

**DECISION AFFIRMING 10-DAY SUSPENSION**

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**ANDRIA SPARER**, Appellant,

v.

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

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**I. INTRODUCTION**

This is an appeal of Appellant's ten-day suspension imposed by her employer, the Department of Safety, Denver Sheriff Department (Agency), assessed on October 22, 2018, for alleged violations of specified Career Service Rules (CSR). Bruce A. Plotkin, Hearing Officer, presided over the appeal hearing. Reid Elkus, Esq. and Zachary Wagner, Esq., Elkus & Sisson, PC, represented the Appellant. Assistant City Attorney Natalia Ballinger represented the Agency. The parties stipulated to the admission of Agency exhibits 1 - 8, and Appellant's exhibits A - C and E - F. Deputy Matthew Hammernik, Sergeant Tina Klosiewski-Lovato, and the Appellant testified during her case-in-chief. The Agency presented Civilian Review Administrator Alfredo Hernandez as its only witness.

**II. ISSUES**

The issues presented for this appeal were whether Appellant established:

- (1) the Agency's finding, that she violated Career Service Rule 16-29 R. as it pertains to DSD RR 200.17.1., was clearly erroneous; or
- (2) the Agency's assessment of a ten-day suspension was clearly erroneous under CSR 20-56 A.; or
- (3) the application of the Agency's disciplinary matrix in assessing discipline was clearly erroneous.

**III. FINDINGS**

On September 26, 2017, the Appellant, four-year Deputy Andria Sparer, was working in the Downtown Detention Center (DDC) in a large, open area<sup>1</sup> where new arrestees wait to be booked into custody or re-booked into custody into the DDC from elsewhere.

Sgt. Lovato and Deputy Hammernik were attempting to escort an unruly inmate, Lynn, to an isolation cell, but had difficulty controlling Lynn who was yelling, cursing, and physically resisting their orders and efforts to restrain him. The commotion caused Sparer, to stand up from her desk

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<sup>1</sup> Referred to in pre-hearing documents as "the pit."

and look at the scuffle. Her view was unobstructed.<sup>2</sup> Deputy Kitzman, seated at the desk next to Sparer, rushed to assist. Four other deputies, ran directly in front of Sparer on their way to assist Lovato and Hammernik. Another deputy on the opposite side of the waiting area also went to assist.

While other deputies were running to assist Lovato and Hammernik, Sparer took four slow steps in that direction, looked down, stopped, and returned to her desk while continuing to look down. She glanced up to see one of the deputies run by her to assist with the ongoing scuffle. [Exh. 4 at 20:09:57-58]. As Sparer began to sit, she looked toward the fingerprint area and, seeing a nurse, walked there to investigate. On her way to the fingerprint station, Sparer looked for one second, [Exh. 3 at 20:10:05-06], toward the I-cell where deputies continued to struggle to gain control of Lynn. Later, Sparer motioned for deputy Minichino to return to his assignment in the fingerprint area. [Sparer testimony; See Exh. F, p. 103 at 183-92; Exhs. 3, 4 at 20:15:28].

The decision maker, Civilian Review Administrator Alfredo Hernandez, assessed a 10-day suspension against Sparer on October 22, 2018. This appeal followed timely on October 29, 2018.

## IV. ANALYSIS

### A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction of this direct appeal of a suspension pursuant to CSR 20-20 A .2. The Hearing Officer is required to affirm the discipline assessed by the Agency if the Appellant fails her burden of proof.

### B. Burden and Standard of Proof

Disciplinary appeals under CSR 20 are not *de novo*. The Appellant retains the burden of persuasion to prove the Agency's finding that she violated CSR 16-29 R. was clearly erroneous or that the Agency's application of its disciplinary matrix in assessing the level of discipline was clearly erroneous. See CSR 20-56 A. Discipline is clearly erroneous: (1) when the decision maker's assessment, even while supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole; (2) when the decision-maker failed to follow its disciplinary matrix and, absent such failure, a lesser discipline or no discipline would have resulted; or (3) if the decision-maker exceeded his authority. CSR 20-56 B.1c.i.-iii.

### C. Career Service Rule Violations

CSR 16-29 R. Conduct which violates...written departmental...regulations... As it pertains to:

Denver Sheriff Department Rules and Regulations [RR]

#### **RR 200.17.1 Failure to Aid and Protect Fellow Deputies – Unreasonable**

**Members of the Department shall not unreasonably fail to assist and protect each other and those with whom members come into contact during the performance of their duties.**

A deputy violates this rule if she fails to assist other deputies with their duties when the circumstances reasonably require such assistance. The relevant circumstances were:

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<sup>2</sup> Compare Exhs. 3 & 6 at 20:09:48-53 with Exh. 4 at 20:09:48-53; see also Exhs. F-137 & 144.

1. The commotion caused by Lynn's yelling, and Lovato's loud "STOP," when Lynn resisted by latching onto a railing, caused Sparer and other deputies to look at Lovato and Hammernik struggling to control Lynn. [Sparer cross-exam].

2. Sparer had an unobstructed view of Lovato and Hammernik struggling to control Lynn. Sparer argued her view was obstructed by a wall. However, any obstruction occurred before Lynn physically resisted, and therefore occurred before the duty to assist arose.<sup>3</sup> The reaction of Deputy Kitzman, who was seated next to Sparer, indicates his view of the struggle - as well as that of Sparer - was unobstructed. Their view included the following two observations.

3. Lovato was unable to control Lynn.

4. Hammernik was having difficulty controlling Lynn.

5. Six other deputies who saw the same thing as Sparer ran to assist Lovato and Hammernik, indicating they did not believe Lynn was controlled.

6. Hammernik stated he did not call out for assistance, and felt he did not need assistance.<sup>4</sup> He also stated 3-5 deputies would have been sufficient to assist, and that too many deputies can create a safety risk. [Hammernik testimony; Lovato testimony]. Hammernik's assessment, alone, is not controlling of the duty to aid and assist. Hammernik testified that while "eventually, yes [I was able to control the inmate]," Lynn's resistance was "greater than I had initially perceived." [Id.].

If Sparer reasonably perceived Hammernik alone, or with other deputies, appeared to have Lynn under control, she could have made a material argument that there was already sufficient assistance. That was not the case. The duty to aid and assist under RR 200.17.1 applies when it is evident a deputy or deputies are struggling to control an inmate. It was evident to a reasonable observer that Lovato and Hammernik struggled to control Lynn. [Exh. 3 at 20:09:50]. Sparer observed that struggle, [See Exh. 4 @ 20:09:50], and no other deputy had yet arrived to assist.<sup>5</sup> In short, at the time relevant to the duty to respond, Sparer likely observed two deputies struggling to control an inmate with 1-3 other deputies on the way, but not yet assisting in that effort.

7. Even after deputies had Lynn inside the I-cell, he continued to resist and caused several deputies to fall backward, as he used his legs to push off of a bench inside the cell. Deputies who had backed out of the cell had to go back in again to contain him. [Ex. F-195 at 81-82].

8. As sergeant, Lovato was tasked with determining the sufficiency of the response. [Lovato testimony ("That's the sergeant's responsibility"); Lovato cross-exam at 10:15:56]. It would be poor policy in a paramilitary organization such as the Agency to permit each deputy to determine whether there is a sufficient response to each use of force incident.

9. Even if, as alleged by Sparer, there was a practice in effect not to leave a nurse unprotected in the fingerprint area when an inmate is present,<sup>6</sup> such practice was immaterial

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<sup>3</sup> Exh. 3, 4 & 6 at 20:09:52-53; Exh. F-137 & 144 [Kitzman IAB Interview, "I lost view of them due to the brick walls around the booking desks. Nearly immediately after I lost view of them, I heard Sgt. Lovato clearly and loudly say 'stop.' Immediately after hearing Sgt. Lovato say 'stop' I stood up and witnessed prisoner Lynn fighting with D/S Hammernik."]

<sup>4</sup> However, Hammernik hedged that response on cross exam. When asked "But were you certain you didn't want anyone to respond?" Hammernik responded, "I wasn't, no", and when asked "Was it reassuring that some deputies did respond?", Hammernik replied "Yeah, and I knew that Sergeant Lovato was there as well, for assistance if needed" [Hammernik cross-exam at 9:27:10]; Lovato observed "Hammernik was having a hard time handling him, he needed help." [Lovato cross-exam at 10:14:46].

<sup>5</sup> In Exh. 3 at 20:09:50, Kitzman can be seen starting toward the scene, and 2 other deputies from the fingerprint area can be seen running to assist, but they are not yet at Sparer's station, and no deputy has yet arrived where the struggle is underway.

<sup>6</sup> Most officers confirmed there was a practice, if not a written policy, rule, or post order, that nurses should not be left alone in the fingerprint area with an inmate. [Hammernik testimony; Hammernik cross-exam; Sparer testimony; Sparer IA interview, Exh. F-107 at 296-299; Lovato testimony; Lovato IA interview, Exh F-34 at 508-513; Aumiller IA interview, Exh. F-215 at 34-37; Kitzman IA interview, Exh. F-145 at 252-267].

under the circumstances. Sparer spent a significant portion of the hearing arguing she felt obligated to cover the fingerprint area instead of aiding and assisting Lovato and Hammernik. Her claim was immaterial since she did not look toward the fingerprint area until after returning to her desk instead of going to aid and assist Lovato and Hammernik. In other words, she violated RR 200.17.1 before her alleged excuse. There was no conflict between the two duties.

Even if Sparer's decision not to aid and assist her fellow deputies were related to her decision to check the fingerprint area, Lovato, as sergeant, was certain deputies do not make the decision whether to aid and assist, as described in the following unrebutted exchange.

**Q:** So the deputies don't make the call on whether they're going to show up?"

**Lovato:** No.

**Q:** The deputy shows up, then the sergeant tells them "I don't need you...?"

**Lovato:** Yes...

**Q:** ... so do you believe there were an appropriate number of responders to this incident? Were there too many responders?

**Lovato:** No, I thought it was, that's pretty normal actually, it's that many people that show up. Sometimes it's more.

**Q:** So a deputy should never look at the number of people who've already responded when determining whether they're going to respond themselves?

**Lovato:** No, no. There's always something else that you can do inside of an event. If you can't physically go up to it and touch that person and help, you can manage the pit [seating area]; you can manage... you're watching the doorways to make sure no one else is... everybody else is OK.

**Q:** So a deputy at the intake desk [where Sparer was seated] would be responsible for what in a use of force event happening nearby?

**Lovato:** At the intake desk, unless you've got an inmate directly in front of you, you're to respond to that... to the use of force event. Anything else is minor compared to what's going on. The safety and security of the facility is first and foremost; and if you've got an event happening in front of you, you are to show up to that event.

**Q:** So, if you're a deputy at the intake desk, and the use of force incident is happening in your vicinity, it's not your responsibility to go to the fingerprint area and look after the nurse?

**Lovato:** No, not necessarily. That can change, because you have to have your head on a swivel in an area like that, so it's not your first responsibility. Your first responsibility is to make sure that that scene is secure enough that you can respond to anything else... so your first responsibility is to show up, and then have the sergeant tell you "I don't need you, go... go over there, go watch" .... Her [Sparer's] first obligation is not to make sure that

the Print Station has someone there, it's to respond to the use of force. This is the more immediate event that's going on.

[Lovato cross-exam].

Follow-up questioning, in which Lovato acknowledged deputies are justified in going to the print area to make sure nurses are not alone with inmates, did not alter a deputy's first priority to respond to a use of force incident near her.

A reasonable person considering the above-stated circumstances would conclude Sparer's failure to respond to the emerging use of force incident with Lovato, Hammernik, and inmate, was unreasonable. Because Hernandez's conclusion was not contrary to what a reasonable person would conclude from the record as a whole, Sparer failed her burden of proof with respect to CSR 16-29 R., as it applied to RR 200.17.1.

## V. DEGREE OF DISCIPLINE

In assessing the degree of discipline, Hernandez followed the requirements of the Agency's disciplinary matrix. Having found Sparer in violation of RR 200.17.1, Hernandez was required to assess the violation as a D-level violation. [Appendix E, Exh. 1-90]. As Sparer's first violation, he was required to set the penalty level at level 5. [*Id.*]. The presumptive penalty at that level is a 10-day suspension. A mitigated penalty is a suspension between 4-6 days, and an aggravated penalty is 14-16 days.

Hernandez considered mitigation in Sparer's favor consisted of her otherwise-unblemished record and positive work reviews. [Hernandez testimony; Exh. 2-73 through 2-88]. Hernandez found it was an aggravating factor that Sparer failed to accept any responsibility for her actions. [Hernandez testimony].

Weighing the foregoing, Hernandez assessed the presumptive penalty of a 10-day suspension. As this penalty fell squarely in the middle of the factors required to be assessed by Hernandez, he would have been remiss to assess a different penalty. Thus, Sparer did not demonstrate that Hernandez failed to follow the Agency's disciplinary matrix.

Finally, Sparer did not allege Hernandez exceeded his authority. Having failed to establish that Hernandez's findings and assessment of penalties were clearly erroneous, those findings and penalty assessment must be affirmed. [CSR 20-56 B.1c.i.-iii].

Hernandez's findings and conclusions were consistent with Agency principles and the Career Service Rules. The mandatory designation of Sparer's violation as a Category D underscored the importance the Agency assigns to its core values of maintaining safe and secure facilities. [Hernandez testimony]. Under the Career Service Rules, Sparer's failure to aid and assist fellow deputies was also an evident serious violation. When asked "if you had to do this all over again, would you do the same thing?" Sparer answered "In my opinion, yes." That candor vindicated Hernandez's assessment.

The seriousness of Sparer's violation, and her failure to acknowledge wrongdoing even after becoming re-familiarized with the recordings of the incident, rendered the penalty one within the range of penalties available to a reasonable and prudent administrator. In re Economakos, CSB 28-13A, 2 (3/24/14).

## VI. ORDER

For reasons set forth above, and in accordance with CSR 20-59, the Agency's ten-day suspension of Appellant is AFFIRMED.

DONE January 30, 2019.



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Bruce A. Plotkin  
Career Service Hearing Officer

### NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this final order, in accordance with the requirements and limitations of CSR § 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery, below. See Career Service Rules at [www.denvergov.org/csa](http://www.denvergov.org/csa). All petitions for review must be filed with the:

#### **Career Service Board**

c/o OHR Executive Director's Office  
201 W. Colfax Avenue, Dept. 412, 4th Floor  
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**AND** opposing parties or their representatives, if any.