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

Appeal No. 53-06

DECISION

IN THE MATTER OF THE APPEAL OF:

MICHAEL DELMONICO,
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Deputy Michael Delmonico (the Appellant), appeals a 30-day suspension, from July 25, 2006 through September 1, 2006, issued by his employer, the Denver Sheriff's Department (the Agency). The Agency alleged the Appellant attacked a co-worker, in violation of specified sections of the Career Service Rules, Denver Sheriff's Department Orders, and an Executive Order. The Appellant claimed his actions did not justify the assessed penalty, and also claimed the penalty was based upon unlawful discrimination, and based upon an unlawful hostile work environment. He seeks a reduction in penalty, lost wages and benefits, a transfer, and treatment for stress.

A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on October 6, 2006. The Appellant was represented by Mr. Anthony Sullivan. The Agency was represented by Robert A. Wolf, Assistant City Attorney, with Major Deeds serving as the Agency's advisory witness.

Agency exhibits 1-12 were admitted by stipulation. The Appellant offered no additional exhibits. The Agency presented the following witnesses: Manager Alvin LaCabe Jr., Deputy John Camozzi, and Deputy Dana Line. The Appellant presented Deputy William Muldoon as his only witness, and did not testify on his own behalf.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant violated Career Service Rule (CSR) 15-110, or 16-60 M, O, or Z;

B. whether the Appellant violated Sheriff's Department Rules 200.15, 300.10, or 2441.D;

C. whether the Appellant violated Executive Order 112;

D. if the Appellant violated any of the above-stated CSRs, Department Rules, or Executive Order, whether the Agency's assessment of a 30-day suspension was reasonably related to the seriousness of the offense(s) and took into consideration the Appellant's past record;

E. whether the Agency engaged in unlawful retaliation;

F. whether the Agency engaged in unlawful discrimination;

G. if the Agency engaged in either unlawful retaliation or discrimination, whether the Appellant is entitled to a reduction in penalty, back wages, back benefits, a transfer, or treatment for stress.

III. FINDINGS

A. Factual Findings

The facts are not substantially disputed. The Appellant is a Denver Deputy Sheriff. Sometime between May 23 and 25, 2006, a co-worker, Deputy John Camozzi, saw the Appellant serve a cup of coffee to an inmate. Camozzi, addressing the Appellant in front of other inmates and deputies, said "you made a good waitress." [Camozzi testimony]. A day or two later, Camozzi told the Appellant the inmates miss him and they probably want him to bring pizza next time. *Id.*

About one week later, on May 30, 2006, the Appellant entered the Officer's Mess Hall just about 1:40 a.m. He saw Camozzi laughing with a group of other deputies, Line and Davis, Vigil and Shaeffer. The Appellant could not hear what was being said, but assumed they were referring to the "waitress" comment from the previous week. Addressing Camozzi, the Appellant said "me and you should go to 11A and work this out and discuss this." [Exhibit 6-4]. 11A was the location of Camozzi's prior comments. Camozzi asked the Appellant to what he was referring. The Appellant, then addressing Deputy Line, said "you know what [Camozzi] said to me? He called me a name." Camozzi replied "I didn't call you a name, I called you a waitress." Camozzi then

apologized to the Appellant, saying "I apologize to you, Mike. I didn't know it bothered you that much." [Line testimony]. Then all the deputies attended their morning briefing for about 10-12 minutes. When the Appellant emerged from the briefing, he entered 11A and told Camozzi to come in, and Camozzi complied. They yelled at each other and called each other "fucking pussy." Camozzi asked "do you want to lose your job?" The Appellant responded "I don't care." [Exhibit 6-4]. Deputies Line and Muldoon overheard the encounter. The Appellant rushed and tackled Camozzi, who fell backward over a riser to the shower area. The Appellant landed on top of Camozzi and pinned him, stating "who's the pussy now?" He made Camozzi take back his waitress comment before releasing him *Id.* Camozzi sustained minor injuries to his knee and back. He also sustained a swollen, black and blue jaw, and two loose teeth.

Neither deputy reported the incident to a supervisor immediately. About six hours later, Camozzi sought leave to go to the hospital, since he was feeling the ill-effects of his injuries. When he explained the basis for his request, an investigation was undertaken.

Consequently, a pre-disciplinary meeting was convened on July 7, 2006. The Appellant appeared with his counselor-at-law, Reid Elkus, Esq., and provided a statement in which he said "[i]t is not something I can say I wanted to do, but I just got to a point where I just couldn't take it and I tried to confront Camozzi many times and I can't take this "waitress"... just escalated into something that is now in a bad situation. We went in to this ...together and I want to say that I shouldn't have done it." On July 20, 2006, the Agency served its Amended Notice of Discipline on the Appellant, suspending him for 30 days, from July 25, 2006 through September 4, 2006. This appeal followed on July 31, 2006.

B. Jurisdictional Findings

The City Charter §C5.25(4) and CSA 2-104 b) 4) require me to determine the facts in an appeal *de novo*, meaning to hear the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975), 1975 Colo. App. LEXIS 969, (add'l citations omitted).[1] I find all issues, whether the Appellant breached Career Service Rules, whether the Agency engaged in unlawful discrimination or harassment, and whether discipline was appropriate, are properly before me.

[1] The Rossmiller court found the Hearing Officer had authority only to recommend findings and conclusions to the Career Service Board, while the Board retained *de novo* review power. The Board subsequently delegated its *de novo* review functions to the Hearing Officer, CSR 19-30,50,53,55, and retained only limited powers of review. CSR 19-61.

IV. ANALYSIS

A. CSR 15-110 Preventing Violence in the Workplace

This rule prohibits "[v]iolence or the threat of violence...in any City work locations" [*sic*], including physical assault. 15-110 A.

The Agency claims the Appellant violated this rule in charging, knocking down, and pinning Camozzi. [LaCabe, Camozzi testimony]. The Appellant responds it was a mutual combat and his penalty should be no greater than that assessed Camozzi.

The Appellant admitted he was on duty on May 30, 2006 when he ran at Camozzi, tackled him and landed on top of him, pinning him to the floor. Further, the Appellant admitted he took Camozzi by surprise in doing so. [Exhibit 6-5]. The Appellant's actions constitute violence in the workplace, in violation of CSR 15-110.

B. CSR 16-60 M. Threatening, fighting with, intimidating, or abusing employees or officers of the City, or any other member of the public, for any reason.

The most important words in CSR 16-60 M. for this case are "fighting...for any reason." The Appellant claims his assault of Camozzi was provoked by Camozzi's teasing, and that his fight with Camozzi was a mutual combat. This rule makes clear neither claim justifies a violation of the rule.

Regarding the Appellant's provocation claim, it is important to note the alleged affront by Camozzi, calling the Appellant a "waitress," occurred more than a week before the Appellant's assault on Camozzi. There was no evidence Camozzi, or anyone else engaged in a pattern of teasing, so even if the Appellant were upset by Camozzi's comments, he had a week to cool down, or report the offense to a supervisor. He did neither, so his provocation claim is unjustified. In addition, the Appellant did not know on May 30 at what Camozzi was laughing, but he became enraged enough to assault Camozzi because he assumed Camozzi was laughing at him. Such a mistaken assumption does not justify the Appellant's violence toward Camozzi. Most telling, when Camozzi was asked how he would feel if he were called "waitress," he replied that being called "waitress" would be "the nicest thing I've ever been called in county jail." In other words, inmates frequently abuse deputies verbally, deputies tease each other, and one simply learns to ignore or take such comments lightly.

Regarding the Appellant's mutual combat claim, Camozzi denied harboring such volition, and neither claim is more probable by a preponderance of the evidence. The Appellant claimed Camozzi knew the invitation to "take it to the showers" indicates an invitation to engage in a fight, [LaCabe cross exam], and Camozzi acknowledged as much, but only as it applies to inmates. [Camozzi cross exam]. The evidence established that other deputies do not resort to violence against each other. Deputy Muldoon testified deputies have their disputes but never resolve them by physical

confrontation. [Muldoon testimony]. Muldoon's credibility was not challenged. Camozzi assumed the Appellant wanted to meet in 11A to have Camozzi apologize there, since that is where the offending words issued. [Camozzi testimony]. For these reasons, the Appellant's claim that Camozzi engaged in a mutual combat fails. Even if the claim were true, the Appellant would nonetheless be in violation of CSR 16-60 M. For these reasons, the Appellant threatened, fought with, and abused Camozzi in violation of CSR 16-60 M. by a preponderance of the evidence.

C. CSR 16-60 O. Failure to maintain satisfactory working relationships with co-workers...

This rule should not be used to remedy a less-than-ideal working relationship, In re Keegan, CSA 69-03, 11 (3/31/04)[2], or to punish an employee for a single outburst, ("I wish they'd let me do my f---ing job"), In re Day, CSA 12-03, p.8 (10/9/03), but should be reserved for an employee's unjustified, purposeful actions or omissions toward a co-worker that inhibit the smooth operations of the unit. *See* In re Anderson, CSA 05-02, 10 (4/30/02). While the rule generally applies to ongoing patterns of conduct, *see, e.g.* In re Tafoya, CSA 72-04, 10 (9/21/04), a single outrageous incident may also violate this rule, *e.g.* In re Collins, CSA 127-03 (2/27/03), In re Green, CSA 130-04, 3 (1/7/05).

After Camozzi teased the Appellant by calling him a "waitress," the Appellant remained sufficiently angry toward Camozzi to assault him a week later. Of particular concern is the Appellant's lingering anger was apparently ignited by his unjustified assumption that Camozzi and others were talking about him when they were not. The Appellant knew he had resources within the Agency to deal with any improprieties by Camozzi, [Exhibit 6-5], but chose to pursue his own remedy, regardless of the consequences (Camozzi: "Do you want to lose your job?" Appellant: "I don't care"). These Appellant's actions against Camozzi were unjustified and outrageous in violation of CSR 16-60 O. by a preponderance of the evidence.

D. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

This rule establishes two independent violations: that the employee caused harm to his Agency, or that the employee caused harm to the City of Denver. The effectiveness of an Agency is its ability to carry out its mission. Good order is the internal structure and means by which an Agency accomplishes its mission. Thus, to sustain a violation under this facet of the rule, the Agency must prove the Appellant's conduct hindered the Agency mission, or negatively affected the structure or means by which the Agency achieves its mission.

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[2] This, and the following citations, refer to repealed CSR 16-51 A. 4)which contained identical language

The Agency functions as a paramilitary organization, [LaCabe testimony]. Thus, compared with other agencies, chain-of-command, and strict adherence to orders take on added importance in light of the safeguarding mission of this Agency.

The Appellant did not dispute that his assault on Camozzi "compromised the safety and security of the facility," a primary mission of the Agency, and "placed [his] fellow officers, the inmates and [Camozzi and the Appellant] at risk." In addition, the Appellant's actions "undermined [his] ability to perform [his] duties as a Deputy Sheriff. Because the deputies' fight occurred within sight and earshot of inmates, it diminished their ability to deal effectively with unruly inmates [LaCabe testimony]. For these reasons, and because of his failure to take his grievance up his chain of command, the Appellant diminished the good order of the Agency in violation of CSR 16-60 Z. by a preponderance of the evidence.

E. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

Departmental Rules and Regulations

200.15 Deputy Sheriffs and employees shall not willfully or intentionally display any disrespectful, insolent or abusive language or behavior towards [sic] any supervisor, Department employee, and [sic] employee of other official agencies or the public, while on duty.

The Appellant swore at, planned to assault, and did assault Camozzi. He appears to claim Camozzi is equally culpable, [Appellant closing argument], but closing argument is not evidence, and the Appellant did not testify or present any evidence otherwise for this claim. Even if the Appellant's assertion were proven, it addresses only mitigation as to the degree of discipline, and not whether this rule was violated. The Appellant's abusive language and assault on Camozzi constitute a violation of Departmental Rule 200.15.

300.10 Deputy Sheriffs and employees shall not indulge in immoral, indecent or disorderly conduct that would impair their orderly performance of duties or cause the public to lose confidence in the Department.

The improper conduct addressed by this rule is either "immoral", or "indecent" or "disorderly" conduct. "Immoral conduct" is that conduct which violates notions of "good or right, when judged by the standards of the average person or society at large." [Encarta Online Dictionary, last viewed 10/24/06]. The Appellant's decision to tackle Camozzi as revenge for a perceived affront of being called "waitress" is not the sort of moral choice envisaged by the definition[3], particularly in light of other non-parties' statements regarding the otherwise-

[3] *See, e.g.* Ex parte Wall, 107 U.S. 265, 294 (U.S. 1883). Even in this Victorian-era decision, the Court required disbarment only for "immoral conduct" which showed the respondent to be unfit as an attorney; *also* "immoral" has been declared to be synonymous with "unprofessional," therefore suggesting a direct connection with fitness to practice of a profession." Hummel v. Board of Chiropractic Examiners, 103 Colo. 476 (Colo. 1939).

reputable moral character of the Appellant, and his otherwise-unblemished work record. [LaCabe testimony].

"Indecent conduct" connotes "something that is portrayed in a manner so offensive as to make it unacceptable under current community mores," United States v. Hymans, 463 F.2d 615, 618 (10th Cir. 1972), and seems to be reserved for sexual content[4], something not at issue here.

"Disorderly conduct" is defined within the rule as "conduct that would impair [the] orderly performance of duties." LaCabe testified the Appellant's assault on Camozzi diminished his ability to deal effectively with unruly inmates. [LaCabe testimony]. LaCabe's testimony was undisputed, and therefore proves, by a preponderance of the evidence, the Appellant's violation of Sheriff's Department Rule 300.10.

Sheriff's Department Order 2441.D Violence in the Workplace

The same conduct that is proscribed by CSR 15-110 is also prohibited by this Department Order. The Appellant's assault on Camozzi on May 30, 2006, therefore constitutes a violation of Sheriff's Department Order 2441.D. as it did for CSR 15-110, above.

F. Executive Order 112 Violence in the Workplace.

This executive order shares common language with CSR 15-110, even as to proscribed behavior in their respective subsections A. Both Executive Order 112 A. and CSR 15-110 A. prohibit physical assault. Therefore, the same facts that proved the Appellant violated CSR 15-110 by his assault on Camozzi, also prove he violated this Executive Order.

G. Whether the Agency engaged in unlawful discrimination or harassment (hostile work environment) against the Appellant.

To establish a discrimination claim, the Appellant bears initial burden to prove discrimination against him on basis of his membership in a protected class. In re Kanan, CSA 09-02, 6 (3/18/02), *also citing* St. Mary's Honor Center et al v. Hicks, 509 U.S. 502 (1993). The Appellant failed to present evidence of his membership in any protected class, failed to establish any other element of discrimination, and therefore fails in his discrimination claim.

Harassment and discrimination claims must first be pursued by seeking the administrative remedies set forth in CSR 15-100 et seq. before the claim is ripe for the hearing officer's review. CSR 19-10 B. The Appellant did not establish his membership in a protected class, nor did he file a complaint with a supervisor concerning Camozzi's teasing. Therefore the Hearing Officer lacks jurisdiction to consider this claim.

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[4] *See,* e.g. United States v. Alpers, 338 U.S. 680 (U.S. 1950)(pornographic phonograph records, taking indecent liberties with children), Ingham v. Tillery, 1999 U.S. App. LEXIS 33406 (10th Cir. 1999)(indecent acts, indecent liberties with a child, and indecent assault).

V. CONCLUSION

The Appellant believed since Camozzi engaged in a fight with him, that he should receive no more penalty than Camozzi. The Appellant ignores that he alone is responsible for escalating mere teasing into violence. He also ignores that he chose to fight with Camozzi instead of taking his grievance to a supervisor. The adage "sticks and stones..." applies aptly here. By his actions, the Appellant violated the following Career Service rules by a preponderance of the evidence: CSR 15-110, Preventing Violence in the Workplace; CSR 16-60 M., Threatening, fighting with, intimidating, or abusing employees or officers of the City, or any other member of the public, for any reason; CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules; CSR 16-60 O. Failure to maintain satisfactory working relationships with co-workers...; and CSR 16-60 Z., Conduct prejudicial.... The Appellant failed to establish either of his claims against the Agency.

VI. DEGREE OF DISCIPLINE

The test to determine the propriety of discipline is whether the degree of discipline is reasonably related to the seriousness of the offense, taking into consideration the Appellant's past disciplinary record. CSR 16-20. Discipline is reasonably related if it falls within the range of reasonable alternatives available to a reasonable, prudent agency administrator. In re Armbruster, CSA 377-01 (3/22/02), *citing* Adkins v. Div. of Youth Services, 720 P.2d 626 (Colo. App. 1986). In determining whether the discipline imposed is within the range of reasonable alternatives, the hearings officer will not 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 the evidence. *Id.*

The Appellant did not substantially dispute that he was in violation of the cited Career Service Rules, or Executive Order 112. He believes since Camozzi engaged in a fight with him, that he should be punished no more than Camozzi, who received a 10-day suspension.

The evidence amply proved the Appellant alone escalated what had been an incident involving teasing, into a physical confrontation that resulted in injuries to Camozzi. LaCabe properly assessed a more significant penalty to the Appellant on that basis. The Career Service Rules and Executive Order 112 permit termination even for a first offense involving violence in the workplace. LaCabe considered termination as a possible penalty, however, he decided, based, in part, upon the Appellant's otherwise clear disciplinary record, and also based upon recommendations from the Appellant's supervisors, to assess a 30-day suspension. The Appellant did not dispute LaCabe's testimony that a 30 day suspension is generally the minimum penalty LaCabe assesses for violence in the workplace.

The Appellant's disciplinary record was virtually clear, with only one minor violation. LaCabe deemed the record clear for purposes of discipline in this case. LaCabe's decision was based upon the evidence, took into consideration the seriousness of the offense and the Appellant's past record. In addition, LaCabe's decision was not clearly excessive, and was not based upon considerations unsupported by the evidence.

VII. ORDER

For reasons stated immediately above, the Agency's suspension of the Appellant for thirty days without pay, from July 25 through September 1, 2006, is **AFFIRMED.**

DONE this 26th day of October, 2006.

Bruce A. Plotkin
Hearing Officer
Career Service Board

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 decision, as stated in the certificate of mailing below. The Career Service Rules are available at www.denvergov.org/csa/career service rules.

All petitions for review must be filed by mail, hand delivery, or facsimile transmission as follows:

BY MAIL OR PERSONAL DELIVERY:

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

BY FAX: 720-913-5720. Transmissions of more than ten pages will not be accepted.

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