CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 65-11A

In the Matter of the Appeal of:

SILVER GUTIERREZ,

Appellant/Petitioner,

v.

DEPARTMENT OF SAFETY, DENVER SHERIFF DEPARTMENT, and the CITY AND COUNTY OF DENVER, a municipal corporation,

Agency/Respondent.

DECISION AND ORDER ON REMAND

The Denver Sheriff Department (Agency) charged Deputy Sheriff Silver Gutierrez (Appellant) with numerous rules violations stemming from his interactions with a female co-worker. As a result of this alleged misconduct, the Agency suspended Appellant for 75 days. Appellant appealed his suspension to a Hearing Officer who found that the Agency failed to prove two of the more serious rules violations alleged. The Hearing Officer reduced Appellant's punishment to a 30-day suspension. Both parties appealed the Hearing Officer's decision to this Board. The Board affirmed the Hearing Officer's decision in its entirety.

The Agency appealed our decision to the Denver District Court. The Court reversed our decision which upheld the Hearing Officer's decision. The Court found that both the Hearing Officer and this Board erred in finding that Appellant was not guilty of rules violations[1] concerning inappropriate conduct with the female employee. The Court, however, refused to re-instate the 75-day suspension, finding that a recalibration of the punishment, in light of the court's findings, was a matter better left to the Board.

Appellant appealed the District Court decision to the Colorado Court of Appeals. The Court of Appeals essentially agreed with the District Court. (*See*, *City and County of Denver v. Gutierrez*, No. 14CA1536, 2016 WL 2962030 (Colo. App. 2016)).[2] Specifically, the Court of

---

[1] Those rules were internal rules of the Agency, specifically: Departmental Order (D.O.) 200.15 (which prohibits deputies from willfully or intentionally displaying any disrespectful, insolent or abusive language towards a supervisor, another employee or the public; D.O. 300.10 (which prohibits immoral, indecent or disorderly conduct which would impair the Agency's mission or cause the public to lose confidence in the Agency); and D.O. 2420.1B (prohibiting sexual harassment, as defined within the Order).

[2] The District Court found that Appellant had violated the Agency's sexual harassment policy in several ways, including making demands for sexual favors from the female co-worker. The Court of Appeals reversed the District

Appeals found that the Hearing Officer and Board erred in the analysis of the rules violations, thereby reaching improper and incorrect conclusions as to whether Appellant had violated D.O 200.15 and D.O 300.10.

The Court of Appeals remanded the case back to the District Court for purpose of remanding the matter back to this Board so we "may consider the appropriate disciplinary action in light of [its] opinion." In response to this order, we remanded the matter back to the Hearing Officer for further proceedings regarding the proper punishment to be imposed in light of the Appellate Court's findings. The Hearing Officer reviewed the case considering the decision of the Court of Appeals. He made appropriate findings regarding rules violations (in compliance with the substance of the Court of Appeal's decision). After finding that Appellant had violated D.O. 200.15 and D.O. 300.10 (an outcome virtually compelled by both court decisions), the Hearing Officer nevertheless decided that Appellant's punishment should not be increased; that is, despite the finding of guilt regarding the two additional rules violations, the Hearing Officer believed that the a thirty-day suspension was still the appropriate penalty. For reasons we cannot fathom, Appellant has appealed that decision to the Board.

The Court of Appeals remanded to this Board to determine an appropriate penalty for the Appellant. We remanded to the Hearing Officer for further proceedings to determine that new penalty. The only thing different about the Hearing Officer's considerations concerning the penalty, between this time and the first time he determined the penalty, would be that now, it has been determined conclusively (by both the District Court and the Court of Appeals) that it was error to find that Appellant was not guilty of violating D.O. 200.15 and D.O. 300.10. In other words, the Hearing Officer was tasked with determining an appropriate penalty in light of Appellant now being guilty of two additional rules violations. Logically, there would be no possibility that the penalty assessed against Appellant would be reduced as a result of a finding of two additional rules violations. Accordingly, the fact that the Hearing Officer did not increase the penalty against Appellant means that the Appellant prevailed concerning the Hearing Officer's reconsideration. We believe that as a general rule (absent circumstances not present here), prevailing parties lack standing to appeal. *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001); *Maciel v. City of Los Angeles*, 336 Fed.Appx 678, 2009 WL 1956237 (9th Cir. 2009).

While we could affirm the Hearing Officer on this ground alone, we consider the merits of the arguments raised in Appellant's Petition for Review. We are limited to reviewing that document because Appellant failed to file a brief supporting his Petition within the time allotted by our rules.[3]

For his first ground for review, Appellant claims there is new evidence in the form a transcript from proceedings in a federal case involving Appellant and the female employee against whom he committed his misconduct. Our Rules require that any new evidence be both

---

Court on this limited issue. Specifically, the Court of Appeals held that Appellant had not made a demand for sexual favors. (*Id*, pars 27-29)

[3] We also could have dismissed the appeal for failure to file a brief.

material evidence and evidence not available at the time the appeal was heard by the Hearing Officer. We remanded this matter back to the Hearing Officer in February of 2017 for further proceedings on the issue of discipline. If Appellant wished to have the Hearing Officer consider a transcript of a trial that was completed in 2014, it was incumbent upon Appellant to file a motion with the Hearing Officer to introduce the transcript into the record. Appellant, instead of attempting to have the transcript entered into the record for consideration by the Hearing Officer, did nothing. And Appellant cannot be heard to say that the transcript was not available upon learning of our remand to the Hearing Officer because the federal trial transcript was available as early as 2014. Further, Appellant cannot reasonably claim to have been surprised at the need to acquire the transcript, since he knew as early as May, 2016 (when the Court of Appels announced its decision), that there would be an opportunity, and maybe a need, to obtain the transcript to present to the Hearing Officer.[4] Finally, Appellant has provided us with nothing to indicate that anything contained in the absent trial transcript would be material evidence.

Appellant next claims that we should overturn the Hearing Officer based on the Hearing Officer making erroneous rules interpretation. Appellant makes a reality-defying claim that the Hearing Officer misinterpreted D.O. 200.15 and D.O. 300.10; and to this we say that Appellant, evidently has not read, or chooses to ignore (and, in turn, asks us to ignore) the decisions issued by the Denver District Court and the Colorado Court of Appeals. The reason we are here in the first place is that those Courts told us, in no uncertain terms, that both the Hearing Officer and this Board misinterpreted the two departmental orders in question when we found that Appellant had not violated them. The Hearing Officer's decision is consistent and in conformance with the decisions issued by the Courts. The Hearing Officer, this time, did not misinterpret D.O. 200.15 or D.O. 300.10.

Appellant further urges us to overturn the Hearing Officer's decision under claiming that his decision sets improper precedent. Again, the Courts held that it was our original decision that set improper precedent. The Courts' decisions strengthen the Agency's anti-harassment and anti-discrimination policies. We see no injustice nor anything improper in that.

Finally, Appellant claims there was insufficient evidence to support the Hearing Officer's findings. Again, in light of the court decisions, we find this argument nonsensical. The Courts could not have reached their respective conclusions had there not been record evidence to support them. We find our existing record to be more than sufficient to support the Hearing Officer's factual findings.

For all of the above reasons, we reject Appellant's arguments and hold that the Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on September 7, 2017, and documented this 5th day of April, 2018.

---

[4] Appellant never even presented a transcript to the Board.

BY THE BOARD:

Patti Klinge, Co-Chair

Board Members Concurring:

Neil Peck

Karen DuWaldt

Patricia Barela Rivera

Tracy Winchester