[1]CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 31-13A

IN THE MATTER OF THE APPEAL OF

[redacted],

Respondent,

vs.

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

Petitioner.

ORDER ON PETITION FOR REVIEW

Denver Deputy Sheriff [redacted] pled no contest to charges of misdemeanor child abuse under C.R.S. Sections 18-6-401(1) and (7)(b). The Denver Sheriff's Department ("Agency" or "DSD") believed the plea and the underlying conduct violated various Career Service Rules and Agency policies and discharged him. [redacted] appealed his discharge. A Hearing Officer determined that [redacted] plea and underlying conduct amounted to violations of: CSR 16-60 L as applied to Departmental Orders 300.11.1 and 300.11.6; CSR 16-60P; and CSR 16-60Y. Nevertheless, the Hearing Officer ordered [redacted] reinstatement and imposed a ninety (90) day suspension in lieu of termination. The Agency appealed that decision. [redacted] did not appeal the Hearing Officer's findings or imposition of punishment.[2] Consequently, the only issue for our review is whether the Hearing Officer erred when he reduced the discipline imposed on [redacted] from termination to a ninety-day suspension. We believe he did. We reverse and re-instate the Manager of Safety's imposed discipline of discharge.

After reviewing the record and the Hearing Officer's decision, we are left with the firm conviction that the Hearing Officer improperly substituted his judgment for that of the Manager's. We have held previously that an Agency's imposed discipline should be upheld if that discipline is within the range of alternatives available to a reasonable and prudent administrator. *Adkins v. Division of Youth Services, Dept. of Institutions*, 720 P.2d 626, 628 (Colo.App.,1986); *Colorado Dept. of Human Services v. Maggard*, 248 P.3d 708 (Colo. 2011). We have also held that discipline imposed by an Appointing Authority should be affirmed by a hearing officer unless that discipline has been imposed arbitrarily, that is, based substantially on

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[2] [redacted] had also alleged that this discipline was a product of prohibited retaliation. The Hearing Officer rejected this claim and [redacted] did not appeal that finding.

considerations unsupported by record evidence, or that discipline is clearly excessive.[3] *In the matter of the Appeal of Steven Economakos and the Department of Safety*, Case No.28-13A.

The Hearing Officer determined that in this case, the punishment of discharge was clearly excessive. We disagree. We note, as did the Hearing Officer, that the Department of Safety has a policy that the Agency would never hire an individual who has been convicted of child abuse. While we do not find this policy unreasonable, we also believe that neither this Board, nor the Hearing Officer is in a position to determine the wisdom of that policy. Given that the Agency will not hire any individual convicted of the crimes to which Appellant has pled, we hold that the penalty of discharge for an employee convicted of crimes which would otherwise have disqualified from initial employment is within the range of alternatives available to a reasonable and prudent administrator.

The logical extension of the Agency's policy of not hiring convicted child abusers, as implemented here by the Manager of Safety, is that it will not employ a convicted child abuser, that is, it will not have convicted child abusers working for it. Again, this is not unreasonable. From a policy standpoint, we do not discern any reason to divide the universe of convicted child abusers into two groups: (1) convicted child abusers who are ineligible to work for the Agency because they ***are*** convicted child abusers; and (2) convicted child abusers who are eligible to work for the Agency, despite their convictions, only because they are currently working for the Agency. The Agency policy is: convicted child abusers will not work for us. We find that policy in conflict with neither sound public policy nor our Career Service rules.

Our holding today should not be interpreted as a hard and fast rule which absolutely prohibits individuals convicted of child abuse from being able to continue their employment with the City. The Manager of Safety (or now, the Executive Director) may encounter a situation where, in his or her discretion, such an individual might be permitted to retain their employment. We hold only that, given the existence of the no-hire policy, discharge for having been convicted of this otherwise disqualifying crime, is neither excessive nor unreasonable.

The Hearing Officer, in finding mitigating circumstances, concluded that the child abuse committed by [redacted] was not "egregious." We note that we see nothing in the record which would indicate the hiring prohibition against convicted child abusers has an exception for those who were convicted of non-egregious child abuse.[4] There is no indication that the Agency will hire convicted child abusers who engaged in so-called non-egregious child abuse. Consequently, the perceived egregiousness of the child abuse conviction is not relevant to the Hearing Officer's determination. Accordingly, we disagree with Hearing Officer's apparent legal conclusion that [redacted] misconduct was not sufficiently severe to warrant the penalty of discharge.

We also note that the Hearing Officer did not take exception to the Manager's determination that the misconduct was properly categorized in the Agency's disciplinary matrix as one warranting a presumptive penalty of discharge. Rather, the Hearing Officer determined that the Manager gave insufficient weight to what he believed were mitigating factors sufficient

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[3] See *City and County of Denver v. Weeks*, 10CA1408 (Colo.App. 2011)(unpublished), *cert denied*, 2012SC53 (2012).

[4] While we can understand the difference, as indicated in the Colorado Revised Statutes, between instances of felony child abuse as opposed to misdemeanor child abuse, we see no evidence that the Agency's policy makes any such distinction; and frankly, we find the entire concept of non-egregious child abuse disturbing.

to warrant the matrix's mitigated 90-day penalty. But again, this appears to be a case of the Hearing Officer substituting his judgment for that of the Manager's. We do not believe this record can be read so as to require a conclusion that the mitigating factors were so overwhelming that the failure to impose the mitigated penalty amounts to an imposition of an arbitrary, unreasonable or excessive penalty. The record indicates that the Manager weighed mitigating and aggravating circumstances and found insufficient reason to deviate from the presumptive penalty. On this record, we do not find the Manager's decision to be arbitrary, unsupported by record evidence or clearly excessive.

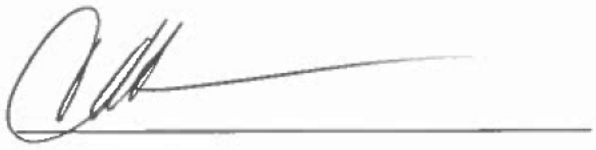
The Hearing Officer also concluded that [redacted] work record demonstrated he would be able to reform his off-work misconduct and that, therefore, the mitigated penalty was warranted. In other words, the Hearing Officer determined that [redacted] work record is predictive of [redacted] future behavior and that said future behavior would not include a repeat of his misconduct. Despite his work record, [redacted] engaged in the child abuse which resulted in his conviction. If his work record were an accurate predictor of his future behavior, the child abuse would never have occurred. As such, any factual or logical connection between [redacted] work record and his future behavior is belied by the conviction.

In addition, [redacted] relatively recent misconduct (which was previously before us) and this incident share a concerning similarity: a lack of sound judgment. In addition, we are struck by the fact that [redacted] is charged with the care and control of prisoners, who individuals totally under his sphere of influence. He committed a criminal act of abuse against his daughter, who similarly is an individual who was under his sphere of control. All of the above leads us to the conclusion that the Manager of Safety acted reasonably and within the bounds of our Rules in discharging [redacted].

The Hearing Officer's decision is REVERSED.

SO ORDERED by the Board on July 3, 2014, and documented this day of August, 2014.

BY THE BOARD:



Chair (or Co-Chair)

Board Members Concurring:

Patti Klinge

Derrick Fuller

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **ORDER** on August 8, 2014, in the manner indicated below, to the following:

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For the Career Service Board