning to the Pod.

Finally, we find the claim that Appellant did not know who was returning to the Pod absurd on its face. Appellant sent KH to the medical station a bit after 9:00pm. When an inmate showed up at 9:42, who did Appellant believe it could have possibly been seeking entry back into the Pod. Had he forgotten that they had sent KH to the medical station?

¹⁰ Appellant’s brief, page 11, 2d sentence of first full paragraph.

¹¹ As far as we can tell, Appellant only claimed before the Hearing Officer that he did not know of KH’s SEP ALL designation, not that he did not know that it was KH that was being brought back to the Pod at approximately 9:41 of the evening in question.

¹² Page 5, last full paragraph.

There is no evidence in the record of that. Had he released so many inmates from the Pod that day that the returnee could have been one of any number of people who needed to return? There is no evidence in the record of that either.

Given the highly controlled structure of a jail, did Appellant believe that the person waiting for entry into the Pod was a pizza delivery man or some other member of the public? Regardless, if Appellant truly did not know who was waiting to return to the Pod, it was certainly incumbent upon him to find out who the person was, so he would know where he was supposed to be housed once back inside the Pod. And once Appellant had consulted with his co-worker or the computer to identify the mystery inmate, Appellant would have learned of the SEP ALL designation after which he could have segregated MM from KH.

This incident was not the fault of the corridor officers. Accordingly, there is no improper policy setting precedent by holding Appellant accountable for his own failure to properly comply with SEP ALL post orders.

The Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on October 17, 2019, and documented this 21st day of May 2020.

BY THE BOARD:

A handwritten signature in black ink, appearing to read 'Karen DuWaldt', written over a horizontal line.

Karen DuWaldt, Co-Chair

Board Members Concurring: Tracy Winchester, David Hayes

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **DECISION and ORDER** on May 21, 2020, in the manner indicated below, to the following:

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