CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER,
STATE OF COLORADO

Appeal No. 47-14A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

EDWARD KELLER,
Appellant-Petitioner,

vs.

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

Jamal Hunter, an inmate at the Downtown Detention Center, was transferred to the 4D Pod, where Denver Deputy Sheriff Edward Keller (Appellant) was working, supervising inmates. Hunter had suffered burn injuries to his genital area the week before, and Appellant was aware of this fact. On the day in question, while in the Pod but out of his cell, Hunter complained to Appellant about his wounds and demanded that he receive medical attention to change his bandaging. Appellant relayed this request to Medical staff who refused to do so at the time, stating that Hunter's situation was not an emergency and that they would deal with him in turn.

As Hunter's allotted time out of his cell was expiring, Appellant ordered him to lock down, that is, to go back into his cell. Hunter refused the request and stated to Appellant, "You are a racist motherfucker and you need to treat me better." Appellant approached Hunter, grabbed him by the shirt sleeve, pointed towards Hunter's cell and escorted the now-compliant Hunter to his cell.

As they reached the cell door, Appellant used his right hand to open the door. Appellant took a step forward and pushed Hunter's upper right arm into the cell with his left hand. This caused Hunter to spin towards his left approximately 90 degrees as his right side entered the cell first. Hunter attempted to steady himself placing his right hand on the door. He also told Appellant to, "Get your fucking hands off me."

Appellant then pushed Hunter's left shoulder with his right hand and pushed Hunter's chest with his left hand back into the cell. Appellant then grabbed Hunter's neck with both hands, in a choke hold, and forced Hunter down onto his bunk.

Appellant had his thumbs on the front of Hunter's neck with his fingers encircling Hunter's neck. He also pushed the left side of Hunter's head into the left wall of the cell.

Deputy Ford, who had followed the pair to Hunter's cell, attempted to assist Appellant. Sergeant Mazzei heard the commotion, called for additional assistance from Deputy Ness, and entered the cell with his Taser. Sgt. Mazzei deployed his Taser in an attempt to subdue Hunter with less than optimal results. The prongs of the Taser failed to lodge in Hunter's skin, though the wires from the Taser managed to shock Mazzei, Ness and Appellant.

Deputy Enriquez joined the fray and began applying pain to Hunter's ankle with his nunchucks. Appellant pushed Hunter's head to the floor and Hunter was turned face-down. Sgt. Mazzei disconnected the prongs and wires from his Taser and stunned Hunter in the back, incapacitating him. Appellant sat on Hunter's legs and handcuffed him behind his back. Appellant and Deputy Ford then lifted Hunter and took him away, as six more deputies arrived on the scene.

Eventually, Hunter filed a lawsuit against the City and several deputies. During the course of that litigation, Appellant was forced to give a deposition. At that deposition, Appellant testified, under oath, offering statements that were not true and which contradicted his prior reports and statements regarding this incident.

For example, in the deposition, Appellant denied that he had his hands around Hunter's throat. Appellant also falsely claimed that Hunter had initially resisted aggressively, that Hunter had turned on him "aggressively and violently, that Hunter had taken an aggressive step towards him and that Hunter had adopted a "fighting stance."

In addition, during the course of the investigation of the incident, Appellant also made false statements. For example, he falsely reported that he thought Hunter was going to start a fight because Hunter was going to swing at him, falsely claimed that his hands were not around Hunter's neck, and false claimed the only reason he took down Hunter was to avoid him or Ford from being hit by Hunter.

As a result of these false statements, the Department of Safety, Denver Sheriff Department (Agency) dismissed Appellant for Commission of Deceptive Acts pursuant to Agency internal regulation RR 200.4.2.[1] Appellant appealed his discharge to a Hearing Officer.

The Hearing Officer, employing the burden of proof in our new Rule 20, held that Appellant had failed to meet his burden of demonstrating the Agency's action to be

[1] The Agency also charged Appellant with other rules violations justifying his dismissal, such as Use of Inappropriate Force and Conduct Prejudicial.

clearly erroneous. Accordingly, the Hearing Officer upheld Appellant's discharge. Appellant has appealed the Hearing Officer's decision to this Board.[2]

Appellant first argues that the Hearing Officer erred in applying Rule 20 to his appeal, because when the appeal was originally filed, Rule 20 was not yet in existence. Prior to the passage of Rule 20, appeals of disciplinary actions by members of the Sheriff Department were subject to *de novo* review by the Hearing Officer, with the burden of proof resting with the Agency to prove by a preponderance of the evidence both the acts of misconduct and the appropriateness of the discipline imposed.

Rule 20 eliminates the requirement of *de novo* review of disciplinary actions within the Sheriff Department and places the burden on the appealing employee to demonstrate that the Agency's actions were clearly erroneous.

We believe the Hearing Officer did not err in applying Rule 20 to this appeal because the effect of Rule 20, shifting the burden of proof from the Agency to the appealing employee, is procedural in nature and not substantive. [3] The Rule, therefore, can be applied retroactively to cases pending at the time of the adoption of the Rule. *See, e.g., People in the Interest of R.F.A.*, 744 P.2d 1202, 1204 (Colo. App. 1987) ("changes in procedural law are applicable to existing causes of action, unless a contrary intent is expressed in the statute. *Krumback, supra*. Changes in the burden of proof are procedural and should be applied retroactively.", citing *Krumback v. Dow Chemical Co.*, 676 P.2d 1215, 1218 (Colo.App.1983)). *See also, Brownson-Rausin v. Industrial Claims Appeals Office*, 131 P.3d 1172, 1178 (Colo. App. 2006) ("Section 8–42–107(8)(b)(II) establishes procedures for the determination of MMI and the allocation of the burden of proof. Its enactment did not deprive or impair any vested right belonging to claimant.

Thus, because the statute effects a change that is procedural, it may be applied retroactively."); *United Securities Corporation v. Bruton* 213 A.2d 892, 893-4 (D.C.Ct.App.1965) ("Although the entire transaction occurred prior to the effective date of the Uniform Commercial Code, the trial occurred after the effective date, and the burden of proof, a procedural matter, was controlled by the law existing at date of trial. There is no vested right in a rule of evidence, and a statute relating solely to procedural law, such as burden of proof and rules of evidence, applies to all proceedings after its

[2] The Hearing Officer upheld many of the other rules violations for which the Agency issued a penalty of discharge but found those penalty assessments to be clearly erroneous and, as a result, reduced those penalties to suspensions. The Agency has filed a cross-appeal of the Hearing Officer's decisions to reduce those penalties.

[3] While our issue was not before the Court of Appeals, in the case of *Marshall v. Civil Service Commission*, 401 P.3d 96 (Colo.App. 2016), the Court plainly refers to the Commission rule which placed the burden of proof on police or firefighters appealing disciplinary decisions of the Executive Director of Safety on the employee as a procedural rule.

effective date even though the transaction occurred prior to its enactment."). The Hearing Officer correctly applied Rule 20.[4]

Appellant further argues that the Hearing Officer erred in applying Rule 20 to this case because previous cases had been heard after Rule 20 had been enacted but the Hearing Officers chose not to apply it, presumably because those cases had been initiated before the Rule had been adopted. This, however, does not persuade us that this Hearing Officer erred.

In those other cases, the parties, regardless of whether they actually agreed, failed to object to the use of the old rule and, therefore, never brought this issue before the Board for a determination. We see no reason, and, in any event, lack jurisdiction, to determine whether the Hearing Officer erred in those cases by applying the old burden of proof.

Nevertheless, given our decision today, all Appellant has demonstrated is that had the issue come before us in any of those other cases, we would have ruled in favor of the retroactive application of Rule 20 and its new burden of proof. The Board's previous lack of attention to this issue is not indicative of an intent for the rule to have been applied only prospectively, but only a result of no party having raised this procedural issue on any appeal.

Appellant also asserts that the Hearing Officer erred in applying Rule 20 to this appeal because the Agency waived and forfeited its right to have Rule 20 apply. According to Appellant, the Agencies failure to insist on the application of Rule 20 to the cases previously referenced acted as a waiver of the ability to ask for the application of Rule 20 in this case.

We do not see, however, how the Agency's failure to act in prior cases waived any right it might have had in this case, and, indeed, we hold that the Agency's failure to request the application of Rule 20 in prior cases did not waive its ability to ask for its application in this case.

Further, as noted by Appellant at page 8 of his brief, waiver is the intentional relinquishment of a known right or privilege. *Dept. of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1994). Rule 20 is neither a right nor a privilege possessed by the Agency or the Appellant and the Rule is not something that can be waived in the traditional sense. Rather, more properly, a party or parties to a hearing can make a request of the Hearing Officer to apply or not apply a rule, or to apply or interpret a rule in a particular way, but the party itself can do no more.

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[4] Appellant cites to the case of *Abromeit v. Denver Career Service Board*, 140 P.3d 44 (Colo.App. 2005) to support its position that the Hearing Officer could not apply Rule 20 retroactively. We have carefully reviewed *Abromeit* and see noting in that decision which leads us to believe that the Hearing Officer in our case erred or that the authority supporting the Hearing Officer's decision is in any way suspect or otherwise inapplicable to this case.

It is the Hearing Officer that applies and interprets Career Service Rules at hearing and the Agency cannot dictate to the Hearing Officer how a rule should be interpreted or whether or how that rule should be applied. A Career Service Rule simply is not something the Agency has the right or ability to waive.

The determination as to whether or how a Career Service Rule should be applied at any hearing, is, in the first instance, a decision solely within the province of the Hearing Officer and is not something "possessed" by either an Agency or Appellant to the extent that either could, on its own initiative, waive the its application.

Forfeiture is different from waiver. While waiver is the "intentional relinquishment or abandonment of a known right," "forfeiture is the failure to make the timely assertion of a right," *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

First, the Agency's motion for application of Rule 20 was made within the time limitations for the filing of motions set by the Hearing Officer. The assertion of the application of Rule 20 was, therefore, timely.

Second, as noted directly above, our Rule 20 and its application, is not a "right" possessed by either the Agency or Appellant. Rule 20 is a procedural Rule implemented by our Hearing Officers and applied by them in accordance with their charge to conduct hearings. Forfeiture is simply inapplicable here, but even if the concept could be applied, the facts of the case do not support Appellant's claim of forfeiture.

Appellant also claims the Hearing Officer erred in applying Rule 20 because the Agency should have been precluded from asking for application of the Rule based on the doctrine of laches

First, as noted by the Agency in its brief, laches is an equitable remedy and the Hearing Officer properly determined that he is not authorized to sit as a court of equity. Second, even if the Hearing Officer could grant such an equitable remedy, we do not believe it would be justified in this case; we perceive no unconscionable delay on the part of the Agency nor do we perceive any prejudice worked upon the Appellant.

In any event, as we noted above, the Agency filed its motion for application of Rule 20 within the deadline set by the Hearing Officer for the filing of motions; the motion, therefore, was timely under the rules of pre-hearing procedure set by the Hearing Officer.

If Appellant was somehow caught off guard by the Agency's motion he could have asked for more time to adjust his case preparation to better meet his new burdens, but we see no argument advanced by Appellant in his brief that he sought this relief and that it was unreasonably denied by the Hearing Officer.

And while we acknowledge that this case took an extremely long time to resolve, our review of the record does not demonstrate that the delay in this matter coming to hearing prejudiced Appellant's ability to present his case. In sum, we find no error in the Hearing Officer's application of Rule 20 to these proceedings.

Appellant further argues that the Hearing Officer erred in in affirming the Agency's determination that he committed deceptive acts. But our review of this record demonstrates unequivocally that the Agency was not clearly erroneous in determining that Appellant had committed deceptive acts. Unequivocal videos of the incident demonstrated that Appellant lied during his deposition and that he lied during the investigation of the incident.

The Hearing Officer could infer from the evidence; from the gross disparity between statements made by Appellant and the videos of the event (as well as a prior written statement offered by Appellant), that those disparities were not accidental or the result of faulty memory[5].

In any event, it was not the Agency's responsibility to prove by a preponderance of the evidence that Appellant committed the deceptive acts, but rather, it was Appellant's burden to demonstrate that the Agency was clearly erroneous in concluding that he had committed those deceptive acts. Appellant's evidence fell woefully short of meeting that burden.[6]

Appellant also claims that his penalty should be mitigate because of the delay in prosecuting his discipline. First, we have previously held that there is no right to mitigation for delay absent prejudice suffered by the Appellant. The Hearing Officer analyzed this claim and found no actual prejudice suffered by Appellant. We find that factual determination supported by the record.

In addition, we note that some of the delay in prosecuting this case resulted from unreasonable discovery demands made by Appellant himself. Appellant is not entitled to mitigation stemming from delay that he, himself was responsible for.

Further, while there was indeed a considerable time gap between the time Appellant had his interaction with Hunter and the time discipline was imposed and litigated, we note that the driving force behind the discipline was Appellants deceptive statements.

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[5] In fact, on numerous occasions in the record, Appellant made his deceptive statements, that is, he told his lies, directly after having had the opportunity to review the videos of the incident and have his recollection of events refreshed.

[6] At pages 12 and 13 of his brief, Appellant argues that the Hearing Officer's factual findings are flawed. This argument fails if, for no other reason than each fact found by the Hearing Officer is supported by record evidence. Appellant finds fault with the Hearing Officer's findings because Appellant believes that the Hearing Officer should have interpreted the evidence differently. This, however, does not demonstrate that any factual finding made by the Hearing Officer is clearly erroneous, rather, all that it proves is that the Hearing Officer's interpretation of record evidence did not match up with the interpretation of that evidence favored by Appellant.

These statements, however, did not occur until some three years after Appellant's interaction with Hunter, in that they were made while Appellant was being deposed during the course of Hunter's federal civil rights lawsuit. The Agency could not have brought Appellant up on charges of making deceptive statements until those statements had been actually made. In sum, the time frames involved in this discipline do not warrant the imposition of a mitigated penalty.

For all these reasons, the Hearing Officer's decision upholding the discharge of Appellant is AFFIRMED.

The Agency has also appealed the Hearing Officer's decision. Specifically, the Agency takes issue with the numerous instances where the Hearing Officer agreed with the Agency and found that the Agency had reasonably concluded that Appellant had committed rules violations, but also found that the Agency was clearly erroneous in determining the particular violations warranted the discipline of discharge, whereby the Hearing Officer modified the penalty on those rules violations.[7]

The Agency seeks a determination that the Hearing Officer should not have modified those penalties to suspensions and seeks the re-imposition of the penalty of discharge for all of the rules violations.

Appellant can only be discharged once. He cannot be any more fired than he already is. Because we cannot offer any meaningful relief to the Agency, we dismiss its appeal as being moot.

SO ORDERED by the Board on January 17, 2019, and documented this 20th day of June 2019.

BY THE BOARD:

Neil Peck, Co-Chair

Board Members Concurring: Karen DuWaldt, Patricia Barela Rivera, Tracy Winchester

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[7] Specifically, the Hearing Officer dismissed the charge that Appellant had violated the prohibition against making misleading or inaccurate statements as it applied to Appellant's initial written statement concerning the incident with Hunter, finding the statement was, essentially accurate. The Hearing Officer agreed with the Agency that Appellant had commit6ed Aggravated Conduct Prohibited by Law but modified the discipline for that violation from discharge to a sixty-day suspension. The Hearing Officer ruled in the same fashion concerning charges brought of Conduct Prejudicial, Use of Inappropriate Force, Abuse of Prisoners, and a violation of Executive Order 135 which prohibits violence in the workplace.

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **DECISION AND ORDER** on June 20, 2019, in the manner indicated below, to the following:

Career Service Hearing Office
CSAHearings@denvergov.org

Career Service Board
CareerServiceBoardAppeals@denvergov.org

City Attorney's Office
dlefiling.litigation@denvergov.org

Donald Sisson
dsisson@elkusandsisson.com

Lucas Lorenz
llorenz@elkusandsisson.com

J. Andrew Nathan
anathan@nbdlaw.com

Marni Nathan Kloster
mkloster@nbdlaw.com

Nick Poppe
npoppe@nbdlaw.com

SafetyHR
safetyHR@denvergov.org

Alfredo Hernandez
alfredo.fernandez@denvergov.org

Patrick Firman, Sheriff
patrick.firman@denvergov.org

Troy Riggs, Executive Director, DOS
troy.riggs@denvergov.org

For the Career Service Board