

DECISION MODIFYING 16-DAY SUSPENSION TO 4-DAY SUSPENSION

LUKE SWARR, Appellant,

v.

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

I. INTRODUCTION

The Appellant challenges his 16-day suspension from the Denver Sheriff's Department (Agency), for alleged violations of specified Career Service Rules and Sheriff Department rules. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on April 28, 2017. The Agency was represented by Natalia Ballinger, Assistant City Attorney, while the Appellant was represented by Don Sisson and Zachary Wagner of the firm Elkus and Sisson, P.C. Agency exhibits 1-5 and 8-13 were admitted, along with Appellant's exhibits A - D. The following witnesses testified for the Agency: Captain Michael Jordan and Civilian Review Administrator Shannon Elwell. The Appellant testified on his own behalf during his case-in-chief, and called retired Deputy Marshall Harris.

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 B., 16-60 L., as it pertains to Denver Sheriff Dept. Rules and Regulations (RR) 200.19; 300.19; and 400.8.1; or 16-60 V.;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to suspend him for 16 days conformed to the purposes of discipline under CSR 16-20.

III. FINDINGS

The Appellant, Luke Swarr, has been a deputy sheriff in the Denver Sheriff's Department (Agency) for 25-years. His duties include the care, custody and control of inmates. He is responsible for being familiar with and enforcing post orders, particularly as they relate to inmate safety. His performance evaluations have always ranked him as exceeding expectations. Twice his performance was rated outstanding. He has received many commendations. In 25 years he received only one disciplinary action, a verbal reprimand for a single failure to log a security round.

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

On Wednesday, February 19, 2014, Swarr was working in the Downtown Detention Center housing unit 3D where he had been assigned for three years. The 3D unit houses special management inmates, which include those who are severely mentally ill, inmates in administrative segregation, inmates in protective custody, and particularly pertinent here, those who are required to be separated at all times from all other inmates, and known as "sep all."

Swarr was supervising the cleaning of inmate cells by two tier clerks². MC, a sep all inmate, asked Swarr if he could remain outside his cell while it was being cleaned. Swarr agreed, even though MC was then standing next to and speaking with two other inmates in view of Swarr. Swarr knew MC was a sep all inmate, but allowed tier clerks to clean MC's cell because MC was "barely functional" and his cell was filthy and smelled bad.

Swarr left the immediate area during the cleaning and walked toward the nearby officer's desk in the pod. Almost as soon as he left, MC ran to the open cell of another inmate, PA, and began kicking him in the head. [Swarr cross-exam]. Swarr, seeing what happened, ran to the cell and removed MC immediately. PA suffered no discernable injury, but was taken to the clinic, then released without any issue.

PA refused to press charges for the assault. During the ensuing investigation, Swarr admitted to the Internal Affairs Bureau that he violated the housing post order pertaining to sep all inmates.

The Agency convened a pre-disciplinary meeting on October 27, 2015. On November 10, 2015, the Agency delivered its notice of suspension to Swarr. This appeal followed timely on November 16, 2015.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A.1.b., as the appeal of a suspension. 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 Swarr violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend his employment for 16-days complied with CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

All allegations of wrongdoing made by the Agency against Swarr revolve around his obligation to keep inmates designated as "sep all" out of contact with all other inmates at all times. For that reason, I begin with the Agency's post order, as it pertains to CSR 16-60 L.

² Tier Porters are inmates who have been afforded certain privileges. In re Steckman, CSB 30-15A, 1 (1/19/2017).

1. CSR 16-60 L. Failure to Observe Written Departmental ... Regulations.

Departmental Order 300.19.1 Disobedience of Rule [as it pertains to...]

DSD Van Cise-Simonet Detention Center Housing Post Order [as it pertains to...]

XI. SEPARATION FROM ALL (SEP ALL).

Inmates designated [as] Separation from All (Sep All) shall not have contact with other inmates at any time. All other inmates shall be secured and separated prior to the Sep All inmate being removed from their cell for designated out of cell time or other activities....

[Exhibit 9-12].

Under this post order, officers must ensure an inmate with a sep all designation is kept separate from all other inmates at all times. No exception is stated.

The undisputed facts establish a violation of this rule. Swarr acknowledged his familiarity with the Order and with MC's status as sep all; Swarr allowed MC out of his cell in close proximity to other inmates who were not secured and separated before Swarr allowed MC out of his cell. [Exhibit 11-3; See also Exhibit 6].

Swarr claimed he was unaware that inmate PA was also a sep all inmate; however even if that is true, it does not change the facts immediately above, which establish two violations: one for permitting MC's contact with tier clerks outside his cell; and a second violation when MC ran into PA's cell (regardless of the assault), neither of which would have occurred if Swarr had enforced the sep all directive.

Swarr also claimed "separation" can have various meanings, and claimed MC was about 10 feet away from other inmates and therefore "separated" within the meaning of the order. I find the order is clear and the words "separation" and "separate" in the order have a plain and uncomplicated meaning. Moreover, housing officers, including Swarr, received a reminder before this incident that if a sep all inmate "must be brought out for any reason, the other inmates must be secured in cells..." [Exhibit 6]. Swarr plainly did not secure the other inmates before allowing MC out of his cell, particularly the opened, nearby cell of PA, regardless of his sep all status.

Moreover, even if there were a 10-foot rule in effect regarding the nearby tier clerks, there is no arguing that MC was close enough to PA to kick him in the head, thus not "separated" even as argued by Swarr. The Agency established that Swarr violated CSR 16-60 L. via the Agency's Housing Post Order XI.

200.19.1 – Performance of duties.

Deputy Sheriffs and employees shall use sound judgment and discretion in the performance of duties.

Elwell claimed Swarr violated this departmental order when he admitted to IA that he exercised poor judgement when MC attacked another inmate. He acknowledged he was tired, his judgement was impaired, he should have taken a break, he let MC out of his cell in the presence of other unsecured inmates, and he failed to properly supervise MC, the result of which allowed MC to run into PA's cell. Swarr made no direct response to this claim, other than

stating he was not aware inmate PA was Sep All because he didn't have a door tag, and that he had no knowledge of any conflict between the two inmates. These facts establish a violation of RR 200.19.1.

400.8.1 – Protecting Prisoners from Physical Harm.

Deputy Sheriffs ... shall be alert at all times to protect prisoners from harming themselves, harming others, or attempting suicide.

There are two elements to this rule. The first requires deputies to be alert at all times. In that respect, it is similar to RR 200.9, requiring deputies to devote their full attention to their duties. The second element describes specific harm to be avoided.

Swarr acknowledged he was fatigued and distracted by his ongoing long shifts, and not exhibiting good judgment at the time of the incident herein. In short, he was not alert.

The second element requires proof of physical harm. [RR 400.8.1; Exhibit 1-9].³ The notice of discipline stated MC “physically attack[ed]”... PA resulting in “physical violence” and “injury” to him. [Exh. 1-8, 1-9]. At hearing, when asked if PA suffered an “actual”⁴ injury, Elwell replied “I don't recall, I believe he complained of pain.” She also believed, from her previous review of the medical record, that he was provided ice, “presumably for his head,” and x-rayed. [Elwell cross-exam]. Swarr argued PA suffered no proven physical harm.

While it may be tempting to consider any kick to the head to constitute physical harm, there must be some evidence physical harm resulted under this rule, even if minor. The only evidence of physical harm was Elwell's diffident recollection that PA stated he had pain. Such hearsay evidence may be persuasive if corroborated by other evidence. [Industrial Claims Appeals Office v. Flower Stop Marketing Corp., 782 P.2d 13, 18 (Colo. 1989)]. Being supplied ice and being x-rayed were also part of the uncorroborated hearsay evidence, and could have been administered prophylactically for the same reason as Elwell proposed – the assumption that a kick to the head may have resulted in physical injury. In short, the Agency did not prove PA suffered physical harm as required under this rule. Consequently this violation remains unproven.

2. 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).

Elwell testified Swarr neglected his duty to provide for the safety and security of the inmates assigned to him, particularly since the housing unit to which Swarr was assigned houses special management inmates, meaning those with the highest risk. The department's mission (safety and security) is the overall duty of the DSD, and Swarr was aware that duty. [Swarr cross-exam].

The same evidence which established a violation of the Agency's Housing Post Order, above, establishes a violation of this duty. Swarr failed to secure a sep all inmate in violation of his duty to provide for the safety and security of inmates, particularly PA.

³ While the title of this rule specifies physical harm, the body of the rule does not. Normally, the title of a rule or law is considered not substantive, leading to a question whether proof of physical harm is required or simply any kind of harm, e.g. psychological, financial, social, legal, etc. I defer to the Agency's interpretation of its own rule which requires an element of physical harm. “[This rule] is specifically intended to protect against physical harm to an inmate.” [Exh. 1-9].

⁴ “actual” injury as referred to in this exchange appears to mean “physical” injury. [See DSD Discipline Handbook, § 15.1.6; n.3].

3. CSR 16-60 B. Carelessness in performance of duties and responsibilities.

A violation under this rule is established when an agency proves an employee performed a known duty in substandard fashion. Elwell testified Swarr's leaving the cell doors of inmates MC and PA open during the cleaning of MC's cell was careless. [Elwell testimony; Exhibit 1-7]. Swarr's failure to segregate MC from other inmates was a neglect of the sep all policy, not a poor performance of it. No other evidence establishes carelessness. No carelessness was established under this allegation.

The Agency also alleged Swarr was careless in his performance of his duty to be "alert at all times to protect prisoners from harming... others," as well as to the Agency's mission to "provide safety and security for the community by ensuring care, custody, transportation, and re-entry services for detainees by operating safe, secure, efficient and humane facilities that adhere to federal state and local laws." [Exh. 1-7].

Swarr's allowing a sep all inmate out of his cell without securing other nearby inmates, and further, allowing the unsecured sep all inmate to attack another inmate, was a failure to be alert to protect inmates from harming others and violated the agency mission to provide safe and secure facilities. These failures, while neglecting the associated duties were not a careless performance of them. No carelessness was established under this allegation.

The Agency also stated Swarr "exhibited poor judgment in the careless performance of his duties when he permitted inmates MC and PA's cell doors to remain open, and inmate MC to remain outside of his cell." Without defining what duties this action allegedly violated, it would be improper to impute them. To the extent the violation was of the Agency's sep all post order, that allegation was addressed, above.

To the extent the Agency claimed any other conduct by Swarr violated CSR 16-60 B., it provided insufficient information to determine what duty was alleged and how Swarr violated it.⁵

4. CSR 16-60 V. Failure to use safety devices or failure to observe safety regulations.

Elwell did not specify which portion of this segmented rule applied to Swarr's conduct. It seems evident that the "safety regulations" phrase apply here, in view of the Agency's repeated references to and focus on its sep all order. The sep all post order is a safety regulation as contemplated by Agency rules. Swarr acknowledged his familiarity with it and his failure to implement it. This violation is established by admission.

V. DEGREE OF DISCIPLINE

Elwell found the balance of the above mitigation and aggravation merited a 16-day suspension. As frequently noted, I am bound to uphold the Agency's election with respect the degree of discipline if it is within the range of alternatives available to a reasonable manager. In re Leyba, CSB 31-16A, 5-6 (3/2/17); citing Adkins v. Division of Youth Services, Dept. of Institutions,

⁵ The form of the Agency's notices of discipline makes it difficult to ascertain what conduct violates which rule. The Agency's disciplinary notices typically list many or all of the rules allegedly violated then, without specifying a nexus to any particular conduct, describes a series of allegations, leaving it up to the hearing officer, but more importantly, up to the appellant, to determine which allegation pertains to which rule. In the present case, the Agency specified carelessness in only one of its allegations, [Exh. 1-7, bottom paragraph]. Even in that instance, the Agency, as noted above, referred to unspecified "duties," along with one specified "duty" under its also-difficult-to-find reference to its Mission Statement.

720 P.2d 626, 628 (Colo.App.1986).⁶ In that regard, I review the decision-maker's determination first for internal consistency, i.e. if the determination comports with the Agency's own standards. Second I review the decision-maker's determination for its compatibility with the Career Service Rule 16-20.

Elwell determined Swarr's conduct fell under Conduct Category D of the Agency's so-called disciplinary matrix, carrying a range of possible penalties from 4 to 16-days suspension without pay. [DSD Discipline Handbook, Appendix E – Penalty Table & Discipline Matrix]. Conduct falls under Category D when it “is substantially contrary to the guiding principles of the Department, or that substantially interferes with its mission, operations, or professional image, or that involves a demonstrable serious risk to deputy sheriff employee or public safety.” [https://www.denvergov.org/content/dam/denvergov/Portals/744/documents/handbooks/Handbook%20-%20Complete%20with%20Appendices%20-%20Revised%20November%2012%202013%20\(2\).pdf](https://www.denvergov.org/content/dam/denvergov/Portals/744/documents/handbooks/Handbook%20-%20Complete%20with%20Appendices%20-%20Revised%20November%2012%202013%20(2).pdf) p. 90. Thus, there are three classes of conduct which fall under Category D violations:

1. Substantially contrary to guiding principles. While not in evidence at hearing, the Agency's guiding principles consist of “Safety, Humanity, Ethics, Respect, Integrity, fiduciary, Fairness and Service.” <https://www.denvergov.org/content/denvergov/en/sheriff-department/about.html> (last viewed 6/8/17).

In pertinent part “Safety” includes the obligation to protect detainees from harm. [Id]. Swarr's failure to maintain MC's sep all status directly contributed to his assault of PA, which was a substantial harm as contemplated by these guiding principles. Physical injury, as argued by Swarr, is not prerequisite to harm, however, evidence of some injury is required. An inmate who was kicked in the head with violence was “harmed” as contemplated by this principle.⁷ Such harm is substantially contrary to this guiding principle.

2. Substantial interference with Agency's mission, operations or professional image. In pertinent part, the Agency's mission is “to provide safe and secure custody for [inmates]....” [Id]. For the same reasons stated immediately above, Swarr's failure to maintain MC's sep all status substantially interfered with the Agency's mission.

Operations or professional image. The Agency failed to present evidence that Swarr's conduct substantially interfered with its operations or professional image. Elwell's conclusory statements alone were insufficient evidence of substantial interference with either element. [See, e.g. Exh. 1-9 (“Deputy Swarr demonstrated ‘conduct that is substantially contrary to the Guiding Principles of the Department or that substantially interferes with its mission, operations, or professional image, or that involves a demonstrable serious risk to deputy sheriff, employee or public safety.’ As such, these rule violations are Conduct Category D violations.”)].

3. Demonstrable serious risk to deputy sheriff, employee, or public safety. While the failure to maintain MC's sep all status could have posed a risk to the safety of nearby deputy sheriffs, including Swarr, the Agency did not allege such risk. “Employee” presumably refers to non-uniformed Agency employees, since that word is immediately preceded by “deputy sheriff,” an apparent distinction in the class of people to be protected. The Agency alleged no risk to the public. Since the only safety risk posited by the Agency was the harm suffered by MC, and MC was not in any of the three classes to be protected under this category, then no violation is found under this element.

⁶ The facts underlying the case, on the other hand, are subject to a *de novo* determination. In re Duran, CSA 10-10, 7 (10/1/10); *citing Turner v. Rossmiller*, 532 P.2d 751 (Colo.App.1975); *see also In re Luna*, CSB 42-07A, 4 (1/30/09).

⁷ Contrast general “harm” as referenced here, with the Agency's failure to prove physical harm, above at pg. 4.

The evidence justified Elwell's determination that Swarr's violations fell under the Agency's matrix category D. That category allows a range of penalties from 4 to 16 days depending on the level of mitigating and aggravating circumstances. Elwell then balanced mitigation and aggravation to conclude that Swarr's conduct was at the most egregious end of that category. [Matrix Appendix E].

Elwell found the following mitigation applied to Swarr: his performance reviews; history with the Department; lack of significant discipline; and Swarr's apparent benign intent. [Exh.1-9].

While not a complete or compulsory list, the matrix lists mitigating circumstances to include:

19.6.1 willingness to accept responsibility and acknowledge wrongdoing, both of which Swarr did here.

19.6.3 The culpable mental state of the deputy in the commission of the violation. The Agency acknowledged Swarr's motives were "pure" and therefore not a culpable mental state.

19.6.4, 19.6.6, and 19.6.7 Complimentary history, including awards, commendation and positive public recognition. Swarr's 25-year work record was exemplary, including two "outstanding" performance reviews [B-187, B-197], numerous "Exceptional" reviews [Exh. B-157 – B-164, B-172, B-179], and the rest were "exceeds expectations" [Exh. B]. Notably his supervisors have uniformly conferred high praise on Swarr's performance, including in the special management unit. "I can't say enough about Luke and all the help he has been to me and third floor, especially special management buildings and prisoners that can be extremely difficult to manage...Awesome Luke. Keep it up." [Exh. B-226]. "He is in his twenty second year and has maintained a level of service for this department that may be unmatched for the front line officer[s]." [Exh. B-217]; "[S]ets the bar high through personal example and professional approach." [Exh. B-208]; "[H]e is totally driven towards a safe outcome of each day." [Exh. B-199]. Swarr's annual reviews are replete with similar comments throughout his work history, and contain several commendations.

The notice of discipline simply nodded "there are present mitigating factors that include performance reviews, history with the Department and lack of significant disciplinary history..." Based on Swarr's exceptional work record, the Agency's designation of mitigation grossly understated Swarr's work history. If Swarr's exceptional 25-year work history does not deserve substantial weight in the assessment of discipline, it is difficult to imagine a record that would.⁸ The Agency's assessment here fails to comport with its requirement, under the Agency's disciplinary matrix, for the decision-maker to determine "whether or not the factors are sufficiently significant to justify a decrease or increase in the presumptive penalty." Simply stating there were "mitigating factors" [DSD Discipline Handbook, p. 26], without assessing their extent or weight fails to assign meaningfully the significance of mitigating factors as required under the matrix. [*Id.* at § 22.2].

19.6.5 If minimal, the severity of the current offense and the lack of or minimal nature of any consequences caused by the current offense. At hearing, Elwell stated Swarr accepted responsibility, reacted quickly to the situation, and she acknowledged consequences were minimal. [Elwell cross-exam]. Despite this acknowledgment, Elwell claimed the incident "brings disrepute on the Department as a whole and jeopardizes its mission." She found his conduct "constituted actual and demonstrable prejudice to the Department."

⁸ Of course an egregious violation may outweigh a prior positive record. [CSR 16-50 A. 1]. That subsequent assessment is a different matter than giving such short shrift to a uniquely positive work history, that it becomes a meaningless factor in subsequent balancing test.

While there was some conflicting testimony as to whether inmate MC injured inmate PA, the preponderance of the evidence indicated the consequences of Swarr's momentary, and highly unusual, lapse were minor. PA was not physically injured. He did not wish to pursue any action against MC or any officer or the Agency, no public attention to the matter was in evidence. In short, this incident had minimal consequences.

In aggravation, Elwell found actual injury to PA while under Swarr's care and duty to enforce the sep all post order; endangerment to PA, MC, tier clerks and himself; actual demonstrable legal and financial risk to the Agency and to the City in the form of civil liability; and actual and demonstrable prejudice to the Agency by Swarr's allowing an inmate-on-inmate assault. Finally, Elwell found an aggravating factor in that Swarr's "poor judgment as it pertains to the safety of inmates in the context of a correctional setting brings disrepute on the Department as a whole and jeopardizes its mission." This description merely establishes the category of violation, not an aggravation of it.

Elwell also found the following aggravating factors which justified a penalty in excess of the presumptive penalty under the Agency's disciplinary matrix: the length of time Swarr had already worked in the Special Management Unit; actual harm to inmate PA; PA's classification as a sep all; the existence of an actual and demonstrable prejudice to the department; and poor judgement which compromised the department's mission and vision. [Elwell testimony]. She concluded the balance of the above mitigation and aggravation merited a 16-day suspension. For reasons noted here and above, Elwell's determination of discipline lacked consistent application of the Agency's matrix. In particular, Elwell failed to accord any weight to Swarr's exceptional work record, considered as aggravating a factor that was substantially mitigating, and failed to weigh meaningfully the balance of mitigating and aggravating factors in applying the matrix, and many of the stated "aggravating" factors were mere recitation to the category of violation. I proceed next to an analysis of the degree of discipline under the Career Service Rules.

As frequently noted, I am bound to uphold the Agency's election with respect to the degree of discipline if it is within the range of alternatives available to a reasonable manager. In re Leyba, CSB 31-16A, 5-6 (3/2/17). The measure of that election depends on a reasonable weighing of three factors under the Career Service Rules.

A. Seriousness of the proven offenses

Inmate safety is of the utmost importance to the Agency. Swarr's failure to separate MC from the other inmates was substantially contrary to that guiding principle. While that conclusion places Swarr's conduct squarely within the range of penalties as designated by the Agency's matrix, category D, the seriousness of his violation must be viewed under the totality of circumstances.

Swarr was attempting to do the right thing by allowing MC out of his cell in order to have tier clerks clean it. His lapse of attention was momentary – seconds – at the end of several long shifts, and not inattention due to playing cards, watching television, intentionally permitting inmate assault or other knowingly wrongful conduct. He was unaware of the bad blood between MC and PA. He was truthful throughout the pre-disciplinary and disciplinary process, and acknowledged his wrongdoing under the Agency's sep all post order.

There was excessive delay in the Agency's processing this case. Approximately 21 months elapsed from the date of wrongdoing until the determination of discipline, and approximately 18 months elapsed between the beginning of the investigation until the issuance of the letter in

contemplation of discipline. Swarr claimed actual prejudice in his inability to promote during the investigation and his inability to apply for transfer. Elwell replied other deputies have been promoted during investigations into their conduct. Neither claim was proven by a preponderance of the evidence, thus no actual prejudice was shown as is required to require a mitigated penalty. [See In re Espinoza, CSB 14-16A, 2-3 (3/8/17)]. Nonetheless, excessive delay is one factor in the propriety of discipline.

B. Prior Record

In Swarr's 25-year career with the Agency, every performance review was "Exceeds Expectations," "Exceptional," or "Outstanding." He was subject to discipline only once, a verbal reprimand for a minor, unrelated issue. The Career Service Rules (and for that matter, the Agency's disciplinary matrix) require that an employee who has performed admirably for many years should have his record count in a significant way in the determination of discipline, absent egregious conduct that outweighs past performance. [See CSR 16-20]. In the three years Swarr was assigned to 3D before this incident, he had no disciplinary issues. Decision-makers must do more than acknowledge past merit, while minimizing its effect. [In re Leyba, CSB 59-14A, 8-10 (2/5/16); see also In re Ford, CSB 48-14A, n. 26 (12/17/15)].

Swarr's 25 years of highly-praised service and lack of discipline should have been a substantially mitigating factor. Instead the Agency counted it as aggravation, to wit: "he should have known better" [Elwell cross-exam, describing aggravating factors]. This is an incorrect assessment of a prior record under CSR 16-20.

C. Likelihood of Reform

From his first interview through hearing, Swarr readily acknowledged his mistakes, his willingness to accept responsibility, and his motivation to change his actions to comply fully with the Agency's sep all post order. The goal of the Career Service disciplinary rules is corrective, not punitive. This goal is emphasized by the repeated use of the word "correct" within the purpose statement of the disciplinary rules. "The goal of discipline is to correct inappropriate behavior..." and "[t]he appointing authority shall impose the type and amount of discipline he or she believes is needed to correct ... the desired behavior or performance." CSR 16-20.⁹

Swarr's acknowledgment of wrongdoing was a first step in reform. There was no evidence contradicting his willingness and commitment to reform. The Agency did not report any subsequent violations of the type addressed in this case, or any subsequent wrongdoing in the 21 months since the date of wrongdoing and the assessment of discipline.

For reasons stated above, the Agency's election to suspend Swarr for 16 days was not within the range of reasonable alternatives available to a reasonable administrator; nor did it comport with the Agency's disciplinary matrix. Giving the overall minimal consequences of Swarr's violations, his outstanding record, and his ability to reform, a reasonable administrator would have assessed a substantially mitigated penalty.

⁹ Notably, this rule has remained unaltered in the latest CSR revision. CSR 16-41. [Page issuance date February 12, 2016].

VI. ORDER

For reasons stated above, the Agency's 16-day suspension of the Appellant, assessed November 10, 2015, is MODIFIED to a four-day suspension.

DONE June 12, 2017.



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

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

Career Service Board

c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

Career Service Hearing Office

201 W. Colfax, Dept. 412, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.

I certify that on June 12, 2017, I emailed a correct copy of this Decision to the following:

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