

DECISION AFFIRMING TERMINATION OF EMPLOYMENT

ROBERT ROYBAL, Appellant,

v.

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

I. INTRODUCTION

The Appellant, Robert Roybal, appeals his dismissal from employment with the Denver Sheriff's Department (Agency) on September 23, 2015, for alleged violations of specified Career Service Rules and Agency regulations. A hearing concerning this appeals was conducted by Bruce A. Plotkin, Hearing Officer, on March 9 and March 18, 2016. The Agency was represented by Assistant City Attorney Natalia Ballinger, while the Appellant was represented by Don Sisson, Esq., of the law firm Elkus Sisson and Rosenstein. Agency exhibits 1 – 9, 11, and 13 - 16 were admitted. Appellant exhibits A - O were admitted. The following witnesses testified for the Agency: Civilian Review Administrator Shannon Elwell and Sergeant Earl Sims. The Appellant testified on his own behalf during his case-in-chief, and called former Deputy Daris Hayes.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules (CSRs)¹: 16-60- A; 16-60 E; 16-60 J; 16-60 O; 16-60Y; 16-60 Z; or 16-60 L., as it pertains to Denver Sheriff Departmental Rules and Regulations (RR) 200.4.2; 200.16; 300.11.6; 400.4.1; 400.5; 400.6; or 300.19.1 as it pertains to Department Order 2440.1P.
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to terminate his employment conformed to the purposes of discipline under CSR 16-20;

The parties agreed, and I find, this is an “all-or-nothing” case. If it is more likely than not that Roybal observed an inmate conducting one or more pat searches of another inmate, then, since he admits he was responsible to intervene and stop such conduct, his failure to do so and denial that he observed such conduct violates every alleged rule. If Roybal, more likely than not, did not see any pat search, then he did not violate any of the alleged rules and his discipline must be reversed.

¹ Since this appeal was filed, the Career Service Rules have been revised. Because the previous version of the rules were in effect at the time discipline was assessed, that version controls the outcome in this appeal.

III. FINDINGS

The Appellant, Robert Roybal, was a deputy sheriff in the Agency for four years. His duties included the care, custody and supervision of inmates. On the date of the incident at issue in this case, he had been assigned to the laundry unit for over one year.

On May 14, 2014, Roybal was the laundry officer in one of the inmate residential pods, pod 4E, in the Downtown Detention Center (DDC). Another deputy, Hayes, was the housing officer for the pod. While the post orders for the two positions differed, both were responsible for stopping improper inmate behaviors, including inmate-to-inmate pat searches which were sometimes used by tier porters (inmates with special privileges) to haze inmates new to the pod. [Elwell testimony]. The Agency maintains a zero-tolerance policy against hazing and requires its deputies to report observed hazing immediately. [Id.; Department Order 2440.1P. B.2.b]. Roybal agreed if he saw such conduct by inmates, it was his responsibility to stop it immediately. No inmate, including tier porters, is allowed to pat search another inmate.

Video evidence from May 14, 2014 shows a tier porter directing laundry exchange and directing inmate movement inside the pod. The tier porter repeatedly performed pat searches at the housing officer's desk on other inmates.

Video surveillance shows Roybal from his left side, so that when his head turned toward his right, in the direction of the pat searches, his eyes could no longer be seen. The video recording showed his head turned in the direction of the tier porter who was starting to pat search another inmate, [Exhibit 9 @ 12:15:18-12:15:21]. Roybal's head turned again toward the same pat search and his head remained turned toward that activity until it finished. [Id. @ 12:15:24-12:15:27]. During another pat search by the same tier porter, Roybal turned his head toward the pat search while the inmate had his hands and legs spread wide and the tier porter was frisking him from behind. [Id. @ 12:15:39-12:15:40]. Roybal turned a third time toward the tier porter while the tier porter's hands were on the back of an inmate who had his arms spread on the sheriff's desk in front of him. Roybal's head remained fixed in that direction for about five seconds while the tier porter kicked apart the inmates' legs and frisked him. [Id. @ 12:16:28-12:16:33].

Following an inmate complaint about the hazing, an investigation ensued. That investigation began by focusing on Hayes' conduct on May 14, 2014, and not on that of Roybal. Only during the investigation of Hayes did the Agency expand its investigation to include Roybal. Roybal was placed on investigatory leave about 16 months after the incident.

A pre-disciplinary meeting was held on September 8, 2015. [Exhibit 4]. Roybal attended with legal counsel. On September 23, 2015, the Agency served a notice of termination of employment on Roybal. This appeal followed timely on October 2, 2015.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR § 19-10 A.1.a, as a direct appeal of a termination. I am 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 Roybal violated one or more cited sections of the Career Service Rules, and to prove its decision to

terminate his employment was reasonable under CSR 16-20. Roybal claimed the standard of proof by which the Agency must prove its claims is "indisputable evidence." Contrary to Appellant's claim, I apply the standard of a preponderance of the evidence.

Appellant claimed the Career Service Board announced a new standard of evidence to be followed by its hearing officers. To provide some context to Appellant's assertion, in In re Lewis, CSB 51-14A (11/5/15), the Career Service Board stated:

This credibility determination was within the Hearing Officer's province. Deputy Lewis claimed he did not see the punch at the time it was thrown. The video of the incident does not provide indisputable evidence to the contrary. The Hearing Officer's finding that Deputy Lewis did not see the punch is supported by record evidence.

In re Lewis, CSB 51-14A, 7 (11/5/15).

Nothing in the context of the Board's finding there, or elsewhere in its Order, suggests it intended to announce a new and previously-non-existent standard of review which would, in a passing comment, depart from over 50 years of precedent in this forum, and would usurp a generally-held standard for administrative hearings and civil cases generally. [In re Weeks, CSB 26-09A, (12/23/10), (rev'd on other grounds); Bender v. Clark, 744 F.2d 1424, 1429 (10th Cir. 1984); Steadman v. S. E. C., 450 U.S. 91, 91 (1981)]. Appellant's "indisputable" standard would place a more onerous standard of proof on review of agency disciplinary actions than on criminal trials. I decline to follow Appellant's siren call to shipwreck firmly-established precedent.

C. Determination of central fact issue.

Both parties agreed if Roybal observed one or more inmate pat searches, and did nothing to intervene, he would have violated most or all the rules alleged by the Agency. For that reason, I begin with that crucial question: did Roybal observe one or more inmate-to-inmate pat searches on May 14, 2014?

The most important piece of evidence was Exhibit 9, the silent video recording in pod 4E on May 14, 2014. That exhibit recorded one view of the activity in 4E between 12:02 p.m. and 12:44:p.m. During that time, Roybal looked toward a tier porter three separate times while the tier porter conducted pat searches of other inmates who were entering the pod to exchange their laundry. Roybal protested it could not be concluded he saw any of the pat searches for the following reasons.

1. Roybal's eyes.

Elwell insisted it was not possible Roybal looked in a direction that was different from the direction his head turned. [Elwell testimony]. That intractable testimony, in view of the evident possibility, was not more credible than Roybal's contrary view. Instead, the most persuasive evidence was the recording itself, from which I conclude it is more likely than not that Roybal viewed 3 instances of pat searches by an inmate. That conclusion derives from the following evidence.

Roybal correctly stated the recording never showed his eyes during the portions of the video recording when his head turned in the direction of the pat searches. At hearing, Roybal claimed he often turned his head one way but looked another, in order to catch inmates passing contraband or attempting to acquire excess or different clean laundry. [Roybal testimony].

It is pertinent that, during his IA interview, on August 4, 2014, Roybal did not explain this misdirection technique. Instead, when the interviewer pointed out where, in the recording, Roybal's head turned toward the pat searches and asked Roybal "[d]o you know where you may have been looking when you were looking in that direction as he's being searched?" Roybal simply stated he did not see them. [Exhibit 3-13]. It is also noteworthy that Roybal did not protest the interviewer's repeated statement that he (Roybal) was looking in the direction of and at the inmate pat searches), as shown in these exchanges.

IA: But at this particular point, at 12:15:39 in the video, you're clearly looking in the direction of this area here where the inmates are being searched?

Roybal: "I didn't see it."

IA: You don't recall seeing this inmate getting searched, as well, at 12:16:33 of the video?

Roybal: No.

IA: And after viewing the video where it appears as though you were – you saw or were looking in the direction while the inmates were being searched, it's your statement today that you didn't see that?

Roybal: Yes... I was probably so focused on my exchange process, you know, I assumed Deputy Hayes had – had that part of the building, you know?

[Exhibit 3-14, 3-17, 3-18].

Roybal explained to the IA interviewer a second reason he may not have seen what occurred directly in front of him: his focus was on the laundry exchange and not on inmates at the pod officer's desk. [Exhibit 3-18]. At the same time, Roybal acknowledged the recording showed inmate-to-inmate pat searches were occurring "right underneath my nose." [Exhibit 3-20], and he did not explain his misdirection technique at that time either.

In his pre-disciplinary meeting on September 8, 2015, some 13 months after his IA interview, neither Roybal nor his attorney mentioned the misdirection technique which Roybal later claimed at hearing. During the pre-disciplinary meeting, Roybal's attorney acknowledged three instances where the Agency claimed Roybal was looking in the direction of illicit pat searches, but did not mention the misdirection technique. Instead Roybal's attorney simply adopted Roybal's earlier statement that he simply did not see the pat searches. "[L]et's accept him at his word. He didn't see it. If he would have saw it, he would have done something about it. It wasn't his responsibility in the first place." [Exhibit 4-10].

2. Not my job.

Another reason Roybal claimed he did not see the pat searches occurring "right under my nose" was his co-worker was the housing officer for 4E that day. Roybal explained the duties of housing and laundry officers are different. The housing officer selects and is primarily responsible for the tier porters, thus, according to Roybal, he was not paying attention to and did not see the pat searches even though his head turned in that direction.

Regardless who had primary responsibility, Roybal agreed he shared the duty to stop wrongful inmate behavior, including inmate-to-inmate pat searches. [Roybal testimony; Roybal

cross-exam]. For reasons stated above, it is apparent by a preponderance of the evidence, that Roybal saw three pat search events on May 14 and did not intervene.

D. Career Service Rule Violations

1. CSR 16-60 A. Neglect of duty.

To sustain a violation under CSR 16-60 A, the Agency must establish that Appellant failed to perform a known duty. *In re Gomez*, CSA 02-12 (5/14/12), citing *In re Abbey*, CSA 99-09, 6 (8/9/10). The Agency claimed Roybal violated this rule because he acknowledged he was under a duty to provide for the care, custody and safety of inmates and failed to protect inmates he saw being pat searched by another inmate in violation of that duty. Roybal acknowledged the duty, and agreed he was obligated to stop inmate-to-inmate pat searches under that duty, but stated he did not see any such pat searches on May 14, 2014.

At hearing, Roybal testified and cross-examined Agency witnesses at length concerning what he actually viewed as opposed to the direction his head turned in each of the three instances when the video showed his head turning toward a pat search. Roybal claimed each time his head turned toward a pat search, he was engaging in a visual deception, and actually turned his eyes in a different direction than his head. He claimed the purpose of the deception was to catch the frequent attempts by inmates to introduce or exchange contraband, or to catch inmates attempting to double up or re-exchange laundry. Roybal compared his deception to a quarterback "looking off" a receiver in order to confuse defenders.

In addition to being unconvincing just in the viewing of the pertinent video recording, Roybal undermined his later explanation by his earlier IA interview. During the IA investigation of the May 14, 2014 inmate pat searches, the IA interviewer asked Roybal directly where he was looking when, at 12:15:20, he turned in the direction of an inmate pat search. Roybal answered:

Generally what I do is I'll have the inmates they're – as you can see they're checking their items on the table. Also what I look for when these guys come through is I need to make sure that these guys aren't doubling up. Some of these guys try to jump back in line; some of these guys will try to go back to their caves and damage their items if they don't like them and bring them back. So what I look for is the inmates that have come through. I'm just watching the open pod. I got a lot of inmates floating around,

[Exhibit 3-13].

In the same interview, the interviewer pointed out another instance, at 12:15:39, when Roybal's head turned toward a pat search. The interviewer commented Roybal is clearly looking in the direction of a pat search. Roybal responded simply "I didn't see it." [Id].

The interviewer pointed out a third instance, at 12:16:33, when Roybal turned in the direction of a pat search. The interviewer asked Roybal if he remembered seeing the pat search. Roybal replied "no." [Exhibit 3-14].

It is unlikely Roybal would have remembered his "look-off" explanation only in time for hearing, yet forgot this critical explanation at a time closer to the incident when, by his own account, he first saw the video recording.

The most convincing evidence - the partial recording of the activity in pod 4E on May 14, 2014 - along with the Roybal's IA interview and pre-disciplinary meeting which, together, tended

to disprove his later denial, prove, by a preponderance of the evidence, that he viewed three instances of inmate-to-inmate pat searches. Consequently, Roybal's failure to intervene to stop the pat searches, in each instance, was a separate violation of his duty to care for inmates under this rule.

The Agency also claimed Roybal's dishonesty during the IA investigation was a violation of his duty to be honest. [Elwell testimony]. The violation of another Career Service Rule, does not automatically violate this rule. The Agency's view of CSR 16-60 A. as a separate harm for violating another rule would impermissibly double almost all other rule violations. In re Robinson, CSA 03-13, 4 (6/18/13); see also In re Mitchell, CSB 57-13A, 3 (11/7/14).

2. CSR 16-60 E. Any act of dishonesty, which may include, but is not limited to:

- 1. Altering or falsifying official records or examinations;**
- 2. Accepting, soliciting, or making a bribe;**
- 3. Lying to supervisors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours.**

Having established that Roybal viewed three instances of inmate-to-inmate pat searches on May 14, 2014, his denial in his subsequent IA interview, that he saw any such activity, was an act of dishonesty under this rule.

3. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

As a Denver Deputy Sheriff, Roybal's duties included intervening to stop wrongful inmate behaviors. He acknowledged inmate-to-inmate pat searches were wrongful behavior requiring intervention to stop it. The evidence established that Roybal observed three instances of inmate-to-inmate pat searches on May 14, 2014. Each of his failures to intervene was a violation of his assigned work as a deputy under this rule.

4. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules. The Agency claimed the Appellant violated the following written policies.

RR 200.4.2. – Commission of a Deceptive Act.

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.

The same evidence which established a violation of CSR 16-60 E., above, also establishes Roybal departed from the truth in his IA interview by telling the interviewer he did not see inmate-to-inmate pat searches. The video evidence and his evolving responses prove, by preponderant evidence, that he saw the inmate-to-inmate pat- searches, rendering his statement to IA a deceptive act in violation of this Agency rule.

200.16 – Failure to Perform Duties

Deputy sheriffs and employees shall not fail to perform the required duties of their assignments.

Roybal's conduct under this rule was covered by other, more specific, violations. No more analysis is due hereunder.

300.11.6 – Conduct Prejudicial

Deputy sheriffs and employees shall not engage in conduct prejudicial to the good order and effectiveness of the department or conduct that brings disrepute on or compromises the integrity of the City or the Department or conduct unbecoming which:

(a) May or may not specifically be set forth in Department rules and regulations or the Operations Manual; or

(b) Causes harm greater than would reasonably be expected to result, regardless of whether the misconduct is specifically set forth in the Department rules and regulations or the Operations Manual.

The Agency's Conduct Prejudicial rule encompasses conduct well-beyond the scope of the Career Service conduct prejudicial rule, CSR 16-60 Z., which confines wrongdoing to actual harm to the Agency or the City, In re Jones, CSB 88-09A (CSB 9/29/2010). In contrast, the Career Service Board stated RR 300.11.16 prohibits "conduct that might otherwise appear to be minor, yet result in serious consequences or potential consequences." In re Redacted, CSB 31-12A, 3 (10/3/13). That case dictates that an employee of the Sheriff's Department may be punished for hypothetical harm as well as actual harm. In re Gale, CSA 02-15, 13 (11/23/15).

Under that broad standard, Roybal's observation of three instances of inmate pat searches, while apparently minor or funny to Roybal, was a violation of the basic rights of the subjugated inmates to be treated humanely, to be free from harassment, and to expect deputies to prevent or stop wrongful inmate behavior at the expense of another. Such willful neglect by Roybal's could reasonably have subjected the department and the City to legal liability, in violation of RR 300.11.6.(a), and (b).

400.4.1. – Cruel and Unusual Treatment of Prisoners

Deputy Sheriffs and employees shall not impose, attempt to impose, solicit another to impose or otherwise permit the imposition of indignities or cruel and unusual punishment on any prisoner.

400.5 – Harassment of Prisoners

Deputy Sheriffs and employees shall not taunt or harass any prisoner or encourage or permit others to do so. Deputy Sheriffs and employees shall not maliciously embarrass, intimidate or threaten any person or encourage or permit others to do so.

A tier porter's pat searches of other inmates on May 14, 2014, were harassment. Based on the evidence, above, Roybal observed three instances of those pat searches. Thus, his failure to intervene permitted the continuation of that harassment in violation of RR 400.5.

400.6 – Abuse of Prisoners

Deputy Sheriffs and employees shall not subject inmates to physical abuse or solicit or encourage others to do so. Physical injury or physical harm is not required to violate this rule.

Without the second sentence in this rule, it is doubtful the inmate pat searches on May 14, 2014 would have amounted to "physical abuse" in violation of the first sentence in this rule. However the addition of the second sentence makes clear that a low bar is established, and

infers that any uninvited touching which is objectively offensive² is included. For the same reasons stated previously, Appellant's failure to stop an uninvited and unlawful pat search conducted by another inmate established a violation of this rule.

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.

Department Order 2440.1 P —Human Relations/Code of Ethics and Standards of Conduct

1. Purpose: The purpose of this order is to prescribe a code of conduct for all employees of the Denver Sheriff Department (DSD), its volunteers, and its contractors regarding the treatment of employees, the public, and those individuals that have been entrusted to the custody of the Department....

2. Policy: Actions of officers and civilians that are inconsistent, incompatible or in conflict with the values established by this agency negatively affect its reputation and that of its officers. Such actions (or inactions) thereby detract from the Department's overall ability to effectively and efficiently protect the public, maintain peace and order, and conduct other essential business. Therefore, it is the policy of the Denver Sheriff Department that staff conduct themselves at all times in a manner that reflects the ethical standards consistent with the rules contained in this policy and otherwise disseminated.

Further, it is the policy of the Denver Sheriff Department that every DSD employee, volunteer, or contractor has the right to work in a professional environment free from discrimination, harassment, hazing, retaliation or intimidation. It is also the Department's policy that persons with whom we come in contact in the course of performing our duties or otherwise shall enjoy freedom from such discriminatory or harassing behavior. To this end, it is the policy of the Denver Sheriff Department that its staff, volunteers and contractors receive and be familiar with and adhere to the standards of conduct as explained and set forth in this Department Order.

Finally, because public confidence in the integrity of members of the Denver Sheriff Department (DSD) demands that we demonstrate the highest standards of conduct at all times, the Denver Sheriff Department maintains a zero tolerance for violations of any part of this policy.

...

6. Ethical, moral and lawful standards governing employee conduct: All employees, volunteers, and contractors of DSD are expected to adhere to the standards of conduct described in this Order. In addition, employees should refer to and are expected to abide by the Denver Sheriff Department Rules and Regulations, and any other federal, state or local laws, statutes or regulations governing expected conduct and lawful behavior.

7. Adherence to and Accountability for Delegated Authority: A brief and general description of the duties, responsibilities and the level of delegated authority to effectively accomplish the assigned tasks of each deputy sheriff rank are listed in the Department's Personnel Manual. The Denver Career Service Authority maintains a current

² For example, an inmate inadvertently backing into another might be uninvited contact, but would not be objectively offensive.

list of job descriptions for all civilian employees, including the level of delegated authority to effectively accomplish the assigned tasks, on the City and County of Denver website. Each employee will be held accountable for the delegated authority described. Also see DSD Rules 330.27.7 and 300.79.2.

A. Denver Sheriff Department Guiding Principles (also see Appendix A):
Employees of the Denver Sheriff Department, as well as Department volunteers and contractors, should conduct themselves according to the following guiding principles while performing their duties:

1. Being ethical and honest in everything we do or say;
2. Acting with respect to all, including other employees and the public;
3. Treating others as we would want to be treated;
5. Being objective, accessible, tolerant, flexible and adaptable;
7. Encouraging a harmonious, supportive environment, putting the team first and fostering positive working relationships;
8. Recognizing the humanity in others and being able to deal with difficult people and situations with compassion and concern;
9. Making reasonable decisions based on common sense and good judgment;
10. Taking personal responsibility and initiative to get things done;
11. Being proactive rather than reactive;
13. Setting a positive example for others to follow;
14. Having the courage to do the right thing;
16. Being accountable for everything we do;
17. Striving for excellence and continued self-improvement;
18. Demonstrating skill, knowledge and competency in carrying out all assigned duties.

B. Professional Standards of Conduct: All Department employees, contractors and volunteers shall adhere to professional standards of conduct and ethical code, including but not limited to the following:

1. Follow all jail policies, procedures and directions;
3. Observe restrictions on the use of force; not subjecting inmates to sexual, emotional or physical abuse or the use of unnecessary levels of force;
4. Respect and protect inmates' rights;
7. Assure safety and security as part of effective job performance;
9. Cooperate in investigations conducted by the Internal Affairs Bureau (IAB) or other law enforcement agencies;

8. Other Prohibited Conduct:

A. Conduct prohibited by Departmental Rules and Regulations

1. DSD employees...shall observe Departmental Rules and Regulations governing conduct, and not engage in conduct prohibited in such rules and regulations.

B. Discrimination, harassment, retaliation, and intimidation

2. No staff member shall perpetrate upon another or encourage conduct consistent with hazing at any time.

a. DSD has a zero tolerance policy far hazing. Hazing includes, but may not be limited to:

the persecution or harassment of another via assigning meaningless, difficult or humiliating tasks, and/or by exacting humiliating performance from, or playing rough practical jokes upon, an individual.

Hazing often (but not always) is directed at an individual who is considered new to a group or unit or under consideration for admission to a formal or informal "fraternity" and perpetrated by one or more veteran group members.

b. Any staff member who believes he/she has observed hazing, has belief or knowledge of its occurrence or believes he/she has been a victim of hazing shall report it immediately.

c. Any DSD member who perpetrates, is found to have encouraged such conduct, or fails to report such conduct is subject to discipline up to and including termination.

Subsection 8 of his rule is the cornerstone of the Agency's case. Subsections 1, 2, 6, and 7 are not enforceable or redundant. They are either explanatory, (sections 1, 2, and 6), unenforceably vague, (section 7.A.), or supplanted by more specifically-directed violations alleged elsewhere. (section 7.B.).

With respect to subsection 8, particularly subsection 8.B., the Agency has a zero tolerance policy against hazing. Deputies who observe hazing are required to report it, and the failure to do so subjects the deputy to discipline, up to and including dismissal. [Exhibits 8-6, 8-7; see *also* definition of hazing in Exhibit 8-2]. Based on my findings, above, Roybal observed a tier porter conducting pat searches of other inmates.

As defined by the Agency, hazing is "[t]o persecute or harass with meaningless, difficult or humiliating tasks, to initiate as into a real or imagined, formal or informal "fraternity" by exacting humiliating performance from, or playing rough practical jokes upon, an individual; to encourage such conduct." [DO 2440.1 P]. The tier porter's pat search of other inmates harassed them by meaningless subjugation to pat searches, and his kicking apart their legs could well have resulted in injury by such a rough activity.

Roybal's observation of the tier porter's conduct and failure to intervene more likely than not encouraged the continuation of that conduct. Certainly, the conduct would likely not have continued if Roybal had intervened. Consequently, Roybal's permitting a tier porter to continue to conduct pat searches of other inmates, even after viewing that conduct, was hazing as defined by RR 200.16.

The evidence established that Roybal observed yet failed to intervene in three instances of hazing in the form of pat searches by a tier clerk on other inmates. The evidence most relied on by the Agency in finding Roybal observed improper pat searches by a tier porter was segments of the recording from one of the security cameras in 4E, specifically at 12:15:10; 12:15:32; and 12:16:28. [Exhibit 9; Exhibit 2-10].

Roybal claimed, accurately, that Roybal's eyes cannot be seen at any point in the recording. Having viewed the video recordings described immediately above, I find it likely, by a preponderance of the evidence (not withstanding Appellant's assertion that a more stringent

standard of review applies) that, in each of the three specified instances when Roybal turned his head, he observed a pat search or a portion of a pat search which was a form of hazing as defined above. Consequently, his failure to report those instances of inmate hazing was a violation of Departmental Order 2440.1 P.8.B.2.c.

5. CSR 16-60 O. Failure to maintain satisfactory working relationships with co-workers, other City employees, or the public.

The Agency failed to produce evidence that any working relationship was harmed by Roybal's failure to intervene in the inmate pat searches he observed on May 14, 2014. Elwell determined that at least one inmate was upset that a reasonable person in Roybal's position would know his inaction would be harmful. [Elwell testimony]. However, this rule requires some evidence of an actual harm to a working relationship and none was provided. Accordingly, no violation was established hereunder.

6. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive Orders, or any other applicable legal authority.

“tier porters are not permitted to conduct pat searches of other inmates, as such searches are solely the responsibility of the deputies. This responsibility is not delegable to tier porters.” [Exhibit 2-6, n.1].

Sheriff Department post orders are “applicable legal authority” under CSR 16-60 Y. By observing, yet failing to intervene in three instances of pat searches, Roybal permitted a tier porter to conduct pat searches of other inmates in violation of this post order.

7. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

Elwell claimed the actual harm resulting from Roybal's conduct was an inmate bringing criminal charges against the tier porter who pat searched him. [Elwell testimony]. I respectfully disagree. First, there was no causal link between Roybal's failure to intervene in the pat search and the criminal charges. Second, it is not evident, by a preponderance of the evidence that, even if Roybal had intervened when he saw the inmate being searched, that his intervention would have prevented the inmate from bringing charges against the tier porter. Third, it was not shown the inmate who brought the charges was one of the inmates who Roybal observed being pat searched. Fourth, bringing criminal charges against a fellow inmate is not, per se, a harm to the City or to the Agency. No other actual harm was apparent from the evidence, thus no violation is found under this rule.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

A. Seriousness of the proven offenses

The Agency views dishonesty, particularly during the course of an investigation, as among the most egregious violations in its rules and regulations, and almost always results in the Agency's termination of the employment relationship. [See, e.g. In re Gale, CSA 02-15 (11/23/15); In re Valerio, CSA 22-14 (9/2/14); In re Kemp, CSA 19-13 (1/2/14)].

B. Prior Record

The Agency's notice of discipline cited no prior discipline. While discipline under the Career Service Rules strives to be progressive, a single violation of the Rules may result in termination. CSR 16-42A.1.3.

C. Likelihood of Reform

In light of Roybal's denial of any wrongdoing the likelihood of reform is unknown.

VI. ORDER

The Agency's termination of the Appellant's employment on September 23, 2015, is AFFIRMED.

DONE April 22, 2016.



Bruce A. Plotkin
Career Service Board Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 et seq. within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.