HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 53-16

DECISION ON REMAND

RYAN BOSVELD, Appellant,

v.

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

I. INTRODUCTION

This case is before the Career Service Hearing Office pursuant to the Career Service Board's (Board) "remand [of] this case back to a hearing officer for further proceedings to determine the propriety of the penalty imposed by the Agency." After a review of the briefs of the parties, the record, and being fully advised in the premises, the Hearing Officer concludes that the discipline imposed by the Department of Safety, Denver Sheriff's Department (Agency) upon Appellant Ryan Bosveld (Appellant) is appropriate.

II. FINDINGS

The Board summarized the relevant factual background of this case as follows:

> Tamatha Anding is a nurse employed by Denver Health assigned to work in the Denver Jail. On October 15, 2015, she was walking down a corridor and as she approached a corner, she heard someone say something, though she was not sure what she had heard. She then encountered Denver Sheriff Ryan Bosveld coming around the corner from a corridor which housed inmates who had been determined to be at risk for suicide. Upon seeing Nurse Anding, Appellant started giggling and said to her, "[w]ell, that wasn't very professional, was it?" When Nurse Anding inquired of Appellant what he was talking about, Appellant replied, "the inmate asked me what he should do ... I told him 'just die'." In Re Bosveld, CSB 53-16A, 1 (11/16/17).

Based on these facts, Civilian Review Administrator Shannon Elwell (CRA Elwell) determined that Appellant's conduct constituted both Neglect of duty, in violation of CSR 16-60 A,[1] and Failure to observe written departmental or agency regulations, policies or rules, in violation of CSR 16-60 L, both violations pertaining to Departmental Rules and Regulations RR-200.24's duty to be courteous and civil in their duties, and RR-400.9's duty to take reasonable precautions in handling mentally ill inmates.

CRA Elwell analyzed Appellant's conduct to identify the applicable category from the Categories of Conduct of the Agency's Discipline Handbook. (Rec. p. 154). She found that the violation regarding RR-200.24 constituted a Conduct Category C violation, which the Denver Sheriff Department Discipline Handbook defines at subsection 13.1.3 as "Conduct that has a

[1] At the time of Appellant's conduct, this version of the Rule 16-60 was in effect and is applicable.

pronounced negative impact on the operations or professional image of the Department; or on relationships with other deputy sheriffs, employees, agencies or the public." (*Id.*).

In determining that Appellant's conduct constituted a Category C violation, CRA Elwell took into consideration that Appellant's "just die" comment was extremely inappropriate and risky and that it had a pronounced negative impact on the operations of the Agency and its image with the nursing staff at the Denver Jail. (*Id.* at 83-84).

CRA Elwell found the violation regarding RR-400.9 constituted a Conduct Category D violation, which the Denver Sheriff Department Discipline Handbook defines at subsection 13.1.4 as "Conduct that is substantially contrary to the guiding principles of the Department or that substantially interferes with its mission, operations or professional image, or that involves a demonstrable serious risk to deputy sheriff, employee or public safety." (*Id.* at 154).

In determining that Appellant's conduct constituted a Category D violation, CRA Elwell also took into consideration that: (1) there is an enhanced risk when dealing with a vulnerable, suicidal inmate, (*Id.* at 466:23), (2) the inmate was housed in the suicidal watch cell floor, of which Appellant had knowledge, (*Id.* at 83), (3) Appellant's "just die" comment to the inmate is encouraging the inmate to commit suicide, (*Id.* at 82), and (4) Appellant's "just die" comment created potential legal or financial liability to the Agency and City and County of Denver (*Id.* at 84).

CRA Elwell considered the totality of the circumstances to determine the appropriate discipline. (*Id.* at 465:22-466:4). As part thereof, she considered Appellant's record as a mitigating factor. She also considered the aggravating factors of the: (1) negative impact on the Agency and its relationship with the nursing staff at the Denver Jail, (2) creation of a legal and financial risk to the Agency and the City and County of Denver, and (3) endangerment of the inmate. (*Id.* at 84-85). Based thereon, CRA Elwell concluded that these factors did not justify a departure from the presumptive penalties for Appellant's violations. (*Id.* at 89).

On August 11, 2016, the Agency imposed the presumptive penalties of two days each for Appellant's violation of CSR 16-60 A and L pertaining to RR-200.24, and ten days each for his violation CSR 16-60 A and L pertaining to RR-400.9. The Agency imposed the penalties concurrently because they arose out of the same incident. (*Id*.). The categories of conduct as well as the discipline levels that the Agency implemented for Appellant's discipline comport with the disciplinary matrix of the Agency's Discipline Handbook.

III. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR 19-10 A.1.b.,[2] as the direct appeal of a suspension. The Hearing Officer is required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo.App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove that its discipline of suspending Appellant for ten days complied with CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

[2] Since Appellant's conduct, this Rule has been modified but this subsection remains identical.

C. Appellant's Defenses

Appellant abdicated his advocacy regarding the propriety of his discipline. Other than stating in the Conclusion of his brief that, "should this Hearing Officer find that there was a violation of policy then such violation does not amount to a ten (10) day suspension," Appellant does not address this issue. Instead, Appellant argues two points -- that he did not commit any violation, and that he cannot be disciplined because he was disciplined previously.

The Hearing Officer generally disregards Appellant's first argument since it appears to be an effort to appeal the Board's decision to the Hearing Officer. No applicable legal authority permits this action.

Next, the Hearing Officer rejects Appellant's argument that he is being subjected through this discipline to what constitutes a "double jeopardy" as it lacks a factual basis. Appellant alleges that his first discipline occurred when Major Kelly Bruning addressed Appellant's conduct[3] as an informal investigation. (Rec. p. 364). Major Bruning declined to discipline Appellant for his conduct because he concluded that the allegations were "Not Sustained." (*Id.* at 279). Appellant argues that he cannot be disciplined subsequently for the same conduct. However, even Appellant concedes that he was not previously disciplined, stating at page 9 of his Brief, "Where there was an opportunity for punishment, based on the facts presented and reviewed, Major Bruning ultimately elected not to impose a penalty."

What Appellant describes is that Major Bruning formulated an opinion favorable to him regarding his conduct. Having done so, Major Bruning then thwarted the disciplinary process. As CRA Elwell testified, the Internal Affairs Bureau (IAB) erred by investigating Appellant's conduct via an informal investigation. (*Id.* at 469:6-9, 474: 2-25). Regardless, Major Bruning was required to submit Appellant's case, even if designated informal, with his findings to the IAB, which would then submit it to the Office of Independent Monitor for approval and closure of it, if appropriate, before returning it to the facility for the major to close it. (*Id.* at 468:20-469:5, Rec. P. 507:13-508:9). CRA Elwell also testified that Major Bruning was not authorized to individually purport to conclude that the allegations in Appellant's case were not sustained. (*Id*.). So, Major Bruning's effort to declare Appellant's conduct as "Not Sustained" was unauthorized and ineffective.

Actually, the decision of whether or not to issue discipline rests with the Appointing Authority, herein the Executive Director of Safety, and the opinions of the employees lower in the chain of command have no legal effect on the Director's decision. In re St. Germain, CSB 24-14A, 7 (9/3/15). Since Major Bruning had not distributed his opinion up the chain of command for approval, he had not previously effectuated any disciplinary action on Appellant. Thus, Appellant's August 11, 2016 suspension cannot constitute a second discipline for the same misconduct. Therefore, it is unnecessary to even analyze the Agency's disciplinary suspension of Appellant to determine whether a "double jeopardy" prohibition is legally applicable to it.

Accordingly, the Hearing Officer proceeds to determine the propriety of the Agency's discipline of Appellant herein.

[3] Two other incidents were referred to Major Bruning simultaneously, but they are not at issue herein.

D. Degree of Discipline

CSR Section 16-20 Purpose of discipline[4] states:

> The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

The Hearing Officer notes that the test for discipline is not whether the discipline is the next step under progressive discipline, but rather whether the degree of discipline is reasonably related to the seriousness of the offense. In re Vigil, CSA 110-05, 8 (3/3/06), *citing* In re Champion, CSB 71-02,18 (7/31/02). The Hearing Officer is not to "disturb the Agency's determination of the severity of the discipline unless it is clearly excessive or based substantially on considerations that are not supported by a preponderance of evidence." In re Weeks, CSB 26-09, 2 (12/23/09).

1. Seriousness of the proven offense

Appellant's offense is indeed serious. As described above in the factual summary of the Board, Appellant made his offensive comment to a vulnerable inmate, knowing of the inmate's vulnerability. Even had Appellant made the comment in jest, it was inappropriate, especially to an individual at risk for a suicide. His comment not only constituted a complete disregard of his responsibility to safeguard the inmates, but it violated his duty. By encouraging the inmate to commit suicide, Appellant endangered the safety of the inmate. (Rec. p. 161 at 19.9.2). He also impeded the operations of the Agency. (*Id.* at 162). Further, Appellant exposed both the Agency and City and County of Denver to potential legal or financial liability. (*Id.* at 161).

2. Prior Record

At the time of this discipline, Appellant had: (1) been a Deputy with the Agency for nine years, (2) positive evaluations, and (3) no prior discipline. The Agency's decision maker properly applied these facts as mitigating circumstances, as is required by the Matrix. (*Id.* at 160 – 64).

3. Likelihood of Reform

The Hearing Officer finds that Appellant probably will reform and not repeat this conduct. The Hearing Officer is equivocal herein because Appellant has not admitted to his conduct. Instead, Appellant claimed as a defense his inability to recall his conduct and that it does not fit his character. (*Id.* at 521). Although his defense is unconvincing, Appellant implicitly acknowledges through it that his conduct was inappropriate and violative of the Agency Rules. Appellant also testified that he would not make such comment to suicidal inmates because it would not be appropriate and that he is not supposed to making such comments. (*Id*. at 525:22-526:2). The Hearing Officer also finds that the discipline imposed by the Agency on Appellant should be adequate to educate him to not repeat this or similar conduct, and is thus consistent with the purpose of discipline and the concept of progressive discipline, both enshrined in the Career Service Rules. *See* CSR 16-20 & 16-50.

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[4] Since Appellant's conduct, Rule 16-20 has also been modified but the relevant substance remains identical.

IV. CONCLUSION

For the reasons stated above, the Hearing Officer concludes that the Agency has proven the following by a preponderance of the evidence about its 10-day suspension of Appellant: (1) it comports with CSR 16-20 and is properly fashioned to correct inappropriate behavior; (2) the record reflected a sufficient, reasonable, and articulated justification for it, and it is within range of alternatives available to a reasonable and prudent administrator, consistent with In re Romero, CSB 28-16A, 2 (6/15/17), *citing* In re Lovingier, CSB 48-14A, 2 (11/7/14); In re Redacted, CSB 31-13A (8/8/14); (3) it is reasonably related to the seriousness of Appellant's conduct; and (4) it is not clearly excessive.

V. ORDER

Accordingly, the Agency's assessment of a 10-day suspension to Appellant is AFFIRMED.

DONE April 26, 2018.

Federico C. Alvarez
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 21-23, within fourteen (14) calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. See Career Service Rules at www.denvergov.org/csa. **All petitions for review must be filed with the following:**

Career Service Board
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AND

Opposing parties or their representatives, if any.