

CIVIL SERVICE COMMISSION, CITY AND COUNTY OF DENVER, COLORADO  
Case Nos. 12 CSC 11- 12

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In the matter of:

**Joshua Herrick (00011)**

Officer in the Classified Service of the Denver Police Department  
Petitioner

and

In the matter of:

**Thomas Sanchez (99041)**

Officer in the Classified Service of the Denver Police Department  
Petitioner

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**FINDINGS, CONCLUSIONS, DECISION AND ORDER**

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Pursuant to a Departmental Order of Disciplinary Action in Case No. P2010 01 074, dated November 27, 2012, (Res. Ex. 1), Petitioner Joshua Herrick was suspended for thirty (30) days without pay for violation of RR-115.1, and was terminated and dismissed from the Classified Service of the Denver Police Department for violation of RR-112.2 of the Denver Police Department Operations Manual.

Pursuant to a Departmental Order of Disciplinary Action in Case No. P2010 01 074, dated November 27, 2012, (Res. Ex. 4), Petitioner Thomas Sanchez was suspended for thirty (30) days without pay for violation of RR-115.1, and was terminated and dismissed from the Classified Service of the Denver Police Department for violation of RR-112.2 of the Denver Police Department Operations Manual.

Thereafter, the above cases were consolidated for purposes of hearing on January 31, 2013. Hearing was held in the consolidated cases on June 6, 7, 11, 12 and 13, 2013, after which the record was closed. Petitioner Herrick was represented by Lara Marks Baker, Esq., and Lindsay N. Hutchinson, Esq. Petitioner Sanchez was represented by Sean T. Olson, Esq. Respondent City and County of Denver was represented by Jennifer L. Jacobson, Esq., and Robert D. Nespor, Esq., Assistant City Attorneys.

The alleged Rules violations involved herein are as follows:

**RR-115.1 Conduct Prohibited by Law:**

Officers shall obey the Charter of the City and County of Denver, all City ordinances, all state and federal statutes, all lawful court orders, and all other applicable laws whether criminal, civil, traffic, or administrative.

**RR-112.2 Commission of a Deceptive Act:**

In connection with any investigation or any judicial or administrative proceeding, officers shall not knowingly commit a materially deceptive act.

The Disciplinary actions herein are governed by Civil Service Commission Rule 12 – Disqualification and Disciplinary Appeals, Hearings and Procedures, dated May 13, 2008. Section 9.B.1 of Rule 12 states that “The Hearing Officer shall give due weight to the necessity of the Manager to maintain administrative control of the respective department.” Section 9.B.3 of Rule 12 states that “The Hearing Officer shall not merely substitute their judgment for that of the Manager of Safety in determining the appropriate level of penalty to be imposed for the sustained violation.”

At issue herein is the conduct of the Petitioners in requesting a welfare check by the Parker Police Department regarding a fellow Denver Police Officer, Kyllion Chafin.

Also in issue is whether one or both of the Petitioners committed a deceptive act or deceptive acts in connection with various official inquiries conducted by the PPD or the DPD or in connection with any of the Petitioners' sworn testimony in various forums after January 27, 2010.

### Findings

On January 27, 2010, following roll call at 7:30 a.m., Petitioners Herrick and Sanchez, while preparing to go on patrol, discussed the absence of their friend and co-worker, Officer Kyllion Chafin, and agreed that they should request a welfare check on Officer Chafin by Parker Police Department, since Chafin lived in Parker, CO, a 45 minute drive from their Denver work location. There is no dispute regarding the requesting of the welfare check. At issue is whether the request was valid, or was made as a practical joke. The welfare check resulted in the Parker Police Department, (hereinafter the PPD), considering whether to break open the front door of Officer Chafin's home, before they were informed that Officer Chafin had called in prior to work reporting himself as sick. A subsequent investigation by the Parker Police was referred to the District Attorney, who initially filed charges against both Petitioners for false reporting. The charges against Petitioner Sanchez were later dropped. The charges against Petitioner Herrick resulted in a mistrial, and upon retrial, an acquittal.

Following the completion of the trials in Douglas County against Petitioner Herrick, the Internal Affairs Bureau of the Denver Police Department, (hereinafter the DPD), performed its own investigation, which resulted in the disciplinary actions herein.

The record submitted herein contains both the investigation file compiled by the PPD, as well as the IAB file compiled by the DPD. What is missing from both of these files are the telephone records of Petitioner Sanchez and of Officer Chafin. The PPD investigation, Ex. 48, shows that the investigator did subpoena the telephone records of Petitioner Herrick, and did include records for PPD Officer Gerlach. From the hearing transcripts in evidence, it appears that the telephone records of Petitioner Sanchez were available and referred to at Petitioner Herrick's trial in Douglas County. It also appears that Officer Chafin informed the DPD investigator that he would supply his telephone records pursuant to subpoena. No telephone records for either Chafin or Petitioner Sanchez were offered herein. Further, numerous phone numbers contained in the two exhibits in evidence were not accounted for or clarified.

Petitioners testified to their openness in requesting the welfare check, noting that they answered all questions asked by Parker Police Dispatch and by Parker Police Officer Gary Gerlach. Respondent elicited testimony regarding information that Petitioners failed to provide regarding the requested welfare check, as well as information which Respondent considered to be exaggerated by Petitioners. Petitioners did not initially provide their last names, nor did they inform Parker Police that both they and Kyllion Chafin were Denver Police Officers. Petitioner Herrick told Parker Police Dispatch that Chafin had left work "kind of frantically, and then he hasn't been to work in the last couple of days." (Ex. 52) Herrick answered the dispatcher's questions regarding vehicles, presence of Chafin's wife, Chafin's phone number, his own first name and phone number, and Chafin's age. The welfare check was assigned to PPD Officer Gary Gerlach. The record reflects that Officer Gerlach attempted to call Petitioner Herrick at 8:24 a.m., but got no answer. The record further reflects that Officer Gerlach then received a phone call from a blocked number at 8:25 a.m. (Ex. 50)

At trial in Douglas County Court, Petitioner Sanchez testified that his personal phone records reflected that he called Officer Gerlach at 303-472-7939, Officer Gerlach's issued Nextel cell phone, at 8:26 a.m. (Ex. 72, Bates 000971). In that conversation Petitioner Sanchez told Officer Gerlach that Officer Chafin might be having financial problems, and may have been upset. (Ex. 72, Bates 00090). Petitioner Sanchez recalled that Officer Gerlach asked if he were Josh, to which he replied "No," and that Officer Gerlach then asked if he had called for a welfare check, to which he replied "Yes." Officer Gerlach's recollection was that Petitioner Sanchez did respond "Yes" when he asked if this were "Josh." Officer Gerlach and PPD Officer Valenti proceeded to make the assigned welfare check at the home of Officer Chafin. When there was no answer to their knocking on Chafin's front door, they investigated further by looking into the garage, where

they identified Chafin's vehicles as described by Petitioner Herrick. They then ran the license plates. Further investigation was made by climbing over the fence and looking into windows on the back of the house, but nothing out of order was observed. While checking with the neighbors, it was learned from another PPD officer via mobile data terminal (MDT) that Officer Chafin was a DPD officer. This fact caused Officer Gerlach to notify his Sergeant about the welfare check, who then came to the scene with PPD Captain Tsurapas.

On being informed of the situation as well that Officer Chafin was a DPD officer, while riding to the scene with PPD Sgt. Bryant, Capt. Tsurapas contacted DPD Lt. James Henning and asked if he had any information regarding the welfare check for Officer Chafin. Lt. Henning asked for five minutes to check. Lt. Henning then requested a Supervisory Sergeant call him. Sgt. Andrejasich responded by phone, and was told by Lt. Henning that PPD was doing a welfare check on Kyllion Chafin, requested by a person named Josh. Sgt. Andrejasich informed Lt. Henning that Officer Chafin had called in sick that morning and that "Josh" might be Officer Josh Herrick. Sgt. Grady Carter was present at Annie's Cafe when this call was received and heard the reference to "Josh." Sgt. Carter then called Petitioner Herrick to ask if he had made a welfare check call on Officer Chafin to the PPD. Petitioner Herrick responded that he had. Sgt. Carter further testified that Petitioner Herrick said that this was a joke they had taken too far, to which Sgt. Carter responded "This is a joke?" and then told Herrick "Don't do that" and that they would talk later. Sgt. Carter denied that Herrick asked, "Am I really in trouble for this?" Importantly, during cross-examination Sgt. Carter admitted that Herrick did not say it was a "practical" joke, and agreed that it was his assumption that the welfare check was a practical joke.

Lt. Henning, having been told by Sgt. Andrejasich that Chafin had called in sick that morning, in turn called Capt. Tsurapas, who, having been informed that Chafin was alright, ended the welfare check, at about 9:23 a.m. At about 10 a.m. Lt. Henning again called Capt. Tsurapas and told him the welfare check had been a joke.

#### Deputy Manager of Safety Jess Vigil

The Departmental Order of Disciplinary Action regarding Petitioner Herrick is thirty-three pages in length, and the Department Order of Disciplinary Action for Petitioner Sanchez is thirty-four pages. Initially, these Orders refer to evidence regarding a PPD photo-radar ticket for Officer Chafin and indicate that Petitioners' motive for the welfare check involved playing a practical joke on Officer Chafin who was allegedly avoiding answering his door to dodge service of the ticket by PPD. The record in this hearing reveals that the PPD had not attempted to serve such a ticket on Officer Chafin. The Orders also state that both Petitioners were aware that Officer Chafin had called in sick each day he was out, but knowledge by Petitioners of such calls was not adduced in this hearing. The Order discusses at length a phone call to PPD Officer Gerlach at

8:25 a.m. The evidence is disputed as to whether or not the caller, admitted to be Petitioner Sanchez, identified himself as "Josh" to Officer Gerlach.

In his Disciplinary Actions, (Exs. 1 and 4), Deputy Manager of Safety Vigil states:

Officer Herrick violated this departmental rule [RR-115.1 and C.R.S. 18-8-111] when he and Officer Sanchez provided false information about Officer Chafin in order to get the Parker Police Department to perform a welfare check on him at his home as a practical joke. Officers Herrick and Sanchez indicated that the welfare check was requested because no one had heard from Officer Chafin for three days and they had concerns about his health or safety. The misrepresentations they made, deliberately and by omission, and their conduct, however, belie that claim. [The identical language is used in Ex. 4 relating to Officer Sanchez]

In addressing the issue of Deceptive Conduct, Deputy Manager Vigil noted that: "Clarifications to Appendix D of the Denver Police Department Discipline Handbook: Conduct Principles and Disciplinary Guidelines were made April 1, 2012..." These changes post-date the incident herein, which occurred on January 27, 2010.

Deputy Manager Vigil summarized his findings regarding the violation of RR-112.2 by stating:

As discussed above, Officer Herrick violated RR-115.1, Conduct Prohibited by Law, when he and Officer Sanchez gave Parker Police officials false information in connection with their request for a welfare check on Officer Chafin. He also violated RR-112.2, Commission of a Deceptive Act, when (1) he and Officer Sanchez continued to insist, in the face of overwhelming evidence to the contrary that the request for a welfare check on Officer Chafin was not a practical joke but was based on legitimate concerns for his well-being, and (2) he and Officer Sanchez fabricated an account of their actions and presented false testimony at trial and made untruthful statements during the Internal Affairs investigation of this matter in order to avoid responsibility for the false report he and Officer Sanchez made to Parker Police Officials. [The identical language is used in Ex. 4 relating to Officer Sanchez]

Deputy Manager Vigil testified regarding his review of the Internal Affairs file in these cases in reaching his decisions. He stated that his review found that Petitioner Herrick initiated a welfare check on Officer Chafin, knowing Chafin was ill when he breakfasted with him on Monday morning, and later went home with the flu. On Wednesday he initiated a welfare check as a joke, because PPD was

trying to serve a radar ticket on Chafin, who had refused to answer his door. Respondent failed to prove that PPD was attempting to serve a photo-radar ticket on Chafin.

He also found that the failure of Petitioners to identify themselves and Kyllion Chafin as police officers, was misleading and intentional. He stated that if it were a legitimate welfare request they would have provided all information available, i.e., the knowledge that Chafin was an officer, that the callers were DPD officers, that there might be a gun present, and that Chafin had called in sick. He stated that virtually the entire PPD had eventually responded to this welfare check request, a gross misstatement, since two officers initially responded, and subsequently a Sergeant and Captain, from a department of 63 officers.

He also questioned the choice of words used by Petitioners, in that in calling the PPD they referred to a "welfare check," but in their statements to the PPD and DPD investigators they indicated they wanted the PPD to "roll by" and check on Chafin, and to go and knock on his door to see if he needed anything. It is not clarified in the record how these descriptions of what Petitioners were seeking differed from the routine welfare checks to which both Petitioners testified to doing as DPD officers on a daily basis.

#### Sergeant Shanna Clark

Sergeant Clark was the booking person in Internal Affairs on January 27, 2010, and took the call regarding the welfare check by Parker Police Department requested by Petitioners. Thereafter, she was responsible for the IA investigation. Her final report, dated January 9, 2012, is Ex. 15. She testified that the initial call was from Lt. James Henning, and the concern was whether the welfare check was legitimate. Ex. 16 contains Progress Notes for this case, and reflects that following the initial opening of this IA case, very little investigation was done until June of 2011, a period of some 17 months, following the trials of Petitioner Herrick in Douglas County, and awaiting receipt of the transcripts from those trials.

Initially, on January 27 and 28, 2010, Sgt. Clark received statements from Officers Gerlach and Valenti, and Sgt. Bryant, from Parker PD, as well as statements from Lt. Henning, and Sgts. Carter, Sullivan and Andrejasich with the Denver PD. She did not interview these officers regarding their statements. Sgt. Clark did attend the trials of Petitioner Herrick in Douglas County, spoke with the Parker investigator, Detective Sherry Corcoran, and obtained the PPD file of their investigations and the trials of Petitioner Herrick. Sgt. Clark resumed her investigation in June of 2011, as shown in Ex. 16, when she took video statements from Officer Kyllion Chafin, and Petitioner Sanchez, and in August 2011, when she took a video statement from Petitioner Herrick. Regarding phone records, the record reflects only that she obtained the phone records of Officer Gerlach and of Petitioner Herrick from PPD. Ex. 16 reflects that on

August 22, 2011, she went to Douglas County Courts to look for phone records in the court case, but obtained no records. Ex. 48, Bates 000475, reflects that phone records for Petitioner Sanchez were requested by PPD Detective Sherry Corcoran, by affidavit to the Court. Ex. 48, Bates 000462, is a Court Order for Production of Records, signed by the Court on March 16, 2010, for the phone number 303-995-0516, shown to be Petitioner Sanchez cell phone number. The record herein does not contain phone logs for Petitioner Sanchez. Sgt. Clark testified that there was some discussion within the department regarding obtaining the phone records, and that she would have been the person to take further action if directed to do so, but that she did not take such action.

#### Officer Kyllion Chafin

DPD Officer Kyllion Chafin testified that on January 27, 2010, he set his alarm clock as usual for 6 a.m., and when he awoke, called the morning Sergeant to report himself as sick. He then went back to sleep. At different times he stated that he awakened at 10 or 10:30 a.m., and at 9 or 9:30 a.m. He testified that he neither heard nor saw PPD officers at his home that morning, and that he had looked out his window after being awakened by his wife. He awoke when his wife came into the bedroom and told him that the phones in the house were blowing up, and gave him his cell phone, which he said he had left downstairs on the first floor in a drawer. He checked his messages and saw a call from the Parker Police, as well as calls from the Petitioners. He stated that he believed that his first call was to the Parker Dispatcher, after which he placed calls to the Petitioners.

Ex. 81 contains calls to Parker Police Dispatch, in the form of separate audio files for each call, as well as a document file listing the times of all calls with date and starting time in GMT as well as duration of calls. Thus, the call shown at (6) is the initial call at 8:21 a.m. by Petitioner Herrick to request the welfare check from Parker dispatcher "Jim." During this call another voice, presumably Petitioner Sanchez, can be heard giving the cell phone number of Officer Chafin, (303) 883-1102, to Herrick to provide to "Jim." The duration of this call is 56 seconds. The call shown at (9) is the dispatcher airing the welfare check request. The call shown at (20) is the dispatcher "Barbara" leaving a voice-mail message at 8:38 a.m. for Kyllion Chafin at (303) 883-1102, known to be Chafin's cell phone number. The calls shown at (24) and (25) are vehicle license plate check requests related to the welfare check on Officer Chafin. The calls at (95) and (96) are from Kyllion Chafin to Parker Dispatch responding to the voice-mail left on his cell phone. These calls were logged at 18:23:47 and 18:24:52 GMT, or 11:23 a.m. on 1-27-10. In the call at (95) Chafin asks who had made the welfare check request. At (96) he is told the request was made by "...first of Josh." The call at (116) is the assignment of case number 244 to the welfare check investigation, at 18:52:56 GMT, or 11:52 a.m.

The record also shows that Officer Chafin's wife worked from a home office on the first floor of their home. Officer Chafin stated that when working from her office she never answered the door or phone. He further stated in an interview with DPD Det. Shanna Clark, (Ex. 86), that his wife had told him that she did not see or hear the PPD at their home on January 27, 2010. Ms. Chafin did not appear as a witness during either of the police department investigations in this matter or in this hearing.

Chafin also testified regarding his frequent poker playing habits, the infrequency of his calling in sick, his differing recollection of the timing of calls on January 27<sup>th</sup>, and his financial concerns regarding his son's college attendance.

#### Petitioner Joshua Herrick

Petitioner Joshua Herrick testified that he has been friends with Kyllion Chafin for over 20 years, and with Petitioner Thomas Sanchez since working with him at the Denver Sheriff's Department in 1997. He regularly socializes with both men. At the time of the incident at issue herein, Herrick and Chafin were working the same schedule, Monday through Thursday, being off Friday through Sunday. Sanchez's days off were Sunday through Tuesday. On Monday January 25, 2010, Herrick was at work with Chafin, who had told Herrick in the morning that he was not feeling well. In the afternoon Herrick did receive a call from Chafin, who said he was going to go home sick. Herrick's phone records, (Ex. 48), indicate four phone calls between the two on the 25<sup>th</sup>, the last being at 2:23 p.m. There are no further calls shown in this Exhibit between the two until Wednesday January 27<sup>th</sup>, when there is a call shown at 9:52 a.m. to Chafin.

Herrick testified that he assumed that Chafin had called in sick on Tuesday and Wednesday, the 26<sup>th</sup> and 27<sup>th</sup>. After roll-call on the 27<sup>th</sup> while loading their cars, he and Sanchez discussed their concern for Chafin, and decided to call Parker PD to request a welfare check. By radio Herrick asked his dispatcher for the Parker phone number. He then proceeded to call PPD at 8:21 a.m. (Ex. 48, Bates 000304, line 37), and spoke with the dispatcher, "Jim." This call is in evidence as Ex. 81, call (6), noted above, and Ex. 52, the transcript of that call.

Following this call, Herrick went into service, going to Denver Health Medical Center (DHMC) to assist in the transfer of a person to the FBI. He was at DHMC and unavailable by cell phone for a period of time. On leaving DHMC he checked his messages and saw that he had missed phone calls while in the DHMC. These calls are reflected in Ex. 48, Bates 000304-305, lines 38-42. The record does not reflect the caller in lines 38, 39, 41 and 42. The calls at lines 40, 43, 45 and 46 were with Petitioner Sanchez, whose cell phone was 303-995-0516. The calls at lines 44 and 48, at 9:14 a.m. and 9:20 a.m., were shown to be with PPD Officer Gerlach, 303-472-7939. (See Ex. 50, Bates 000513). Also note that Ex. 48, Bates 000311, shows text usage by Herrick at 10:12 a.m. on 1-27-

2010, leaving a message for Chafin at 303-883-1102. Note that the assigned times of phone calls in Exs. 48 and 50 vary, presumably because of differences in the phone companies' clocks.

Petitioner Thomas Sanchez

Petitioner Thomas Sanchez was at home as part of his days off work on Sunday, January 24, 2010. His daughter asked to play a game on his iPhone, and he told her it was in his car. Retrieving the phone, his daughter informed him that he had just missed a call, indicating that the phone was lighted. Petitioner checked his calls and saw a call from his friend, Officer Kyllion Chafin. He listened to a garbled message, and concluded it was an accidental ghost call. He attempted to call Chafin, but got no answer. He attempted to call Chafin on Monday the 25<sup>th</sup>, but was unsuccessful. No further contact with Chafin was attempted until Wednesday, January 27<sup>th</sup>.

Sanchez returned to work as scheduled on Wednesday January 27<sup>th</sup>. He testified that Chafin was not at work, and that he assumed he was sick. After roll-call he talked with Petitioner Herrick about having PPD conduct a welfare check on Chafin. He checked his cell phone for Chafin's cell phone number for Herrick to provide to the PPD dispatcher. Both then began loading their respective police vehicles. At this time Herrick's cell phone rang, and Herrick asked Sanchez to grab it. Sanchez missed the call, and told Herrick he did not recognize the number. Herrick said the call might be from PPD, and to return it. Sanchez then sat in his own car, and using his personal cell phone, returned the call to the number shown on Herrick's phone, which was to PPD Officer Gerlach. Sanchez testified that Gerlach asked if this were "Josh," and that he responded "No," and that Gerlach then asked if he had requested a welfare check, to which Sanchez responded "Yes. Sanchez testified that while making this call he had rolled up the windows on his vehicle because of the temperature, and because, although both he and Herrick were friends with Chafin, he did not know if Herrick shared his same concerns about Chafin's welfare. He testified that he told Gerlach that Chafin was "upset," but probably did not say "despondent." He did recall saying that Chafin had financial problems over his son going to Columbia University to play football. He stated that he personally thought Chafin was hard of hearing, based only on his experience with him. He also told Gerlach that Chafin had been a Marine, and that he took care of himself. He stated that he himself is a worry-wart, and he was concerned about Chafin's gambling habit.

After roll call, he and Herrick went their separate ways. He stated that he next heard from Herrick after 9 a.m., when Herrick called him to ask if he had heard from Chafin. He stated that he replied yes, that he was alright, and asked why, and that Herrick informed him that PPD was about to kick in Chafin's door. Sanchez testified herein that he knew Chafin had called him because in February of 2011 he had checked his phone records at the time of Herrick's trial and had seen that he had received a call from Chafin and had talked to him. He further

testified that in the first Herrick trial he had said that Chafin had texted him, but later realized he had misspoken. He also testified that in the second Herrick trial he had stated there was a blocked call at 9:15 a.m. that he was sure had been from Chafin. He agreed that he had told PPD that the call from Chafin had been about or after 10 a.m. a number of times. Regarding his phone calls, he stated that he looked at his phone records online, but that he never had a copy of his records, and that PPD had obtained his records during their investigation, and that he was shown his records at trial.

Sanchez also testified that Sgt. Carter called him and asked to meet him at an Arby's restaurant, where Carter informed him that Herrick was in trouble for a welfare call on Chafin, and Sanchez informed Carter that he had made the call. Sgt. Carter testified, after reviewing Ex. 32, that after receiving a return call from Officer Chafin at 10:45 a.m., he received a call from Petitioner Sanchez who asked how much trouble he was in, to which Carter replied it was an ongoing investigation and he could not talk about it, but it was not good. Sgt. Carter was not asked by any counsel about meeting with Petitioner Sanchez at an Arby's restaurant. His testimony herein differs slightly from Ex. 36, where he stated that Sanchez asked, "How much trouble are we in?" Sgt. Carter then responded, "We?" not knowing of Sanchez's involvement. Ex. 36 then states that Sanchez related his involvement in the welfare check call, a scenario not found in Ex. 32, which was dated 1-27-10, the day of the incident, while Ex. 36 is dated 3-10-11, and was made as a follow up to his prior statement and several court appearances/testimonies, and was requested by DPD investigator Sgt. Shanna Clark.

Petitioner Sanchez took a polygraph examination, Pet. Ex. A, dated April 15, 2010. The examiner found that Sanchez answered truthfully when he responded "No" to the questions: "On January 27, 2010, did you knowingly provide false information to the Parker Police Officer?" and "On January 27, 2010, did you report the welfare check as a prank on Officer Chafin?"

#### Captain James Tsurapas

Captain Tsurapas testified that he was in his office when he noticed on his MDT screen that a welfare check involved a Denver Police Officer. He responded to the scene in Sgt. Bryant's car. While driving to the scene he decided to check with Lt. James Henning, DPD, regarding whether Chafin was a DPD officer. He also stated that he knew Cmdr. Dilley, DPD, from the Democratic National Convention event. Lt. Henning asked for time to check on Officer Chafin. Upon learning from Henning that Chafin had called in sick that morning, the welfare check was closed at 9:23 a.m. He was later called at about 10 a.m. by Lt. Henning, who informed him that the welfare check request had been a practical joke, and that DPD was requesting that PPD provide copies of all reports on the incident. He later called Lt. Henning to inform him that the

District Attorney was considering a criminal complaint in the matter for false reporting.

#### Officer Gary Gerlach

Officer Gerlach was assigned by PPD Dispatch to do a welfare check on Kyllion Chafin. He called the phone number of the requesting party, "Josh," as shown at line 34, Ex. 50, Bates 000513, at 720-480-7574, at 8:24 a.m., which was not answered. He received an incoming call from an unavailable number at 8:25 a.m., Ex. 50, line 35, Bates 000513. He testified that he asked if this were "Josh," and that the reply was "Yes." He stated that if he had been told "No," he would have had additional questions. He testified that he was told that Chafin had money problems and was upset, that he was an ex-Marine, that he hadn't been heard from, and that he had left hurriedly. He stated that he was not told that Chafin was a DPD officer, that he had gone home sick, that he did not answer his door, or that he had called in reporting himself as sick. He testified that if contact were not made on a welfare check, a Sergeant would respond to the scene. In this case, Sgt. Bryant responded with Capt. Tsurapas. There was a discussion of whether to force entry to the home, but there was no decision to do so. While checking with neighbors regarding Chafin, he had received a MDT message from PPD Officer Ben Longoria that Chafin was a DPD Officer.

#### Sergeant Grady Carter

Sgt. Carter was at Annie's restaurant on the morning of January 27<sup>th</sup>, 2010, and overheard a call from Sgt. Andrejasich to Lt. Henning, after Henning had requested over the air a call from a supervisor. He understood that Henning was asking about a welfare check being done by PPD concerning Kyllion Chafin, requested by "Josh." He concluded the welfare check request was made by Josh Herrick, and proceeded to call Herrick. This call is not reflected in Ex. 48, which shows calls to Herrick's personal cell phone, 720-480-7574. He asked Petitioner Herrick if he had requested a welfare check on Chafin, to which Herrick responded yes. He stated that Herrick said this was a joke they had taken too far. Carter replied to the effect: "you're telling me this is a joke," and that Herrick responded, "Yes." He testified that he assumed Herrick meant it was a practical joke. He denied that Herrick asked, "Am I really in trouble for this?"

In testifying, Sgt. Carter reviewed Ex. 32, a statement he prepared on 1-27-10 at the request of Lt. Henning. He stated that the fourth paragraph of Ex. 32 referred to a call from Petitioner Sanchez, shortly after he had checked on the welfare of Officer Chafin at about 10:45 a.m., in which call Sanchez had asked how much trouble they were in, and he had responded it was an ongoing investigation, and he could not talk about it, but it did not look good. Carter further testified that he was present later on 1-27-10 when Herrick and Sanchez were present separately in Cmdr. Dilley's office, and were not permitted to explain their request for a welfare check on Kyllion Chafin. Carter admitted that

there were inaccuracies in Ex. 32, especially that he was not called by Lt. Henning.

Sergeants John Sullivan and Bill Andrejasich testified regarding their receiving calls from Kyllion Chafin on January 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup>, 2010, reporting in as sick, their understanding at Annie's that "Josh" referred to by Lt. Henning was probably Joshua Herrick, and also of hearing Sgt. Carter's calls to Herrick and Lt. Henning.

### Conclusions

Petitioner Herrick made the initial call for a welfare check on Officer Chafin to the PPD. The transcript of that call to PPD is found in Ex. 52, Bates 000530. None of the statements or answers to questions in that transcript has been shown to be untruthful. Herrick requested the welfare check and answered the questions posed by the PPD dispatcher.

After the call was assigned to PPD Officer Gerlach, Officer Gerlach called Herrick's phone number. Herrick missed the call, but Petitioner Sanchez returned the call to Officer Gerlach at Herrick's request, as shown by Ex. 50, Bates 000513, line 35, showing an incoming call at 8:25 a.m., number unavailable. It is disputed between Officer Gerlach and Petitioner Sanchez, whether or not Sanchez identified himself as "Josh." Sanchez did provide additional information about Chafin having financial problems, being an ex-Marine, and being upset. Again, the record testimony of Chafin herein reflects that he did have concerns over the financial cost of sending his son to college out of state to play football and that he had talked about his concerns with Petitioners.

Petitioner Herrick was unavailable from approximately 8:45 a.m. to 9:12 a.m., as evidenced by his phone records at Ex. 48, Bates 000305, lines 42 and 43. He testified that on leaving DHMC he checked his phone calls and called Sanchez to ask if he had heard from Chafin, who stated that he had, and that Chafin was okay. He told Sanchez that PPD was about to kick in Chafin's door. The record reflects a blocked call to Gerlach at 9:12 a.m. and a call to Gerlach at 9:19 a.m. from Herrick. Gerlach closed this incident at 9:23 a.m.

It is apparent that Sgt. Carter and Lt. Henning reacted to learning of the welfare check by concluding that Petitioners were attempting to play a practical joke. Carter told Henning this, and Henning reported this to Capt. Tsurapas of the PPD. However, we find that Petitioners and Chafin were not shown to be known for playing jokes on each other or on others, and that Respondent has failed to provide sufficient evidence that this was in fact a practical joke. Respondent's case is undermined by the fact that Sgt. Carter admitted in both Herrick trials and at this hearing that he made an assumption that Herrick was playing a practical joke on Chafin.

The only basis for finding that the welfare check was intended to be a practical joke was the conversation between Petitioner Herrick and Sgt. Carter, wherein Herrick admits stating "this is a joke," but claiming that he was referring to Sgt. Carter's and the Department's reaction to the welfare check, which later resulted in an IA investigation being opened. It is reasonable to assume that the call by Sgt. Carter to Petitioner Herrick inquiring about the welfare check caused Herrick to recognize that the department was concerned about the request for the check. Herrick's explanation of his response to Sgt. Carter's inquiry is not an unreasonable one. Therefore, it was incumbent upon Respondent to explicate its interpretation of that conversation given the ambiguity of the statement. However, the record herein fails to clarify the tone, inflection, or intent of the conversation between Carter and Herrick. At the hearing, no motive was given for the alleged practical joke other than that the three officers were close and long term friends. Further, the delay by Internal Affairs in completing its investigation leaves the record incomplete regarding phone calls between the numerous actors in this incident, critically those of Sanchez and Chafin.

On reviewing the record herein, Deputy Manager Vigil relied on what he believed Petitioners should have told PPD in requesting the welfare check, and what he assumed both Petitioners knew of Chafin's condition. Thus, he stated that PPD should have been informed that Petitioners and Chafin were DPD officers, that they should have attempted to contact Chafin before requesting the welfare check, that they should have checked with DPD supervisors regarding Chafin before requesting the welfare check, and that Petitioners should have contacted friends within the PPD to assist in checking on Chafin's welfare, rather than calling PPD dispatch. While those actions may have been prudent, they do not provide a sufficient basis for the Panel to find that Herrick's and Sanchez's welfare check was intended to be a practical joke.

As to Herrick, Vigil stated that Herrick was aware that Chafin had left work sick on Monday afternoon, the 25<sup>th</sup>. Herrick also was aware that officers were required to call in when not reporting for duty as scheduled, and that failure to do so would cause a supervisor to respond. As to Sanchez, he had been unable to contact Chafin on the 24<sup>th</sup>, and had not been at work until the 27<sup>th</sup>. He too knew that officers were required to call in when not able to report for duty. This knowledge alone, however, does not provide a basis for finding that the welfare check request was made as a practical joke. The admission of Sgt. Carter that Herrick did not use the word "practical," and his further admission that he had assumed it was a practical joke that had gone too far, requires that Respondent show some basis for the disciplinary actions herein. In addition, Deputy Manager Vigil admitted that the disciplinary records of Petitioners contained no significant prior discipline.

Officers Herrick and Sanchez maintained throughout this incident, the investigation, the two criminal trials and this hearing that they had concerns

about Chafin and had not called in the welfare check as a practical joke. Herrick and Sanchez established that to them, a welfare check was a routine event and seemed to be a practical way to check on Chafin. In hindsight, the Officers admitted that it may not have been the best course of action, but at the time, neither Officer could have anticipated that PPD would respond to the welfare check by contemplating breaking down Chafin's door. Respondent failed to present sufficient evidence to refute the testimony of Herrick and Sanchez as to the reason for the welfare check.

In the direct examination of Sgt. Carter, Respondent did not establish a basis for the assumption that the welfare check was a practical joke. Nor did Counsel question Sgt. Carter regarding Petitioner Herrick's tone of voice or inflection in making the statement about the call being a "joke."

Further, while Ex. 81 reflects that Chafin did not call Parker dispatch until 11:23 a.m., which conflicts with his recollection of being awakened by his wife at around 9 a.m. or 10 a.m., this fact does not have a bearing on the basic question herein, whether the Petitioners requested the welfare check as a "practical joke" which went too far, and thereafter lied about it.

Respondent did present limited evidence regarding the delay in conducting the DPD investigation herein, which included testimony that the delay was caused by Petitioners being charged in Douglas County. Therefore, Herrick and Sanchez could not be required to respond to questions pursuant to *Garrity*, which contains a clause regarding self-incrimination. (See Ex. 35) A *Garrity* advisement is given to order and compel an officer to provide a statement as part of an internal departmental investigation. The record herein does not reflect a basis for the decision of the DPD to delay their investigations herein regarding matters other than obtaining statements from Petitioners until following the completion of PPD investigations, charges and trials. This unnecessary delay resulted in an incomplete record in this matter.

Respondent's case of false reporting to authorities under RR-115.1 turns on proving that the welfare check was a practical joke on the part of Herrick and Sanchez. The Panel finds that Respondent has failed to prove that the welfare check requested by Petitioners constituted false reporting to authorities. Having found that Petitioners were not guilty of false reporting, the Panel finds that Petitioners have not violated RR-115.1. Respondent's discipline under RR-112.2, Commission of a Deceptive Act, was based on Herrick's and Sanchez's statements and testimony during the investigation and trials wherein Herrick and Sanchez continued to assert repeatedly that the welfare check was legitimate and not a practical joke. Having found that Respondent has not proven a violation of RR-115.1 against either Herrick or Sanchez for the welfare check, the Panel further finds that Petitioners have not violated RR-112.2, Commission of a Deceptive Act, by their statements and testimony during the investigation of this incident, by either the PPD or the DPD or at the two criminal trials.

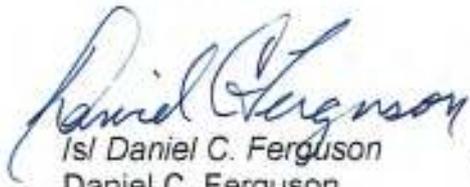
ORDER

The Departmental Orders of Disciplinary Action in Case No. P2010 01 074, dated November 27, 2012, regarding both Joshua Herrick and Thomas Sanchez, are reversed.

**NOTICE OF APPEAL RIGHTS**

*Pursuant to Charter § 9.4.15(E), and Rule 12 § 11 (A) (1) and (2), the decision of the Panel of the Hearing Officers may be appealed to either the Civil Service Commission, or directly to District Court. Any appeal to the Commission shall be initiated by filing a Notice of Appeal with the Commission, within fifteen (15) calendar days of the date noted on the certificate of service of the Hearing Officer's decision by the Commission. Any appeal to District Court shall be initiated in accordance with the Colorado Rules of Civil Procedure currently in effect.*

Dated this 12<sup>th</sup> day of July, 2013,  
at Littleton, Colorado



*/s/ Daniel C. Ferguson*  
Daniel C. Ferguson  
Chief Hearing Officer

*/s/ Hazel Hanley*  
Hazel E. Hanley  
Hearing Officer

*/s/ Susan Eckert*  
Susan J. Eckert  
Hearing Officer