HEARINGS OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 05-06

DECISION

IN THE MATTER OF THE APPEAL OF:

JARED SIMPLEMAN,
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Deputy Jared Simpleman, appeals a thirty-day suspension assessed by his employer, the Denver Sheriff's Department, (Agency) on January 19, 2006. The Agency alleges the Appellant violated specified Career Service Rules (CSRs) and Agency regulations. The Appellant filed a timely appeal on January 20, 2006. A hearing concerning this appeal was conducted on April 21, 2006, by Bruce A. Plotkin, Hearings Officer. The Appellant was present and was represented by Reid Elkus, Esq. The Agency was represented by Joseph A. DiGregorio, Assistant City Attorney, with Major Deeds serving as advisory witness. Agency exhibits 1-7 were admitted. The Appellant offered no additional exhibits. The Agency presented the following witnesses: the Appellant as a hostile witness, Sgt. Kelly Bruning, Manager of Safety Alvin LaCabe, and Division Chief Ronald Foos. The Appellant testified on his own behalf.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant violated any of the following CSRs: 16-50 A. 1), 3), 14), 20), or CSR 16-51 A. 2), 5), 6), or 11);

B. if the Appellant violated any of the aforementioned CSRs, whether the discipline imposed conformed with, and fulfilled the purpose of, discipline under CSR 16-10.

III. FINDINGS

The Appellant is a deputy sheriff at the Agency, assigned to the Denver County Jail. On Thanksgiving Day, November 24, 2005, the Appellant was assigned as "Observation Officer" in Building 6. Building 6 is a special management unit that houses inmates who are poorly behaved, mentally ill, those in protective custody, and juveniles - in short - high risk prisoners. His duties as Observation Officer included observing and controlling at all times inmates who are out of their cells, and accounting constantly for each inmate. [Foos, Appellant testimony] Sleeping on duty is expressly prohibited. [Exhibit 1-2]. On November 24, the Appellant worked a shift from 2:00 a.m. to noon, and was scheduled to work an overtime shift from noon to 4 p.m.

Division Chief Foos, who is in charge of operations at the Denver County Jail, was off-duty that day, but decided to conduct rounds nonetheless, in order to thank staff for working the holiday shift. As Foos approached the Appellant's post, he observed the Appellant seated outside the Observation Officer's cage with his feet propped up on the cage bars. The Appellant's chair faced a television that was on inside the cage. His head was tilted to one side, chin on his chest, eyes closed. For about one and one half minutes, from less than two feet away, Foos never saw the Appellant's head rise off his chest and never saw his eyes open. During the time he observed the Appellant, Foos went from one side of the Appellant to the other, and also faced him. Foos observed the cage door open, and also saw an inmate outside the cage, talking on a phone with the cord passing through the cage. Two other inmates were outside their cells in the common area, one of whom was behind the Appellant. [1] No other deputy was present or supervising at the time. Another door was open allowing access to the next building, Building 7, which houses the commissary and gymnasium. The gymnasium houses overflow inmates.

Foos was still observing the Appellant when another deputy entered from Building 7. That deputy was carrying keys that jangled when he walked. Foos observed the Appellant open his eyes when the keys jangled. He blinked rapidly, and upon seeing Foos, stood up with a surprised look. Foos demanded "what were you doing?" The Appellant replied "watching the football game." Foos said

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[1] The inmates who were outside their cells were "tier clerks" who had permission to be outside their cells. Two tier clerks were cleaning, but it was unclear whether the third tier clerk had permission to call on the telephone. The main point made by the Agency is that none of the tier clerks was under the Appellant's observation or control if the Appellant was asleep. The Appellant stated he was aware of their presence, albeit in a "relaxed state." [Appellant testimony].

"no you weren't, I was standing here for a couple of minutes and your eyes were closed the entire time." Foos told the Appellant to follow him to the Sergeant's office where the Appellant repeated he was merely watching the football game and stated he didn't think there was a security concern since he had no keys. Foos cancelled the Appellant's scheduled noon to 4 p.m. overtime shift for that day.

An investigation concerning the incident was undertaken by Sgt. Kelly Bruning. As part of Bruning's investigation, he interviewed the Appellant on December 15, 2005. The Appellant insisted he was not sleeping, but merely in a "relaxed state" with his feet up, watching a football game on a television in the officer's cage. He repeated to Bruning that security was not compromised since he did not have any keys in his possession.

A pre-disciplinary meeting was held on January 5, 2006. The Appellant was present with his attorney, Reid Elkus, Esq. The Appellant provided a statement. The Appellant reiterated he was not sleeping on duty November 24, 2005, and added he was aware of Foos' presence, was aware of the presence of the inmate using the officer's telephone behind him, and was aware of the presence of two other inmates outside their cells. The Appellant explained the building tier door was open so that the inmates could clean the building. The Appellant apologized for being in a "relaxed state."

On January 19, 2006, the Agency issued its notice of discipline, a 30-day suspension, effective January 26 through March 6, 2006. The Appellant filed this appeal on January 20, 2006.

IV. ANALYSIS

A. CSR 16-50 A. 1) Gross Negligence or willful neglect of duty.

"Gross Negligence", under CSR 16-50 A.1), means the failure to use reasonable care that is flagrant or beyond all allowance, or showing an utter lack of responsibility, and justifies a presumption of willfulness and wantonness. In re Keegan, CSA 69-03, 8 (3/21/04).

The Agency alleged two bases for discipline: the Appellant was sleeping on duty, and he then dishonestly failed to accept responsibility for his misconduct. Therefore, the first determination is whether the Appellant was sleeping while on duty November 24, 2005. In that regard, Foos, the Appellant's supervisor, testified he believed the Appellant was sleeping, because the Appellant's head was on his chest, his chest was rising and falling with each breath, his eyes were closed, and he didn't open his eyes or visibly react to Foos' presence during the approximately one and one half minutes Foos observed him, until the jangling of another deputy's keys awakened the Appellant. [Foos testimony, Exhibit 1-3].

The Appellant insisted he was not asleep, but merely in a "relaxed state," without defining what he meant by that phrase. He stated he maintained awareness of the tier clerks who were behind him outside their cells, and was aware of Foos' presence, although he did not hear Foos enter Building 6, and did not know how long Foos was standing by him. The Appellant then stated Foos was standing by him for perhaps five to ten seconds before Foos awakened him by asking him what he was doing. [Appellant testimony].

Alvin LaCabe is the Manager of Safety for Denver. In that capacity he serves as the administrative head of the Police, Fire and Sheriff's Departments, thus he is the Agency head and Appellant's second-level supervisor. LaCabe reviewed the investigation into the Appellant's alleged sleeping while on duty, and concluded the Appellant was sleeping based upon the following. Foos had no motive to fabricate his observations of the Appellant, while the Appellant, would have a strong motive to avoid almost certain discipline for sleeping on duty. Foos observed the Appellant's eyes closed even while he stood directly in front of the Appellant, in line with the television, so it is not possible the Appellant was watching TV with Foos blocking the Appellant's view. Finally, LaCabe concluded the Appellant's assertion defied common sense in that the Appellant could not be reasonably be aware that Foos, the chief of the Denver County Jail, was present, yet remain seated, arms folded, feet up on the cage, watching television, and not acknowledge Foos' presence.

The Hearings Officer concludes, by a preponderance of the evidence, that LaCabe's conclusions are more logical and more credible than those of the Appellant. The Appellant presented no evidence Foos had any reason to fabricate his above-described observations of the Appellant. Also, the Hearings Officer agrees with LaCabe, that it is highly unlikely a third-year deputy on duty would remain seated, feet up, watching television, and not acknowledge his supervisor standing directly in front of him. For these reasons the Hearings Officer concludes the Appellant was sleeping while on duty at approximately 11:30 a.m. on November 24, 2005. The next step is to determine whether the Appellant's sleeping constitutes gross negligence or willful neglect of duty.

Depending on the circumstances, sleeping on the job could be simple carelessness in the performance of duties, and not gross negligence or willful neglect of duty; however, there were circumstances in this case, which are highly indicative of gross negligence. (1) The Appellant was assigned to a high-risk environment in Building 6 where both the worse-behaved and most vulnerable inmates are housed, making vigilance a paramount duty. (2) It was 11:30 a.m. at the end of a long shift which began at 2:00 a.m., so for the Appellant to prop up his feet and watch television was to invite at a minimum, inattention, and more likely, as found above, somnolence. (3) The Appellant acknowledged it is always an unsafe practice to allow inmates to gain access to a position behind an officer. [Appellant, Bruning, LaCabe testimony]. The Appellant acknowledged two inmates were behind him while he sat, feet propped up, watching television, in a

"relaxed state," an inherently dangerous situation. (4) With the Observation Officer's cage opened, inmates have access to razors, and sensitive information contained in the cage unless the Observation Officer is vigilant.

It seems evident an officer in the Appellant's position could be easily overcome by inmates, especially as the Appellant was alone at his post. Therefore, one of the most important issues to resolve regarding this alleged rule violation was the degree of threat posed by the tier clerks who were out of their cells during the Appellant's watch.

The Appellant stated tier clerks are chosen for their good behavior and compliance to rules, [Appellant testimony], inferring the inmates who were out of their cells under his watch posed little threat. The Appellant also stated it is common practice for the cage door to remain open while tier clerks clean, as was the case at the time, since it would be highly inconvenient to lock and unlock doors during cleaning. [Appellant testimony]. Bruning acknowledged the cage is usually unlocked during cleaning, but only under direct and constant supervision of a deputy, since razors and cleaning supplies are kept there. [Bruning testimony]. Deputies have been killed in building 6, so security is not to be taken lightly. *Id.* Bruning also testified juveniles are required to be kept away from contact with other inmates since there is a risk of assault, even through their cells, by bodily fluids. *Id.*

The Hearings Officer finds even if, as the Appellant states, tier clerks are chosen for their compliance to orders, they are part of a more dangerous and more at risk population, so their good behavior status as tier clerks must be considered in that context. The Appellant's inattention aggravated the danger to himself and to the inmates in his charge by allowing inmate access to his cage and to Building 7. He answered that locking doors was not his job, since another deputy held the keys; but he did not dispute the testimony of Bruning, LaCabe and Foos, all of whom testified security, including securing doors is part of the responsibility for each deputy on duty. [Bruning, LaCabe, Foos testimony].

Thus, while the precise degree of risk posed by tier clerks in Building 6 cannot be established, the preceding factors make it evident the highest degree of vigilance is of paramount importance for deputies working in Building 6. The Appellant's self-induced inattention, the inherent danger of the population in that building, the presence of two inmates behind the Appellant, and tier clerk access to dangerous material, combined to create a situation that was beyond all allowance and justifies a presumption of wantonness, in violation of CSR 16-50 A. 1) by a preponderance of the evidence.

B. CSR 16-50 A. 3) Dishonesty, including...lying to superiors or falsifying records with respect to...disciplinary actions...or any other act of dishonesty not specifically listed in this paragraph.

The Agency found the Appellant violated this rule when he denied sleeping on duty. The Appellant denies he was sleeping. For reasons stated above, the Hearings Officer finds the Appellant was sleeping while on duty on November 24, 2005, therefore his denial to his supervisor Foos, to the investigator Bruning, and to the committee in his pre-disciplinary meeting, was dishonest in violation of CSR 16-50 A. 3).

C. CSR 16-50 A. 14) Failure to observe safety regulations which... jeopardizes the safety of self or others...

A violation of this rule requires the Appellant to be reasonably aware of a specified work regulation concerning job safety. It may be violated three ways: 1. when there is a nexus between an employee's omission and injury to the employee or another; 2. when the employee's omission jeopardizes the safety of the employee or others; or 3. when the employee's omission results in damage or destruction of city property. In re Owoeye, CSA 11-05, 4 (6/10/05).

In some general sense, most of the regulations that govern deputies' work requirements at the County Jail relate to safety, since most of their work activities, directly or indirectly, concern the safe keeping and control of inmates. Two Agency rules cited in the Agency's notice of discipline directly impact safety at the jail.

The Agency "Departmental Rules and Regulations," applied to the Appellant on November 24, 2005. Rule # 200.10, [Exhibit 1-3] reads "Deputy Sheriff [sic] and employees will not sleep while on duty." For reasons as stated above, the Hearings Officer finds the Appellant knew or reasonably should have known sleeping at his post was a violation of safety protocol. Further, for reasons as found above, the Appellant's sleeping jeopardized his own safety and the safety of inmates in the County Jail.

Departmental Rule #200.15 reads "Deputy Sheriff [sic] and employees will not fail, neither [*sic*] willfully or through negligence, incompetence or cowardice, to perform the required duties of their assignment." A critical function of the Appellant's post was to observe inmates on his watch, something he could not have accomplished while sleeping on duty. By propping up his feet in front of a television at the end of a long shift, the Appellant is responsible for creating the conditions under which it was likely he would become inattentive. Such self-induced inattentiveness was a negligent failure to perform his required duties.

Departmental rule # 200.4 reads "Deputy sheriff [sic] and employees will not willfully depart from the truth, knowingly make misleading statements or falsify

any report, testimony, or work related communication." The Appellant violated this standard three times: as established above, he departed from the truth in denying to Foos that he slept on duty; he knowingly made misleading statements to Bruning regarding his state of awareness during Bruning's investigation into the Appellant's conduct; and he made misleading statements to the committee during his pre-disciplinary meeting regarding his sleeping while on duty, despite strong evidence to the contrary. Because the Appellant violated Agency safety standards by sleeping while on duty, negligently failed to perform critical functions of his post, and made misleading statements to his supervisor, to the investigator and to the committee at his pre-disciplinary meeting, he violated CSR 16-50 A. 14) by a preponderance of the evidence.

D. CSR 16-50 A. 20) Conduct not specifically identified herein may also be cause for dismissal.

This provision is meant to be a catch-all for unique, serious misconduct which is not otherwise identified by specific violations within the Career Service Rules. In re Wortman, CSA 68-2,13 (5/2/03). The Agency identified the specific conduct, described above, as its basis for discipline. No other basis for discipline is found. Therefore the Hearings Officer declines to apply this rule.

E. CSR 16-51 A. 2) Failure to meet established standards of performance including either qualitative or quantitative standards.

Three requirements are prerequisite to finding a violation of this rule: 1. a prior-established standard, such as those one would find in a performance evaluation, in a classification description, or in agency or division published policy and procedures; 2. clear communication of that standard to the Appellant; 3. the Appellant's failure to meet such standard. In re Routa, CSA 123-04, 3 (1/28/05) *citing* Pabst v. Industrial Claim Appeals Office, 833 P.2d 64, 64-65 (Colo. App. 1992). LaCabe stated the Appellant violated this rule by his failure to meet safety standards and post orders. The Agency established, above, that the Appellant was aware of safety standards for inmate observation and control, and that he violated those standards.[1] The Appellant's response, that he denied sleeping while on duty, has already been discredited. The Agency therefore established the Appellant's violation of this rule by a preponderance of the evidence.

F. CSR 16-51 A. 5) Failure to observe departmental regulations.

The Hearings Officer found the Appellant violated specified Departmental Rules and Regulations, above, including Departmental Rule # 200.10, which prohibits sleeping on duty, Departmental Rule #200.15, which requires competent performance of duties, and Departmental Rule # 200, which prohibits lying or presenting false testimony. While this rule carries a more general

[1] The Agency was unable to enter its post orders into evidence and therefore failed to establish what post orders the Appellant may have violated.

application than the safety standards referenced by CSR 16-50 A. 14), above, for the same reasons as found, above, the Appellant violated the aforementioned Departmental Rules under the more general standard enunciated here.

G. CSR 16-51 A. 6) Carelessness in performance of duties and responsibilities.

To prove a violation of CSR 16-51 A. 6), the Agency must establish the Appellant had an important work duty or responsibility, and was heedless and unmindful of that duty, with the result that potential or actual significant harm resulted. In re Owoeye, CSA11-05 (6/10/05).

1. Important work duty. The security requirements inherent to the Appellant's post were an important duty. As Observation Officer and the only deputy present at Building 6, tier ABC at 11:30 a.m. on November 24, 2005, the Appellant was solely responsible for the safeguarding and control of the prisoners on his watch.

2. Heedless and unmindful. It has already been established that the Appellant slept while on post. It has also already been established that the Appellant put himself in a position to be inattentive by placing his feet up at the end of a long night shift while watching television.

3. Potential harm. When the Appellant slept on his post, he allowed critical lapses in security over the most dangerous and most vulnerable inmates. While the Appellant minimized the potential for harm in that facility, the Hearings Officer finds the testimony of LaCabe, Bruning and Foos more convincing. It is not logical that the most dangerous inmates would not seek an opportunity to do harm if afforded an opportunity, and it is not logical that the most vulnerable inmates, such as juveniles, would not be more susceptible to harm if the Observation Officer is not observing inmate activity, particularly since, as admitted by the Appellant, five inmates were out of their cells and had access to the juvenile cells. [Appellant cross-exam]. As all three prongs of the carelessness test are established, the Agency has proven the Appellant violated this rule by a preponderance of the evidence.

H. CSR 16-51 A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

This provision is meant to be a catch-all for unique, serious misconduct which is not otherwise identified by specific violations within the Career Service Rules. In re Wortman, CSA 68-2,13 (5/2/03). The Agency identified the specific conduct, described above, as its basis for discipline. No other basis for discipline is found. Therefore the Hearings Officer declines to apply this rule.

V. LEVEL OF DISCIPLINE

The Agency substantially proved each violation it alleged against the Appellant. What remains, then, is to review the Agency's choice of discipline.

The correct test to determine the propriety of discipline is whether the degree of discipline is reasonably related to the seriousness of the offense, taking into consideration the Appellant's past disciplinary record. CSR 16-10. Discipline is reasonably related if it falls within the range of reasonable alternatives available to a reasonable, prudent agency administrator. In re Armbruster, CSA 377-01 (3/22/02), *citing* Adkins v. Div. of Youth Services, 720 P.2d 626 (Colo. App. 1986). In determining whether the discipline imposed is within the range of reasonable alternatives, the Hearings Officer will not disturb the Agency's determination of the severity of the discipline unless it is clearly excessive or based substantially on considerations that are not supported by a preponderance of the evidence. *Id.*

The post occupied by the Appellant on November 24, 2005 carried responsibilities critical to the safety of the Appellant, inmates, and other deputies. It was unclear whether escape was a possible outcome of the Appellant's inattention, however it was evident great harm could have resulted. Five tier clerks in the most high-risk unit of the county jail were out of their cells and unsupervised during the time the Appellant slept. [Appellant cross-exam]. No other deputy was present. These tier clerks had access to razors, cleaning equipment, and sensitive information contained in the Observation Officer's cage. Two tier clerks were behind the Appellant, something the Appellant acknowledges is inappropriate and dangerous. Under these circumstances, the Agency's concern that the Appellant unacceptably minimized the risk to himself and others appears amply justified.

The Appellant was issued a verbal warning in 2004 for sleeping on duty. [Exhibit 7]. In 2003 he received a written reprimand for failing to provide a doctor's letter for sick leave as ordered by his supervisor. [Exhibit 3]. Even though the Appellant's disciplinary record is not aggravated, and his work reviews were satisfactory, progressive discipline is not required. CSR 16-50 A. 3. The Agency is justified in considering the magnitude of the potential harm by sleeping at the particular post occupied by the Appellant. "[A]ny measure of discipline may be used in any given situation as appropriate." CSR 16-50 A. 1. LaCabe stated he considered a range of penalties, including termination, and decided against termination based upon the Appellant's good work history. [LaCabe testimony].

Under the circumstances of this case described above, the Hearings Officer finds LaCabe's decision to assess a thirty-day suspension against the Appellant was based substantially upon considerations that were supported by a preponderance of the evidence, was neither arbitrary nor capricious, was reasonably related to the seriousness of the offense, took into consideration the Appellant's record, and was within the reasonable range of alternatives available to him. The discipline therefore conformed with, and fulfilled the purpose of, discipline under CSR 16-10.

VI. ORDER

The Agency's suspension of the Appellant for thirty days, from January 26 through March 5, 2006, is AFFIRMED.

DONE this 16th day of May, 2006.

Bruce A. Plotkin
Hearings Officer
Career Service Board

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.

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

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