CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 25-15A (On Remand)

DECISION AND ORDER ON REMAND

IN THE MATTER OF THE APPEAL OF:

WAYNE JOCHEM, Respondent-Appellant**,**

v.

DEPARTMENT OF SAFETY, DENVER SHERIFF DEPARTMENT, and the City and County of Denver, a municipal corporation, Petitioner-Agency.

The Department of Safety, Denver Sheriff Department (Agency) demoted Wayne Jochem (Appellant) from the rank of Captain to Sergeant as a result of rules violations stemming from an incident where he ordered that an inmate be given a cigarette, despite the fact that cigarettes are considered contraband in the jail and there were rules prohibiting keeping smoking materials where an inmate might have access to them.

Appellant appealed his demotion to a Hearing Officer. The Hearing Officer absolved Appellant of any rules violations. The Agency appealed the Hearing Officer's decision to this Board, which found that the Hearing Officer had erred and that the record supported the Agency's claim that Appellant had engaged in misconduct in violation of Career Service and Agency rules. This Board then reinstated the Agency's imposed demotion of Appellant from Captain to Sergeant.

Appellant appealed the Board's decision to the Denver District Court. The Court upheld the Board in its finding that Appellant had committed rules violations. The Court also, however, determined that there was an insufficient record before it to weigh in on the Board's decision to impose discipline.

Accordingly, the Court remanded the matter back to the Board to create a record on the issue of appropriate discipline. In turn, we remanded this matter back to the Hearing Officer to conduct further proceedings for the purpose of creating a sufficient record on the issue of discipline.

The Hearing Officer conducted those proceedings and ultimately determined that the Agency had proven that the discipline of demotion was appropriate under the circumstances. Appellant has appealed that decision to the Board. Again, we AFFIRM the Hearing Officer's decision.

Appellant has divided his argument in support of his appeal into seven sections. We reject those arguments and will attempt to explain why, in the order presented by the Appellant, we have done so.

In section 1 of his brief, Appellant first claims that the imposed punishment is not warranted because, rather than justifying the imposed discipline, the Agency's Civilian Review Administrator (CRA) simply parroted words of the Agency's disciplinary Matrix to reach a pre-determined desired result. This, however, is not borne out by the record.

The Hearing Officer found (and these findings are supported by record evidence), that the CRA articulated specific rationale, supported by facts in the case and the terms of the Matrix, as justification for imposing the demotion as discipline. (See, especially, the Hearing Officer's decision at pages 3-5.) The situation which caused us to issue our warning in *In re Ford*, 48-14A, cited by Appellant, is not present in this case.

Appellant next, at page 7 of his brief, argues that the CRA could have reached a different conclusion about whether Appellant was guilty of Neglect of Duty. We interpret this as asking us to find that the CRA reached an improper, unduly harsh conclusion as to the penalty to be imposed against Appellant. But again, this did not happen.

The fact that Appellant engaged in conduct amounting to Neglect of Duty was proven by the Agency and affirmed by the District Court. Nor do we see it as a close call where maybe the CRA or this Board, could have gone the other way in favor of Appellant, thereby warranting a lesser penalty.

The record unequivocally reflects that Appellant exercised abysmal judgment in ordering a subordinate to give a prisoner a cigarette, was derelict in his duty by failing to object or clarify with his superior, if, in fact, he truly believed he had been ordered to give the prisoner a cigarette, and abdicated his responsibility to lead his subordinates, when he justified his obvious rules violations to those subordinates by claiming that "rank has its privileges."

We cannot accept, based on this record, that Appellant had a "good faith belief" that he was justified in giving the prisoner the cigarette (as argued on page 7 of his brief) and, in any event, any such belief would not be grounds for overturning the Hearing Officer's decision.

At page 8 of his brief, Appellant points out that the record lacks evidence of him engaging in a "pattern of ill-advised leadership techniques," and that all in all, his work record has been good. Appellant, accordingly, takes issue with the fact that he was demoted for a single act of misconduct. Evidently, Appellant finds this unfair.

First, we find no rule or precedent which prohibits a demotion based on a single act of misconduct, especially where, as here, that single act of misconduct demonstrates that Appellant is no longer fit to lead. Second, we perceive no unfairness

in this case. It might be true that in some cases, it might take a pattern of repeated misconduct and poor judgment to demonstrate to management that someone is no longer fit to lead, but here, the record makes it clear that Appellant was able to accomplish this with one flourish of a cigarette.

Appellant next, at page 8 of his brief, argues that the CRA improperly balanced mitigating and aggravating evidence and that the evidence of mitigation is overwhelming. We disagree. The record reflects, and the Hearing Officer properly found, that the CRA considered both aggravating and mitigating factors, and that her conclusions were reasonable and supported by record evidence. The claim that evidence of mitigation is "overwhelming" is not supported by the record.

The evidence of mitigation in this case (see p. 4 of the Hearing Officer's decision) does not compel us to reach a different result on punishment than the one found to be appropriate by the Agency and the Hearing Officer. The Hearing Officer did not err when he found the CRA's analysis of aggravation and mitigation to be both appropriate and sufficient.

Section 2 of Appellant's argument (starting at the bottom of page 8 of his brief), argues that the Hearing Officer conducted an improper review of the disciplinary determination because it was not a truly *de novo* review in that said review relied on facts that were relied upon by the Board after the initial hearing and affirmed by the Court on administrative review.

We first point out that if Appellant was dissatisfied with the factual recitation advanced by the Board as not accurately reflecting the Hearing Officer's findings, he had an opportunity to make that argument to the District court. [1] The Court, however, did not take issue with any fact relied on by the Board to justify its decision overturning the original Hearing Officer's ultimate findings concerning rules violations. Consequently, those facts became the law of the case and the Hearing Officer, on remand, was obligated to accept them.

We did not read the District's Court's remand order as direction to open the entire case as if no facts had ever been found on any other aspects of the case. The matter was not remanded for a new hearing on all issues, rather, it was remanded for the purpose of creating a record on the issue of the proper discipline to be imposed. The fact that the Hearing Officer, in reaching his conclusion, might have relied on facts that had already been adduced and, essentially affirmed by the Board and the District Court, did not amount to error by the Hearing Officer.

[1] At page 9 of his brief, Appellant recites "facts" that the Hearing Officer allegedly got wrong, such as the "fact" that no witness to the incident ever actually heard Major Gettler order Appellant to give the prisoner a cigarette. But Appellant is simply wrong. No one actually heard Major Gettler tell Appellant to give the prisoner a cigarette. All of the fact cited by the Hearing Officer were supported by the record and Appellant's assertion of incorrect "facts" can be nothing more than an incorrect interpretation of what is actually reflected in the record.

Appellant next claims that the Hearing Officer erred in upholding the discipline of demotion because Career Service Rule 16-51(A) calls for discipline to be progressive whenever practicable. But plainly, the Agency determined, and the Hearing Officer agreed, that a lesser discipline would not be practicable.

Given the staggeringly poor judgment exercised by Appellant, we cannot say that the Agency's or the Hearing Officer's judgment was anything but reasonable. We do not believe the Hearing Officer abused his discretion in upholding the discipline of demotion, despite the lack of prior significant progressive discipline in Appellant's work record.

Section 3 of Appellant's argument claims that this Board lacks jurisdiction to review the penalty determination because the Agency, allegedly, failed to properly raise the issue in its Petition For Review. We disagree. In its Petition, the Agency specifically asked that this Board reverse the [original] Hearing Officer and reinstate the decision to demote the Appellant. We believe our jurisdiction over the issue of discipline has been properly invoked.[2]

In Section 4 of his argument, Appellant first compares himself to another former member of DSD management who also exhibited terrible judgment and argues that what he did was not as bad as what this other person did. We need not decide whether this is an accurate relative assessment of the parties' conduct and we do not see how any such assessment would result in our finding that the Hearing Officer erred, given that the comparator received a demotion of two ranks while Appellant was only demoted one rank.

Judging from the punishments alone, one could reasonably conclude that Appellant's misconduct was not as egregious as that of his comparator's, but that neither logically nor legally leads us to conclude that the punishment imposed on Appellant was excessive, unreasonable, or not supported by record evidence.

The remainder of this section of Appellant's argument points out that Appellant, when he committed his misconduct, was not acting from any selfish motive, and then asks the Board to re-weigh the evidence in this light. We will not re-weigh the evidence.

It was the Hearing Officer's responsibility to consider and weigh evidence. When reaching his conclusions, the Hearing Officer was aware of the fact that Appellant was

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[2] It is true, as Appellant seems to assert, that the Agency never specifically mentioned the Hearing Officer's finding that any consideration of the appropriateness of the imposed discipline would be moot (since, of course, no penalty could be assessed if no rules violations had been sustained). We do not believe the Agency needed to mention "moot" or "mootness" to preserve the issue. We note the Hearing Officer was technically correct in that given how she had ruled on the charges, consideration of punishment was, in fact moot. The Agency, in its Petition for Review, however, properly contested every finding made by the Hearing Officer that led her to conclude that a penalty determination would be moot, and the Appellant does not question this. Given that the mootness finding was part and parcel of the findings on the charges, when the Hearing Officer's findings on the charges fell, the issue of the appropriateness of a penalty was once again in play.

not acting selfishly because, as Appellant notes, it is a part of the record. The fact that the Hearing Officer could have weighed the evidence differently or that he could have reached different conclusions about the evidence does not mean he committed error by coming to the findings and conclusions he did.

In Section 5 of his argument, Appellant asks us to consider his case as being more akin to the case of *In re Wilson*, No. 38-17, where a Hearing Officer modified a two-rank demotion to a thirty days suspension. We cannot oblige the Appellant.

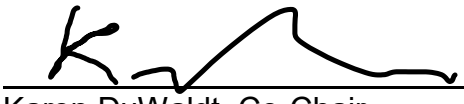
First, the facts of Wilson are not in this record. Second, we would not find the Hearing Officer's findings and conclusions dispositive of anything, as this case was never before the Board for its consideration. Third, it is well-settled, that the DSD's (and all of the Career Service) disciplinary system is not a comparative system (though consistency in discipline is undoubtedly desirable) in that discipline will be sustained if it is within the range of alternatives available to a reasonably prudent administrator. Fourth, Appellant's argument nowhere points out any error made by the Hearing Officer in reaching his conclusions. The fact that the Hearing Officer reached a different conclusion than one reached by a different hearing officer in a different case is not improper, let alone reversible error.

The remainder of Appellant's argument (Sections 6 and 7) ask us again to re-weigh evidence and to discount the CRA's testimony. We are beyond that point. The Hearing Officer considered the CRA's testimony. It was his right to give it the credibility and weight he believed it deserved. The fact that Appellant does not believe that the CRA's testimony justifies the imposition of the disciplinary demotion does not mean the Hearing Officer committed reversible error when he made findings in a manner which the Appellant finds disagreeable. Again, we find based on this record that all of the Hearing Officer's findings are supported by record evidence and reasonable given any applicable law, rule or facts.

Because Appellant has offered no valid reason for finding that the Hearing Officer erred in upholding the disciplinary demotion, the Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on October 17, 2019, and documented this 21st day of May 2020.

BY THE BOARD:



Karen DuWaldt, Co-Chair

Board Members Concurring: Tracy Winchester, David Hayes

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **DECISION and ORDER** on May 21, 2020, in the manner indicated below, to the following:

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For the Career Service Board