

**CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF
COLORADO**
Appeal No. 55-14A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

ROSANNA JENKINS,

Respondent-Appellant,

vs.

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

Petitioner-Agency.

The Denver Department of Safety and its Sheriff's Department (Agency) discharged Deputy Roseanna Jenkins. The Agency claimed that Deputy Jenkins made three racially insulting comments in front of prisoners and co-workers and then lied during the ensuing investigations into her actions.

Deputy Jenkins appealed her dismissal. The Hearing Officer determined that Deputy Jenkins did not make one of the three comments she was accused of making.¹ The Hearing Officer also determined that Deputy Jenkins, in making one of the other comments, was simply repeating back what one inmate had said to her². The Hearing Officer further determined that Deputy Jenkins made a comment which was pejorative, though she did not know that it was at

¹ The statement at issue is, "and proud of it;" allegedly made in response to a prisoner who had referred to the Deputy as "white lady."

² Here, Deputy Jenkins testified that when working with an inmate while handing out dinner trays, the inmate said to Deputy Jenkins that one of the trays was for "Nappy Head," referring to another prisoner. Deputy Jenkins claimed, and the Hearing Officer found, that Deputy Jenkins repeated this statement. The Civilian Review Administrator (CRA) believed that Deputy Jenkins had, out of the blue, simply called the prisoner, or uttered the words "nappy head" for no apparent reason.

the time of her utterance of the statement.³ The Hearing Officer also believed that while Deputy Jenkins made some inaccurate statements during the course of the investigation, that these misstatements were not made with the intent to deceive. The Hearing Officer vacated Deputy Jenkin's dismissal and imposed a six-day suspension.

The Agency has appealed that decision. We affirm the Hearing Officer.

The Agency first takes issue with the Hearing Officer's analysis concerning a statement made by Deputy Jenkins during the course of an Internal Affairs investigation. Specifically, at one point during the investigation, Deputy Jenkins stated that she had not spoken to other deputies about her comments when, in fact, she had had a discussion with Deputy Nolan. The Agency claims the Hearing Officer erred when she failed to analyze this omission under Departmental Regulation RR- 200.4.2, rather than RR-200.4.1.

RR-200.4.2 states:

In connection with any investigation or any judicial or administrative proceeding, deputy sheriffs and employees shall not willfully, intentionally, or knowingly commit a materially deceptive act, including but not limited to departing from the truth verbally, making a false report, or intentionally omitting information.

Initially, we agree with the Agency that, since the CRA issued discipline based on her belief that the statement in question violated R-200.4.2, the Hearing Officer should have reviewed the discipline under that Regulation, rather than under RR-200.4.1. Nevertheless, we find this error harmless. Our review of the record leads us to the finding of ultimate fact that Officer Jenkins, in initially omitting mention of her discussion with Deputy Nolan, did not do so

³ Deputy Jenkins uttered the phrase "Black is wack." The CRA believed this statement was made knowing that it was an insult and that it was made with the intent to insult. The context of the statement calls this conclusion into question. Deputy Jenkins made the comment in response to some friendly conversation regarding her deep tan, with one prisoner commenting that she could be black. Deputy Jenkins then responded with "Black is wack." It seems odd to us that anyone would think, under these circumstances, that Deputy Jenkins intended to insult anyone since, she would, in effect, be insulting herself as well.

with the requisite intent to support a finding that she violated RR-200.4.2.⁴ We also agree with Deputy Jenkins when she asserts in her brief that the Hearing Officer did, in fact, analyze this conduct under our Rule 16-60E(3), which could be reasonably interpreted as having a similar level of intent for a finding that this Rule has been violated. By concluding that Deputy Jenkins, in this case, lacked the requisite intent for a 16-60E(3) violation, (a conclusion we find justified by this record), we believe the Hearing Officer, in reality, reached the same conclusion this Board reached.⁵

The Agency next argues the Hearing Officer substituted her opinion for that of the decision-maker on the issue of whether Deputy Jenkins falsely denied she knew “wack” meant “bad.” This is an issue, however, on which the Office of the Executive Director of Safety is not entitled to deference. The Hearing Officer did not, in our *de novo* hearing context, substitute her judgment for that of the CRA. Rather, she simply decided the case. The issue for the Hearing Officer to decide was whether Deputy Jenkins committed rules violations, and part of that analysis necessarily entailed deciding whether Deputy Jenkins was credible when she claimed she did not know the negative connotations behind the word “wack.” The Hearing Officer believed Deputy Jenkins. There is credible record evidence making the Hearing Officer’s determination reasonable. Were we to afford deference to the Executive Director or the CRA on this issue, we would no longer have *de novo* hearings and the burden of proof at hearing would

⁴ This Board is free to make its own findings on ultimate facts as well ultimate conclusions of law concerning rules violations. *Nixon v. City and County of Denver*, 343 P.3d 1051 (Colo.App. 2014).

⁵ In addition, reading between the lines of the last paragraph on page 13 of the Hearing Officer’s decision, it would appear that the Hearing Officer had significant doubts about the materiality of this omission; doubts which we do not find unreasonable given the entirety of the record.

be shifted to the appealing employee. We are not there yet. At our hearings, the assessment of witness credibility lies, in the first instance, with our hearing officers.⁶

Finally, the Agency argues that the hearing officer erred in putting too much weight on the disciplinary recommendations and findings of the conduct review office. The Board is not persuaded.

First, we do not believe this argument presents us with any grounds for overturning the Hearing Officer's decision, based on our rules governing our review. As noted above, the only argument made by the Agency is that the Hearing Officer gave too much weight to admissible evidence. This evidence issue is not precedential in nature (see CSR 19-60C), nor, in our mind, does it entail a misinterpretation of any rule, statute, or Denver Charter provision.⁷

The Hearing Officer is free to consider any admissible evidence in reaching her conclusions. The Agency does not argue that this evidence was inadmissible; only that the Hearing Officer gave it "too much weight." While the Agency does not offer us a formula for determining how much weight is too much weight⁸, we are left with the conclusion that "too much weight", in the eyes of the Agency, means that the Hearing Officer gave the evidence enough weight so that it did not persuade her that the Agency was correct.

⁶ The fact that the Hearing Officer found that reasonable minds could differ as to whether Deputy Jenkins was being honest when she denied knowing that "wack" was bad, does not mean that in the eyes of the Hearing Officer, the Agency met its burden of proof. Just as in baseball where at first base, a tie goes to the runner, given that the burden of proving rules violations rests with the Agency, a tie, or an even balance of evidence, goes to the appealing employee because the Agency has not proven that portion of its case by a preponderance of the evidence.

⁷ The Agency, in its brief, does make reference to various Charter provisions and portions of the handbook accompanying the Disciplinary Matrix. But the Hearing Officer, in her opinion, did not offer any interpretation of the cited Charter or Handbook provisions, and we do not believe that the Hearing Officer's decision entailed any misinterpretations of these provisions.

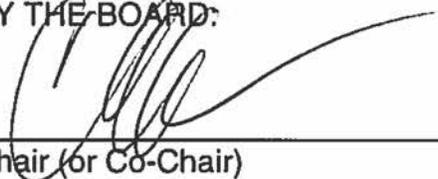
⁸ And we are unaware of the existence of any Goldilocks-Three Bears-like formula, comparable to, say, a Body Mass Index calculation, which would allow us to determine whether the Hearing Officer has afforded a piece of evidence not enough weight, too much weight, or just the right amount of weight.

Further, we note that the Hearing Officer did not consider this evidence dispositive on the issue of Deputy Jenkin's credibility in denying that she knew that "wack" was bad. Rather, we believe the Hearing Officer found that this evidence supported her determination that Deputy Jenkins presented as a credible witness.

For the above reasons, the Hearing Officer's decision is **AFFIRMED**.

SO ORDERED by the Board on September 17, 2015, and documented this 5th day of November, 2015.

BY THE BOARD:



Chair (or Co-Chair)

Board Members Concurring:

Gina Casias (Co-Chair) _____

Patti Klinge _____

Derrick Fuller _____

Neil Peck _____