

**DECISION AFFIRMING 6-DAY SUSPENSION**

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**JEROME GONZALES**, Appellant,

v.

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

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**I. INTRODUCTION**

Appellant, above, appeals his six-day suspension by his employer, the Denver Sheriff Department (Agency or DSD). A hearing was conducted by Bruce A. Plotkin, Hearing Officer, on July 29, 2020. Appellant was represented by Zachary Wagner, Esq., of Elkus and Sisson LLC. Assistant City Attorney Natalia Ballinger represented the Agency. The parties stipulated to admission of Appellant's exhibits A-H, and Agency exhibits 1A – 1E, 1G – 1BC<sup>1</sup>, and 2. The Appellant testified on his own behalf and offered no other witness. Sergeants Bowen and Middleton testified for the Agency, as did Deputy Director of Safety Mary Dulacki.<sup>2</sup>

**II. JURISDICTION AND BURDEN OF PROOF**

Jurisdiction for the appeal of Appellant's suspension resides in Career Service Rule (CSR) 20-20 A.2. In disciplinary actions under CSR 20, unlike other Career Service Appeals, the burden of persuasion remains with the Appellant to show the decision by the Agency was clearly erroneous or that the application of its disciplinary matrix was clearly erroneous. [CSR 20-56 A].

**III. ISSUES**

The following issues were presented for appeal:

- A. whether Appellant established the Agency's finding - that he violated Career Service Rule (CSR) 16-28 R. as it pertains to Denver Sheriff's Department Rules/Regulations (RR) 200.15.1 or 200.13.1 - was clearly erroneous; or

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<sup>1</sup> Exhibit 1AM appeared to be another AIU interview, but the recording began after, presumably, identifying the interviewee. Neither party referred to the exhibit nor did either party identify the interviewee. Thus, while the interviewee may be inferred from other evidence, I disregard this exhibit.

<sup>2</sup> Middleton testified by telephone. Bowen and Dulacki testified by video link.

- B. whether the Agency's application of its disciplinary matrix in assessing a six-day suspension was clearly erroneous.

#### IV. FINDINGS

The Appellant, Deputy Jerome Gonzales, has been a DSD deputy for 22 years. His overall duties are the care and custody of inmates. Because the DSD is a paramilitary organization, he is required to obey all lawful commands. If an order conflicts with a previous order or directive, the deputy may not elect which one to follow, but is required to bring the conflict to the attention of the supervisor issuing the most recent order and ask for a resolution. [Exh. 2-105]. He is required to show respect to his fellow deputies and supervisors. Before the incident underlying this appeal, he had no prior, relevant discipline.

On May 9, 2019, Sergeant Middleton asked Sergeant Bowen to assist in a search for contraband ("cell shake") in Building 21 by assembling a search team. Bowen was the duty roster sergeant in Building 22, thus in charge of assignments for subordinate deputies. Bowen assembled a list that included Gonzales and told Middleton most of them would appear promptly and others, including Gonzales, could be expected after the breaks they were currently providing to other deputies. [Exh. 1E. p.5; Exh. 1A1 p. 4 at 63-67]. Bowen telephoned Gonzales and told him he needed to go to Building 21 for a "cell shake." [Exh. 1N-3 at 36-41]. Gonzales did not go and did not tell Bowen.

When Gonzales failed to report to Building 21, Middleton called to ask what he was doing and if he was going to assist in the search. [*Id.* at p. 5, lines 82-86; Exh. 1AL at 2:53-3:04]. Gonzales told Middleton she was misusing resources, stated there was nothing for him to do, and he had breaks to give [to medically-challenged colleagues] so he would not assist. [*Id.* at p. 5, lines 90-94; Exh. 1AL at 3:04-3:27]. Gonzales suggested "why don't you tell some of those lazy Operations guys to get off their asses, 'cause they're just sitting around with their thumbs up their asses doing nothing" Exh. 1AL at 3:44-4:20]. This was directly insulting to Middleton because she was in charge of Operations. Gonzales continued, "I'm not going to watch a fellow officer go down because of your stupidity." [1W-11 231-233; Gonzales cross exam]. Middleton, a superior officer to Gonzales, was "floored" by Gonzales's response<sup>3</sup> and reported it to Bowen. She was sufficiently shaken by Gonzales's tirade that she sought counsel how to handle it from Captain Rolando.

The following day, Bowen asked Gonzales why he did not show up as ordered for the cell shake. Gonzales responded he had other things to do, it was "stupid" that he was sent there, and Sgt. Middleton was not properly managing the search. [Exh. 1A1 at 2:28; Exh. 1B; Appellant cross-exam]. When Bowen replied he, not Gonzales, manages resources and therefore Appellant needed obey his orders, Gonzales said Bowen's directive was stupid, he didn't care about Bowen's [sergeant] stripes, he couldn't push Appellant around as he did

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<sup>3</sup> Ironically, Middleton had already dispatched members of her Operations staff to assist in the cell shake, [Exh. 1AL at 4:23-4:40], showing Gonzales to be as uninformed as he was demeaning.

the rookies, and if he had a problem, they could take it to the Captain. [*Id.*; Exh. 1A] at 3:04; Exh. 1B]. Bowen obliged and they asked to meet with Captain Rolando.

The meeting with Capt. Rolando included Sergeants Middleton and Bowen, Gonzales, and his representative. During the meeting, Gonzales continued to berate Bowen and Middleton. He said, "Middleton has her head up her ass." [Bowen testimony]. Gonzales continued to complain about "everything that's wrong with the Department as the reason why he didn't show up to my building search." [Exh. D (2) p. 12, ll. 262-267; Middleton testimony]. Rolando admonished Gonzales for his disrespect. Based on Gonzales's initial and continuing disrespect, Bowen filed a formal complaint.

An investigation by the Administrative Investigations Unit (AIU)<sup>4</sup> ensued. During his AIU interview, Gonzales acknowledged he told Middleton he needed to relieve a diabetic deputy and that he would not compromise the deputy's health due to Middleton's "stupidity." He deemed the cell shake - which he did not attend - "a circus." [Exh. 1W, p. 10, ll. 227-233; Appellant cross-exam.] Gonzales told AIU the search wasted two hours [*Id.* at p. 15, ll. 368-374] and said he did not consider it an emergency. [*Id.* at p. 16, l. 396].

The Agency served Gonzales with a letter in contemplation of discipline on April 3, 2020, and convened a Contemplation of Discipline Meeting on April 27, 2020, which Gonzales attended with his attorney. A notice of discipline - the present six-day suspension - issued May 5, 2020.

## V. ANALYSIS

The Agency charged Gonzales with violating Career Service Rule 16-28 R., **Conduct which violates... written departmental or agency regulations, policies or rules...** via two DSD rules.

**RR 200.15.1 Respect for Fellow Deputies, Employees, and Members of the Public**  
**Deputy Sheriffs and employees shall treat other members of the Department (including supervisors), other City employees (including supervisors), vendors, and other members of the public with the respect due them including, but not limited to, refraining from uttering any disrespectful language.** [parenthetical statements in the original].

Appellant conceded he violated this Rule by his rude, disrespectful language to both Middleton and Bowen. [Exh. 1 AH at 7:20-7:42; see also Appellant's Opening Statement 8:40:08 – 8:40:17]. This admission effects a withdrawal of Appellant's claim with respect to the establishment of Appellant's violation of RR 200.15.1.<sup>5</sup>

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<sup>4</sup> AIU was previously known as the Internal Affairs Bureau (IAB).

<sup>5</sup> Appellant retained his right to claim the degree of discipline assessed for a violation of RR 200.15.1 was excessive.

**RR 200.13.1 – Disobeying Lawful Order.**

**Deputy sheriffs and employees shall not disobey any lawful order of a supervisor, including supervisory orders relayed by a person of lesser or equal rank. (Please see Appendix C of the Discipline Handbook regarding conflicting or unlawful orders).**  
[parenthetical statement in the original].

I infer from the evidence that Gonzales raised four defenses to this violation: (1) Neither Bowen nor Middleton actually ordered him to report to Building 21; (2) Bowen's directive conflicted with his Post order to relieve officers. (3) it was more important to relieve fellow officers, as they both had medical conditions; (4) the cell shake was not an emergency that required his presence.

1. Not really an order.

Gonzales claimed Bowen merely asked him to "come see me when you're done [with your relief duty]." [Exh. 1AH at 13:40]. He also claimed when Middleton called, she said "sweetie, how are you doing? Would you like to help me with a cell shake in 21?" [Gonzales testimony].

First, both Bowen and Middleton contradicted Gonzales's recollection and Gonzales did not dispute their credibility. Second, both sergeants made fairly contemporaneous records of their interactions with Gonzales, making their recollection more reliable than that of Gonzales. Third, If there was any doubt whether Middleton issued an order which he refused, Gonzales resolved it on cross-examination, when he conceded Middleton called him twice to ask him to assist in the cell shake, and during the second call she asked "where are you?" and "I need you."

With respect to Bowen, Gonzales claimed Bowen asked, but did not order him to report to the cell shake. One determinative piece of evidence here is, the next day when Bowen asked Gonzales why he did not report to Building 21, Gonzales did not protest that Bowen did not order him to report. [Bowen testimony; Gonzales testimony]. Moreover, Bowen directly disputed Gonzales's claim. In his AIU interview, Bowen explained that when Gonzales told him he was in the middle of providing a break, Bowen replied "as soon as he was done with the break that he was doing at that time, he needed to go to Building 21 and assist with the search." [Exh. 1AI at 1:31; Bowen testimony; Exhs. 1AI; 1N]. Gonzales did not challenge Bowen's credibility on this point. Finally, Gonzales said neither Sergeant ever uttered "I order you." Magic words are not required to constitute an order, and Appellant pointed to no authority for the proposition. See [In re Norman-Curry](#), CSA 28-07 & 50-08 (2/27/09).

2. Conflicting Orders (report to cell shake vs. abandoning post).

Gonzales claimed, without citation to a particular order, that he was required to relieve his fellow officers in Building 22, and because he was the only remaining Security Officer (relief

officer), that complying with Bowen's order to report to Building 21 would have required him to abandon his post.

Even assuming there were conflicting orders, Gonzales did not comply with the DSD's requirements for resolving them. The DSD Handbook states:

### **Conflicting Orders**

**Deputy sheriffs and employees who receive an order that conflicts with a previous order or directive will bring the conflict to the attention of the supervisor issuing the most recent order and ask for a resolution. If the supervisor affirms the most recent order as given, the employee will obey that order and will not be disciplined or otherwise penalized for disobeying the previous order. If the supervisor who issued the recent order or a supervisor of greater rank is not readily available to resolve the conflict, the deputy sheriff or employee will carry out the most recent order and advise a supervisor as soon as possible.**

[Exh. 2-105; see also Dulacki testimony].

#### 3. More important to relieve colleagues.

This claim fails on its face, as a subordinate's opinion of a lawful order is irrelevant to his obligation to obey it and to comply with DSD policy regarding conflicts.

#### 4. Not an emergency.

Gonzales claimed an unspecified post order requires him to respond to emergencies, but a cell shake is not an emergency. Here too, the logic is patently unreasonable. If Gonzales were required to report only to situations he deemed to be emergencies, he would be entitled to ignore all orders and situations he deemed unworthy of his "emergency" designation. [See [In re Sparer](#), CSA A071-18 (1/30/19); *aff'd* [In re Sparer](#), CSB A071-18A (7/18/19)]. That Gonzales deemed the search a "circus" is also irrelevant to his obligation to obey lawful orders and to comply with the Agency's conflict policy.

Finally, when representing Gonzales at his AIU interview, Gonzales's attorney stated Gonzales went by Bowen's office several times on the date of the incident, after Bowen asked him to go to the cell shake, but Bowen said nothing about his alleged order to Gonzales, the inference being that, had Bowen ordered Gonzales, he would have said something when he saw Gonzales later that day. This inferred claim also fails because Bowen did not find out Gonzales failed to report to the cell shake until after Gonzales finished his shift and left for the day. [Middleton testimony].

In short, none of Gonzales's defenses met his burden to demonstrate the Agency's findings under RR 200.13.1 were clearly erroneous.<sup>6</sup>

## **VI. Degree of Discipline.**

### **RR 200.15.1 - Respect for Fellow Deputies**

This violation may be assessed as a category B or C violation under the Agency's disciplinary matrix. Conduct Category C violations includes misconduct that has a pronounced negative impact on the operations of the Department or on relationships with other deputy sheriffs.

Gonzales conceded he told Middleton "I'm not going to watch a fellow officer go down because of your stupidity." [Exh. 1W-11 at 231-233; Gonzales cross exam]. Middleton was so "floored" by Gonzales' conduct, she felt compelled to seek advice from Capt. Rolando how to handle Gonzales going forward. Moreover, Gonzales ignored her for 2-3 weeks afterward. [Middleton testimony]. Gonzales told Bowen his directive was stupid, he didn't care about Bowen's stripes, and he couldn't push Appellant around as he did the rookies. Thus, Gonzales demeaned two superiors in less than 24 hours and could have been charged with separate violations of 200.15.1. Both sergeants stated their relationships with Gonzales were significantly diminished by his actions and insults, with Bowen adding Gonzales's insults and insubordination have become a pattern of behavior to the point where he no longer trusts Gonzales to carry out the Agency's mission. It is apparent that, by using patently disrespectful language to directly criticize supervisors and fellow employees, Gonzales's misconduct had a pronounced negative impact on his relationships with other deputy sheriffs. Therefore, this misconduct was properly characterized under Conduct Category C.

In mitigation, Dulacki<sup>7</sup> considered Gonzales had no prior, relevant sustained disciplinary cases that would increase the discipline level assigned to this violation. The Deputy Director also considered Gonzales's annual reviews always met or exceeded expectations. [Exh. A]. Pursuant to the disciplinary matrix, a first offense of Conduct Category C calls for discipline under level three. The mitigated penalty for a level three violation is a written reprimand to a one-day suspension, the presumptive penalty is a two-day suspension, and the aggravated penalty is a three to four-day suspension. [Exh. 2-127].

Dulacki found the following circumstances deserved a penalty in the aggravated range: Gonzales's patently offensive tirades against two superior officers; the prolonged nature of his tirade aimed at multiple supervisors, fellow employees, and Agency operations; his failure to

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<sup>6</sup> Gonzales also claimed other deputies, without specifying who or under what circumstances, failed to appear for the cell shake. The basis of this claim was an unspecified letter from Sgt. Middleton stating "most" of the deputies showed up for the cell shake. Alone, this claim fails to establish any clearly erroneous error with respect to the violations found against Gonzales. [Exh. 1AH at 10:25-10:38].

<sup>7</sup> The Deputy Director established her qualification to act as decision maker by delegation of authority from the Executive Director of Safety. [Dulacki testimony].

accept responsibility for his actions until the Contemplation Meeting nearly one year later. [Exh. 1E 9-10]. Even at hearing, while testifying concerning Bowen's straightforward question the following day why he did not report to Building 21, Gonzales maintained Bowen "somewhat harass[ed] me about why I didn't respond to the shake" and admitted to responding with inappropriate language. [Gonzales testimony].

It is noteworthy that, during the investigation into Gonzales's conduct, he failed to respond to two successive notices by AIU and responded to a third only after his Captain was notified of Gonzales's neglect. It is also noteworthy that, even at hearing, Gonzales continued to express contempt for Bowen's supervision, avoiding answering whether he regretted his hostility toward Bowen and whether he would change. [Gonzales cross-exam].

Gonzales acknowledged he "probably" called Bowen an "idiot." [*Id.* at p.35, ll. 857-864]. Astonishingly, when Gonzales was asked "do you still believe Sgt. Bowen is an idiot?" he answered "yes" at the very hearing providing an opportunity to explain why his penalty should be mitigated.<sup>8</sup> As aptly noted by Deputy Director Dulacki, there is a danger to the command structure, operation, and mission of a paramilitary organization such as DSD when it becomes acceptable to denigrate superiors and refuse lawful commands. She also noted that if someone believes they have a better solution, the mature and most helpful thing to do is to work with others, not against them, to improve the system. In short, there was ample evidence to justify increasing the penalty by one day (from a presumptive two-day suspension to three days) under RR 200.15.1.

### **RR-200.13.1 – Disobeying Lawful Order**

Pursuant to the DSD disciplinary matrix, a violation of RR-200.13.1, Disobeying Lawful Order, may range from Conduct Category C through F. Here too, Dulacki elected to assign the misconduct under Category C. As noted above, Conduct Category C violations describe misconduct that has a pronounced negative impact on the operations of the Department or on relationships with other deputy sheriffs.

As noted by Dulacki, the Agency's command structure depends on compliance. If a subordinate refuses orders, supervisors can no longer rely on the subordinate, and a weak link develops in the chain of command which is necessary for the Agency's mission to provide a safe and secure environment. A subordinate's refusal to obey orders by a seasoned deputy also sets a dangerous example for other deputies [Dulacki testimony]. Common sense dictates this danger is evident without requiring the Agency to prove it by a specific occurrence in this case.

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<sup>8</sup> Gonzales alleged he expressed contrition almost immediately toward Middleton and there should be no time limit for contrition to count as mitigation. While that is true as far as it goes, I cannot ignore the totality of the circumstances here, which include Gonzales's evident, continuing hostility and lack of contrition for his conduct toward Bowen's authority, and even his highly couched apology toward Middleton, stating he respects [only] her rank.

Deputy Gonzales has no prior relevant sustained disciplinary cases. Pursuant to the disciplinary matrix, a first offense of Conduct Category C calls for a discipline level three penalty. The mitigated penalty is a written reprimand to one day suspension, the presumptive penalty is a two-day suspension, and the aggravated penalty is a three to four-day suspension.

Dulacki considered the same mitigation as above, but determined there were aggravating circumstances in determining this penalty. Gonzales not only defied Bowen's order but defied two subsequent orders from Sergeant Middleton. Even if the orders conflicted with the established post orders, Deputy Gonzales failed to follow protocol to resolve them. Deputy Gonzales's continuing insubordinate behavior and defiance of authority compounded the seriousness of this misconduct, justifying a penalty in the aggravated range, thus the penalty was not clearly erroneous. Since the violation was factually distinct from the conduct violating RR 200.15.1, the Agency was justified in assessing this penalty consecutively instead of concurrently and doing so did not violate the Matrix's anti-stacking provision. [DSD Discipline Handbook Sections 32.7, 32.8.].

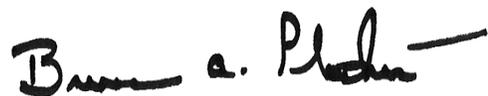
Undoubtedly, with his 22 years of experience, Deputy Gonzales gained much insight and has much to offer the Agency to improve processes and policies. As he first stated, he has and could continue to assist new deputies and sergeants as they learn the ropes. It is unfortunate that, instead of working with others to improve the Agency, he resorted to personal attacks and insubordination, and thereby undermined his perhaps intended message.

Because the decision maker substantially followed the Agency's disciplinary matrix, appropriately considered all the relevant circumstances and evidence, and appropriately found the aggravating circumstances in this case substantially outweighed Gonzales's prior record, the Agency was justified in assessing the minimum aggravated penalty under its disciplinary matrix. Gonzales failed to establish that the Agency's application of its disciplinary matrix was clearly erroneous.

## VII. ORDER

The Agency's assessment of a six-day suspension against the Appellant on May 5, 2020, is AFFIRMED.

DONE August 6<sup>th</sup>, 2020.



Bruce A. Plotkin  
Career Service Hearing Officer