

DECISION ON REMAND

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WAYNE JOCHEM, Appellant,

v.

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

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I. INTRODUCTION

This case is before the Career Service Hearing Office pursuant to the Career Service Board's (Board) March 7, 2019 remand of it "for the purpose of considering the appropriate penalty to be imposed on Appellant for the proven rules violations, and for developing a record thereon." After a review of the record, and being fully advised in the premises, the Hearing Officer addresses the Department of Safety, Denver Sheriff's Department (Agency) discipline of Appellant Wayne Jochem (Appellant) as described below.

On April 30, 2015, the Agency demoted Appellant from the rank of Captain to Sergeant, which demotion he appealed. On December 31, 2015, the Hearing Officer found that the Agency failed to prove that Appellant violated the specified CSRs and reversed its demotion of him. The Agency appealed the Hearing Officer's decision to the Board. On October 6, 2016, the Board reversed the Hearing Officer, finding that the Agency had proven that Appellant violated some specified CSRs,<sup>1</sup> and it reimposed his demotion. In re Jochem, CSB 25-15A (10/6/16). Appellant appealed the Board's decision to the Denver District Court. On July 24, 2018, the Court affirmed the Board's conclusion that Appellant had violated some CSRs, Denver District Court Case No. 2016CV33977. However, the Court could not review the Board's reinstatement of Appellant's demotion because the record lacked any findings or conclusions regarding Appellant's penalty determination, and it remanded the case to the Board for the creation of that record. Id. The Board then remanded this case to the Career Service Hearing Office therefor.

II. FINDINGS

The Board summarized the relevant factual background of this case on which it decided that the Agency had proven Appellant's violations, and on which the Denver District Court affirmed the Board, as follows:

On September 4, 2014, Captain Wayne Jochem ("Appellant"), Sgt. Michael Jordan, and Deputy William Mitko responded to the cell of a mentally unstable inmate. The inmate was acting belligerently and needed to be moved to a cell equipped with a camera. Attempts to reason with the prisoner in an effort to get him to cooperate with the move

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<sup>1</sup> The Hearing Officer had previously absolved Appellant of the violations, and thereby found that the Agency also did not prove that he violated RR 300.11.6 (Conduct Prejudicial), but the appellate bodies did not address RR 300.11.6, hence the Hearing Officer does not consider it as a basis for the penalty herein.

were unavailing. The inmate seemed unaware of his surroundings, and every attempt at conversation was responded to by the inmate with the demand, "give me a cigarette." Appellant responded to the inmate's demand for a cigarette by telling him that cigarettes and lighters are contraband.<sup>2</sup>

Because it appeared that force might be required to move the inmate, Appellant assembled a cell extraction team. As required by protocol, Appellant contacted his supervisor, Major Anthony Gettler, to obtain permission for the cell extraction.

Upon receiving Appellant's call, Major Gettler met with the group of deputies, which now included Sgt. Joshua Franks. Major Gettler also tried to communicate with the uncooperative prisoner. The prisoner's response remained constant – "give me a cigarette." Eventually, Major Gettler decided that if they could get the prisoner to move with a cigarette, they should get a cigarette – in an effort to avoid having to use force against the prisoner during the cell transfer.<sup>3</sup>

Major Gettler obtained a cigarette. The prisoner's re-location, however, had been delayed to give medical staff the opportunity to administer medications the prisoner had previously refused that morning. Major Gettler then returned to his office and put the cigarette in a desk drawer.

Shortly thereafter, Appellant came to Major Gettler's office to inform him that they were now ready to move the prisoner. Major Gettler gave Appellant the cigarette. Appellant then proceeded to the prisoner's cell. By the time Appellant arrived at the cell, however, the prisoner had turned cooperative. He had taken his medication and he had permitted himself to be handcuffed. In addition, the prisoner was then escorted to his cell, without incident – without the need for the use of force at all, and without the use of the cigarette in any fashion.

Once in the new cell, the prisoner again became combative. He pushed against some deputies and tried – unsuccessfully – to get out of the cell. The prisoner seemed anxious, wide-eyed and confused. Eventually, Appellant ordered the deputies to remove the handcuffs from the prisoner and had them exit the cell.

Present on the scene during the transfer was Deputy Michael Nester. Nester, who was certified and experienced in crisis intervention skills, had taken control of the prisoner during the cell transfer and was now attempting to calm the prisoner from behind the closed cell door. During his attempted conversation with the prisoner, Nester heard Appellant say that if he (the prisoner) cooperated with Nester, he would get a cigarette.

Eventually, the prisoner cooperated with a nurse performing a medical check and the prisoner then asked for his cigarette. Appellant responded by telling the prisoner that he had done what they (deputies) wanted him to do; so he rolled the cigarette under the cell door. The prisoner then kicked the cigarette back out the door. Appellant picked up the

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<sup>2</sup> Hearing Officer's findings of fact at page 2, top paragraph of her decision.

<sup>3</sup> All of the participants in the discussion recall hearing Major Gettler saying different things about the acquisition and/or use of a cigarette. (Hearing Officer Decision, p.2.) Major Gettler himself could not remember what he said precisely, but recalls he may have made one of four possible statements. Of the four possible statements Major Gettler admitted he may have made, none of them mentioned actually giving the cigarette to the inmate. (Hearing Officer Decision, p.8.)

cigarette, gave it to Deputy Nester, and instructed him to give the cigarette back to the prisoner. Deputy Nester did [as] he was instructed. This time, the prisoner kept the cigarette.

Sometime thereafter, Sgt. Jordan passed by the prisoner's cell and noticed that he had a cigarette. Sgt. Jordan instructed Deputy Mitko to retrieve the cigarette. Deputy Mitko told the prisoner he would get him a lighter for the cigarette if he would return the cigarette. The prisoner rolled the cigarette out the door to [D]eputy Mitko.

Word got out among the prison population that one of their own had been given a cigarette. As a result, inmates started asking Deputy Mitko for cigarettes. Inmates also started asking Sgt. Jordan whether if they acted up, they too, would be rewarded with beer.

Afterwards, Sgts. Jordan and Franks were discussing the incident. They decided to speak to Appellant as to why a cigarette was used to handle an inmate and to express their objections. Appellant reviewed the situation with them and further commented that "rank has its privileges" and that sometimes, one needs to bend the rules.<sup>4</sup>

The entire matter was eventually investigated by Internal Affairs within the Sheriff Department. The Agency determined that Appellant had violated several Departmental rules and Career Service Rules. He was issued a demotion – from the rank of Captain to Sergeant.<sup>5</sup>

In re Jochem, *supra*, pp. 1-3.

#### Disciplinary Decision

Civilian Review Administrator Shannon Elwell (CRA Elwell) made the Agency's disciplinary decision to demote Appellant one rank based on two premises. First, she found that, by furnishing an inmate with a cigarette, Appellant violated several rules; and next, by ordering Deputy Nester to give the inmate the cigarette, Appellant failed to properly supervise him.

CRA Elwell determined that Appellant violated DO 7710.11 (Smoking and Tobacco Policy) by failing to ensure that cigarettes are kept in places inaccessible to inmates, and violated RR-400.12 (Prohibited Transactions with Prisoners) because he did not receive express permission to give the cigarette to the inmate. CRA Elwell also found that Appellant violated RR-1100.8 (Failure to Supervise) because he demonstrated poor judgment, failed to lead by example, and exposed his subordinates to the risk of discipline by directing them to violate policy. Through these violations, Appellant violated 300.19.1 (Disobedience of Rule), through which he in turn violated CSR 16-60 A. (Neglect of duty) and L. (Failure to observe).

As found by the Board, and affirmed by the Denver District Court, Appellant committed Rules violations by giving the inmate the cigarette, and by instructing Deputy Nester to do so again after the inmate rejected it the first time. He violated D.O. 7701.11, under which he had the responsibility to "ensure that all tobacco products ... are kept in places not available to inmates." He also violated RR 400.12 by the same conduct, under which he had the responsibility to "not give or loan to a prisoner any unauthorized item ... without express permission from a supervisor." Similarly, Appellant violated RR 1100.8, under which he was required to "fulfill all obligations, duties and responsibilities of [his] rank."

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<sup>4</sup> Hearing Officer Decision, top of page 4.

<sup>5</sup> This is a demotion of one rank. There is no intermediate rank of Lieutenant within the Sheriff Department.

## Level of Penalty

Under the Agency 's Discipline Handbook (Handbook), Appellant's violations RR-300.19.1, RR-400.12 and RR-1100.8 may be assigned any Conduct Category from A to F, depending on the nature of the misconduct and level of impact or harm caused by it. In the April 30, 2015 Notice of Discipline (Ex. 1) CRA Elwell assigned his violations a Conduct Category E, defined as:

Conduct that involves the serious abuse or misuse of authority, unethical behavior, or an act that results in an actual serious and adverse impact on deputy sheriff, employee or public safety, or to the professionalism of the Department.

CRA Elwell concluded from the record, and as it is summarized above, that Appellant caused actual serious harm to the department because inmates and deputies "were surprised and upset to observe and/or learn of the cigarette being used as both a coaxing mechanism [and] "security blanket" for an uncooperative inmate. She found that his failure to use sanctioned methods to achieve his objective negatively impacted the professional image of the department. She also considered his statement to his subordinate sergeants that "rank has its privileges" to be unethical and a serious misuse of authority which showed he was unfit to be a Captain. (Ex. 1-20). A Conduct Category E first violation has the penalty suspension categories: presumptive - 30 days, mitigated - 18-22 days, and aggravated - 38-42 days.

CRA Elwell next considered the mitigating and aggravating factors. As mitigation, she considered that Appellant had (1) committed misconduct while trying to avoid force, (2) no bad intentions, (3) received many commendations during his career (albeit she deemed some were superficial), (4) caused minimal consequences with his misconduct, (5) a lengthy, positive career, and (6) minimal prior disciplinary history relative to his years of service. As aggravation, she considered (1) Appellant's supervisory rank of captain, (2) the actual and demonstrable prejudice to the Agency, and (3) his failure to take responsibility for his misconduct.

However, after this analysis, CRA Elwell determined that special circumstances connected to Appellant's misconduct warranted discipline beyond the Matrix's Conduct Category E's aggravated penalty, to a demotion to sergeant pursuant to its Handbook Section 25.5 (Involuntary Demotion with a Reduction in Pay.)<sup>6</sup> Handbook Section 25.5.1 states:

Involuntary demotion with a reduction in pay of a deputy sheriff may occur if, after considering all of the facts and circumstances surrounding an incident, it is determined that a deputy sheriff lacks the ability, willingness or worthiness to perform in the current rank. Involuntary demotion with a reduction in pay reflects the determination that a deputy sheriff has demonstrated by his/her misconduct that he/she is unfit to fulfill the responsibilities and duties required for his/her current position at the specific rank.

CRA Elwell applied the following Handbook Sections to her analysis:

25.4.4.1 Commission of a series of acts which constitute a course of conduct characterized by a continued inability or unwillingness on the part of the deputy sheriff to conform to expected standards of conduct;

25.4.4.3 Commission of an act or acts which call into serious question the deputy sheriff's trustworthiness and/or integrity so as to interfere with the continued

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<sup>6</sup> This version of the Handbook was effective then, as of November 12, 2013.

performance of his or her assigned duties and responsibilities, or which demonstrate a serious lack of the ethics, character or judgment necessary to hold the position of deputy sheriff;

As support for 25.4.4.1, CRA Elwell joined Appellant's misconduct herein (giving the inmate a cigarette, instructing Deputy Nester to return the cigarette to the inmate, claiming that rank has privileges, and refusing to accept responsibility for his misconduct) to his 2013 discipline, for violations of RR-200.7.1 (Release of Confidential Information) and RR-200.13 (Disobeying a Lawful Order), for releasing information about a traffic accident to hospital security services. She concluded therefrom that he demonstrated an inability or unwillingness to conform to the standards of conduct expected of high-level command. As support for 25.4.4.3, CRA Elwell cited Appellant's poor judgment in giving the inmate a cigarette, directing a deputy to return the cigarette to the inmate, and disregarding his subordinates' concerns over his actions. She concluded therefrom that he lacked the ability, judgment, and character to be a captain.

### III. ANALYSIS

#### A. Jurisdiction and Review

Jurisdiction is proper under CSR 19-10 A.1.b.,<sup>7</sup> 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 demotion of Appellant complied with CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

#### C. Authority

**CSR 16-60<sup>8</sup> Discipline and Dismissal** states in relevant part:

The following may be cause for the discipline or dismissal of a Career Service employee:

- A. Neglect of duty; ...
- L. Failure to observe written departmental or agency regulations, policies or rules;

**As it pertains to:**<sup>9</sup>

#### **300.19.1 Disobedience of Rule:**

Deputy Sheriffs and employees shall not violate any lawful Departmental rule (including CSA rules), duty, procedure, policy, directive, instruction, order (including Mayor's Executive Orders), or Operations Manual section.

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<sup>7</sup> This version of Rule 19 governed the procedure at the time of Appellant's hearing.

<sup>8</sup> This version of Rule 16 was in effect at the time of Appellant's misconduct.

<sup>9</sup> These versions of Agency Rules and Regulations were in effect at the time of Appellant's misconduct.

## 400.12 Prohibited Transactions with Prisoners

Deputy sheriffs and employees shall not give or loan to a prisoner any unauthorized item nor borrow from an inmate any article, money, or item without express permission from a supervisor.

## 7710.11 Smoking and Tobacco Policy

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### 5. Guidelines:

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B. In accordance with the *Mayor's Executive Order 99* and *Municipal Code Article IX 24 301-317*, the Denver Sheriff Department is declaring the Denver County Jail, Downtown Detention Center, the Training Academy and the Vehicle Impound Facility as "NO SMOKING" buildings. ...

1. **Downtown Detention Center (DDC):** At no time will smoking or the use of tobacco products be permitted in any working area, inmate living area, the parking garage, any interior area or on the outside grounds, except as designated by the Director of Corrections, Manager of Safety or designees.

### 6. Accountability:

It is the responsibility of all employees to ensure that all tobacco products and smoking paraphernalia are kept in places not available to inmates, and to be familiar with and adhere to the meaning and intent of this order. Failure to comply with this order shall be grounds for disciplinary and legal action.

### 7. Responsibility:

...

B. All supervisors will ensure that the provisions of this policy are being followed.

8. **Staff:** All officers and employees will comply with the provisions of this policy.

## 1100.8 Failure to Supervise

Supervisors are required to fulfill all obligations, duties, and responsibilities of their rank.

### D. Degree of Discipline

CSR Section 16-20<sup>10</sup> Purpose of discipline 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.

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<sup>10</sup> CSR 16-20 has been renumbered 16-41 but otherwise remains identical.

## 1. Seriousness of the proven offense

The Agency's claim that Appellant's offenses constitute special circumstances, the basis for his demotion, is described above. Appellant defends against the demotion by claiming inequity since Major Gettler was disciplined with a two-day suspension for initially formulating the novel idea of and retrieving a cigarette. He notes that, but for Major Gettler's intervention, he would have used his assembled extraction team to forcibly move the inmate without involving a cigarette. He also defends against it on alleged principle of honesty to inmates, rejecting herein the false offer to an inmate of a cigarette for cooperation. Appellant also argues that his demotion was excessive under the circumstances, to which it was not reasonably related.

Given the record, the Agency proved that the application of special circumstances governed Appellant's demotion. As a supervisor, Appellant was responsible to lead his subordinates. See In re Givens, CSA 37-17 (12/28/17), *aff'd* In re Givens, CSB 37-17A (10/18/18). He should have clarified for himself, but more importantly, for them whether Major Gettler was explicitly ordering that they provide the inmate with a prohibited cigarette, versus merely show it to him to induce his cooperation. The evidence amply documents their confusion over the issue of giving an inmate a cigarette, an explicit Rules' violation. See In re Gordon, CSA 10-14 (11/28/14), *aff'd* In re Gordon, CSB 10-14A (7/16/15). Appellant himself stated at his pre-disciplinary hearing that he never intended "to allow the inmate to keep the cigarette, smoke it, use it, etc." (Ex. 15-6). Yet no witness stated that Major Gettler specified any of these limits as details of his plan. So, Appellant, who assembled the team and was the next most senior deputy, needed to clarify the plan. As a leader, he needed to remind Major Gettler that the plan would violate Agency Rules and, if needed, to state that he would observe the Rules and not actually give the inmate the cigarette, to protect his subordinates from possible discipline. See In re Koonce, CSA 34-17 (12/22/17), *aff'd* In re Koonce, CSB 34-17A (6/21/18); see also In re Gale, CSA 02-15 (11/23/15), *aff'd* In re Gale, CSB 02-15A (7/21/16).

Based on his claim to the principle of honesty to inmates, Appellant had a higher duty to confront Major Gettler as soon as the Major volunteered the cigarette idea. Unlike the other witnesses, who did not hear Major Gettler direct the giving of a cigarette to the inmate or expected it to happen, Appellant claimed he inferred this directive from the Major's comments. If so, and based on his principle, Appellant would give the inmate the cigarette once the Major stated his idea to use it. In effect, Appellant would superimpose his personal principle over the Agency Rules. Since Major Gettler did not observe this principle, Appellant needed to warn the Major that he construed the Major's idea to be an order to give the inmate the cigarette. His failure to do so facilitated a disregard of Agency Rules and exposed all involved to discipline.

Appellant's subordinates were concerned when they learned that he had given the inmate a cigarette. Sgts. Jordan and Frank confronted him, as it violated the Rules and they were anxious about future incidents. See Koonce, *supra*; Givens, *supra*. As a leader, Appellant should have explained to them that he had taken a one-time action, if that was the case, or whether any reasons might justify repeating it. More importantly, he should have explained how and why, or what actions he would take to ensure that, they were not liable for it. Instead, Appellant made the flippant comments that rank has its privileges and that sometimes you have to bend the rules. His comment about rank is problematic since he referenced his rank, superior to the sergeants and other deputies. So, if is rank provided any safe harbor for a Rules' violation, they did not benefit from it. Next, as they all knew, Appellant did not bend the rules, he violated them. He had compounded his violation by mischaracterizing it to claim the alleged benefit of his rank, in contrast to his alleged refusal to lie to inmates.<sup>11</sup> So he failed to provide the leadership that his subordinates sought from him.

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<sup>11</sup> Appellant's principle is imprecise since he deemed himself to be acting honestly when he intended to "give" the inmate a cigarette yet he intended to not let the inmate keep it.

The Agency was able to rely on Matrix Section 25.5.2, which stated in relevant part, "...If the commission of the violation prior to attaining the current rank would have raised substantial questions as to the deputy sheriff's fitness to hold that rank in the first place...", to demote him. As analyzed above, Appellant's violation would certainly have raised such substantial questions. Appellant also agreed at his pre-disciplinary meeting that the conduct of which he stood accused "would more than likely prevented [his] promotion." (Ex. 15-25.)

Last, Appellant did not accept responsibility for his misconduct. Throughout the disciplinary process, he alone claimed that he followed Major Gettler's order to give the inmate a cigarette. He refused to accept responsibility for his actions at the scene even though he was the senior officer present. (Ex. 15-14). He claimed that Major Gettler, and other superior officers, can order Rules' violations. Under this scenario, he could interpret comments of superiors as he deemed appropriate and, based thereon, violate Agency Rules with impunity. He refused to recognize the flaw in his characterization of the Agency operation. Instead, Appellant claimed that his potential discipline should dissipate once "the prejudices, the guesses, and the preconceived notions, etc., [were] removed" from the disciplinary process. (Ex. 15-3). In other words, everyone who had concluded that he violated the Rules either was incorrect or had ulterior motives.

## 2. Prior Record

Appellant's prior record was already considered in the analysis of Matrix Factor 25.4.4.1.

## 3. Likelihood of Reform

Appellant's likelihood of reform is unclear. He continues to claim that he committed no misconduct insofar as he just executed what he characterized as Major Gettler's orders.

## IV. CONCLUSION AND ORDER

As described above, the Agency proved that Appellant has a demonstrated inability or unwillingness to conform to the standards of conduct expected of high level command; and that he lacked the ability, judgment, and character to hold the position of captain, pursuant to Handbook Sections 25.4.4.1 and 25.4.4.3, respectively. Accordingly, it could exercise its discretion to demote Appellant pursuant to Handbook Section 25.5.

The Agency's discipline of Appellant comported with CSR 16-20, as it was properly fashioned to address inappropriate behavior, and was reasonably related to the seriousness of Appellant's conduct; and (2) the record reflected a sufficient, reasonable, and articulated justification for it, it was within the range of alternatives available to a reasonable and prudent administrator, and it was not clearly excessive. See In re Romero, CSB 28-16A, 2 (6/15/17); In re Redacted, CSB 31-13A, 1-2 (8/8/14).

Accordingly, the Agency's demotion of Appellant from Captain to Sergeant is AFFIRMED.

DONE March 20, 2019



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Federico C. Alvarez  
Career Service Hearing Officer