

DECISION AFFIRMING DISMISSAL

EDWARD KELLER, Appellant,

v.

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

I. INTRODUCTION

Appellant Edward Keller (Mr. Keller) appeals his September 8, 2014 dismissal from the Department of Safety, Denver Sheriff's Department (Agency) for alleged violations of the Career Service Rules (CSRs) specified below. On May 23 and 24, 2018 Hearing Officer Federico C. Alvarez conducted a hearing to determine the propriety of the Agency's discipline. Donald C. Sisson, Esq. and Lucas Lorenz, Esq. represented the Appellant and J. Andrew Nathan, Esq. and Marni Nathan Kloster, Esq. represented the Agency. Appellant's exhibits A, B, C, G, S, Z, DD, GG, HH, Page 1 of PP, and WW and the Agency's exhibits 1 through 28, 30, through 35, and 37 were admitted into evidence. Mr. Keller and the following witnesses testified on his behalf: Sergeant Anthony Mazzei, Deputy Thomas Ford, Sergeant Kevin Ness, Captain Kelly Bruning, Chief Connie Coyle, Deputy Sheldon Marr, Chief Gary Wilson, and Stuart Shapiro, Esq. Deputy Director of Safety Jess Vigil testified on behalf of the Agency.

II. ISSUES

The following issues were presented for appeal:

A. whether Mr. Keller violated any of the following CSRs as they pertain to the affiliated Agency Rules and Regulations, statute or Executive Order:

CSR 16-60 A, E, and L (DSD 200.4.1); CSR 16-60 A, E, and L (DSD Rule 200.4.2); CSR 16-60 A and L (DSD Rule 300.11.2; CRS 18-3-204); CSR 16-60 A, L, and Z (DSD 300.11.6); CSR 16-60 A, L, and M (DSD Rules 400.4.1 and 400.6); CSR 16-60 A and L (DSD Rules 300.19.1(DO 5011.1J and 300.22)); CSR16-60 A and Y as it pertains to CSR 15-110 and EO 112; and

B. if Mr. Keller violated any of the aforementioned CSRs, whether the Agency's dismissal of him conformed to the purposes of discipline available pursuant to CSR 16-20.

III. FINDINGS

The Parties stipulated to the following facts:

On July 31, 2011, Hunter was assigned to the 4D pod housing unit in the DDC. The 4D pod is a special management unit. Prior to July 31, 2011, Appellant was instructed by a Sergeant to search Hunter's cell in 4D and look for a piece of a metal bed, which could be used as a weapon, that was missing from the medical unit where Hunter had been housed₁ prior to being assigned to the 4D pod.

The date of Deputy Keller's use of force incident with Jamal Hunter is July 31, 2011. Deputy Keller submitted his use of force report on July 31, 2011 approximately 1.5 hours after the incident. Jamal Hunter filed his civil lawsuit on or about October 10, 2012 (Civil Action No. 12-cv-02682-JLK). The City and County of Denver agreed to a \$3.25 million-dollar settlement that was approved by the City Council on or about August 29, 2012.¹ The Department of Safety and the Denver Sheriff's Department terminated Deputy Keller on September 8, 2014.

In addition to the stipulated facts, the Hearing Officer makes the following findings:

A. Background

On July 30, 2011, inmate Jamal Hunter (Mr. Hunter) was transferred into 4D pod at the Downtown Detention Center, because of burns he had suffered to his genital area the previous week. On July 30 and 31, 2011, Mr. Keller worked 4D pod where he supervised inmates including Mr. Hunter. Mr. Keller knew that Mr. Hunter's injuries were fresh and oozing as Mr. Hunter had shown them to Mr. Keller. On July 31, when Mr. Keller started his shift at 2:30 p.m., Mr. Hunter promptly complained again, wanting the bandages on his injuries changed. Mr. Keller or Deputy Ford, also on duty in 4D pod, conveyed that request to the medical staff. That staff responded that Mr. Hunter was not in an emergency status, so they would attend to him when they made their round. Mr. Hunter had received his one hour of free time out of his cell to end at 4:30 p.m. and had been mostly on the telephone, without incident to this point.

By this point in time, Mr. Keller had concluded that Mr. Hunter was an annoying complainer or whiner due to his constant demands for attention and complaints about his prior injury. Mr. Keller described Mr. Hunter as "mouthy" and "Just flapping his gums a lot" in his deposition in the civil lawsuit (Lawsuit.) [Exh. 25, p. 30. In. 15 – p. 31, In. 13].

B. The Videos

Exhibit 7, one of the videos documenting the physical interaction between the Deputies and Mr. Hunter (Incident), viewing into the hallway containing the officer's desk shows that: Mr. Hunter entered the hallway from a doorway on the right side, walking slow and limping slightly on his left leg. He held papers in his left hand and was facing toward the camera. He spoke to Mr. Keller, gesturing at himself and to his left, which was to Mr. Keller's right as Mr. Keller now faced Mr. Hunter with his back to the camera. As they spoke, Mr. Hunter turned almost 90 degrees towards his left, the direction to where he was gesturing and had his right side toward Mr. Keller. During this exchange, Mr. Keller testified that he ordered Mr. Hunter to "lock down," to return to his cell, so they could accord other inmates their free time and distribute the next meal. Mr. Keller testified that Mr. Hunter disobeyed his order and instead made the unwarranted insult to Mr. Keller, "You are a racist motherfucker and you need to treat me better."

Mr. Keller then began walking forward away from the camera and toward Mr. Hunter, who was four steps away, and almost immediately pointed toward Mr. Hunter's cell with his right hand. Mr. Keller reached and, with his left hand, grabbed Mr. Hunter by the right shirt (short) sleeve of his jail uniform. Mr. Keller then firmly escorted the now compliant Mr. Hunter away from the camera toward his cell, which was through the doorway on the right and then immediately to the left, adjacent to the hallway. Mr. Hunter walked on the left side of Mr. Keller as they approached the cell. Mr. Keller took five steps to reach Mr. Hunter's cell door, with the hinges of the door on its right side. Deputy Ford, who had been sitting behind Mr. Keller out of sight of the camera view, now followed them. Mr. Keller used his free right hand to reach the door handle on his left and opened the door toward them. Mr. Keller took a step forward and then pushed Mr. Hunter's upper right arm into the cell with his left hand, which caused Mr. Hunter to spin

¹ This year should be 2014.

toward his left about 90 degrees as his right side entered the cell first. Mr. Keller then released the cell door and pushed Mr. Hunter's left shoulder with his right hand and Mr. Hunter's upper chest with his left hand toward the cell. In essentially one fluid motion Mr. Keller then grabbed Mr. Hunter with both hands around the neck in a chokehold and forced Mr. Hunter down onto his bunk.

23 seconds elapsed from the time that Mr. Hunter entered the officer's desk area to when Mr. Keller grabbed Mr. Hunter by the sleeve. Five seconds elapsed from the time that Mr. Keller first grabbed Mr. Hunter by the sleeve to when he next grabbed Mr. Hunter by the neck.

Exhibit 8, the video of the view from rear of the cell looking toward the cell door, so that the directions are reversed, shows that: the door opened outward and Mr. Keller pushed Mr. Hunter, facing the camera, into the cell. Mr. Hunter's came in right side first and slightly head first, steadying himself with his right hand on the door. He then caught himself and turned about 90 degrees to his left, facing the right wall of his cell. At around this point, Mr. Hunter said, "Get your fucking hands off of me.", turning his face to his left toward Mr. Keller. Mr. Hunter's hands were at hip level but with the momentum of the turn, his right hand had bobbed slightly forward and up, and then back to hip level. Mr. Keller did not seem to see this hand movement as Mr. Hunter's torso mostly blocked it from view and he was focused on Mr. Hunter's face. Mr. Hunter did not adopt a fighting stance or lift his arms up or back to prepare to swing at Mr. Keller.

Mr. Keller had turned about 45 degrees sideways to his right to move through the cell door, which was hinged on his right side and open about 80 degrees. Mr. Keller then released his right hand from the door and with it pushed Mr. Hunter's left shoulder and with his left hand simultaneously pushed Mr. Hunter's upper chest toward the cell's interior. Mr. Keller's move caused Mr. Hunter to continue to turn a little more so that they now essentially faced each other. Mr. Keller then immediately grabbed Mr. Hunter by the neck with both hands and forced Mr. Hunter backward onto his bunk, situated against the doorway wall and along the left wall. Mr. Hunter landed on his back lengthwise on the bunk with Mr. Keller straddling on top of him, still grabbing Mr. Hunter in a chokehold. Mr. Keller's thumbs were on the front of Mr. Hunter's neck, with his fingers encircling Mr. Hunter's neck, and the bottom of his palms beneath his little fingers resting just at or above Mr. Hunter's collarbone. As soon as they landed on the bunk, Mr. Keller pushed Mr. Hunter's left side of the head into the left wall of the cell.

Deputy Ford, who entered the cell behind Mr. Keller, now assisted by grabbing Mr. Hunter's right arm. Mr. Keller then moved his right hand to the back of Mr. Hunter's neck and his left hand to his upper chest. They brought Mr. Hunter to a semi-seated position against the wall. Mr. About five seconds elapsed from when Mr. Keller pushed Mr. Hunter into the cell to this point. Mr. Keller wrote in his Report that he ordered Mr. Hunter to quit resisting and roll over to be handcuffed. Mr. Hunter did not do so, but between being pushed onto the bunk and/or wall and being restrained, he could not have complied unless they had released him so he could take this action. They then tried to force Mr. Hunter to the floor to handcuff him.

From the hallway across from the doors going into the 4D pod, Sergeant Mazzei heard Mr. Hunter demand that Mr. Keller remove his hands, so he came to investigate, and yelled for Sergeant Ness, then a Deputy. Sergeant Mazzei entered the cell about nine seconds after Mr. Keller pushed Mr. Hunter in, as they were trying to force him from the bunk to the floor. Sergeant Mazzei had a taser but shot it unsuccessfully. The taser's two metal prongs, attached to it with wires, did not enter Mr. Hunter's skin so he was not affected. However, Sergeants Mazzei and Ness and Mr. Keller got shocked by the wires. Sergeant Ness and Deputy Enriquez followed Sergeant Mazzei into the cell about five seconds later and helped restrain Mr. Hunter. Deputy Enriquez applied pain to Mr. Hunter's left ankle area with his nunchucks. Mr. Hunter did not cooperate and appeared to be trying to curl into a fetal position. Mr. Keller pushed Mr. Hunter's

head to the floor and they turned him face down. Around this time, Mr. Hunter dropped his papers and they crumpled onto the floor. He had 2 regular sized writing papers that had been folded in half and a third that was about 2 by 3 inches in size.

Sergeant Mazzei had now removed the prongs and wires from the taser and stunned Mr. Hunter directly with it, a drive stun, in the lower back, incapacitating him. Mr. Keller, then sat on Mr. Hunter's legs and handcuffed him behind his back. Mr. Keller and Deputy Ford then lifted Mr. Hunter off the ground, ending the Incident. As they escorted Mr. Hunter out of the cell, four more Deputies arrived at the cell door, then two more Deputies arrived in the hallway through which they escorted him out.

About 20 seconds elapsed from when Mr. Keller pushed Mr. Hunter into the cell to when they incapacitated him, and from then, another 30 seconds elapsed to when they began escorting him out of the cell. Six Deputies escorted Mr. Hunter to the Medical Unit on the third floor for evaluation. Mr. Hunter remained under observation in the medical unit for 24-48 hours. Mr. Keller had no further contact with Mr. Hunter. [Exh. 3 In. 1411-14].

Exhibit S is a version of Exhibit 8 in slow motion which shows what is described above.

C. The Agency Reaction

Only Mr. Keller had a view of Mr. Hunter prior to his initial takedown. As Deputy Ford testified at the hearing, he was behind Mr. Keller and could not see their interaction. All other officers arrived when Mr. Keller had already taken Mr. Hunter down and did not see what precipitated the Incident. They only heard orders or ordered Mr. Hunter to yield and helped immobilize him for Mr. Keller to handcuff him. Mr. Hunter did not sustain any injuries that required medical treatment from Mr. Keller's takedown of him to the bunk.

Around 6:07 P.m. on July 31, Mr. Keller wrote an OIC Staff Report (Report), [Exh. 26]:

At 1630 while working 4D, inmate Hunter, Jamal was told to lockdown from his freetime. Hunter approached the officers desk before locking down and began to yell at me about his medical condition. Hunter was informed by myself and Officer Ford that medical had been called and was aware and stated it was not an emergency and he would be seen when medical staff was available. Hunter was again told to lockdown. Hunter then began yelling at me and I quote, "You are a racist motherfucker and you need to treat me better." I informed Hunter that I was being professional and would treat him no different than any other inmate. Again I ordered Hunter to lockdown. While Hunter was yelling at Officer Ford and myself, I placed my hand on his right arm to escort him to his cell. Hunter then yelled and I quote, "Get your fucking hands off of me." Hunter then pulled away from and turned on me. Instinct took over and I then grabbed Hunter by his neck and while taking him to the ground we landed on his bunk. I ordered Hunter to roll over and place his hands behind his back. He refused and began to fight with Officer Ford and myself. I then grabbed Hunter by his arms to get him on the floor so we could gain control. While being assisted in taking control of Hunter, I then heard that the taser would be used if he did not comply. Hunter refused to comply and was tasered. Once Hunter was under control and compliant, I placed handcuffs on him. Hunter was escorted from 4D to be seen by medical.

As required, all officers involved in the Incident with Mr. Hunter prepared Reports. After reviewing them, Sergeant Mazzei did not initiate discipline against Mr. Keller. Deputy Ford was likely influential in this result because, although he could not have seen such action, he wrote in

his Report that, "Inmate Hunter turned on Officer Keller in a violent manner." This statement, when coupled with Mr. Keller's Report would have led Sergeant Mazzei to conclude that Mr. Hunter precipitated authorized use of force by Mr. Keller.

Captain Kelly Bruning reviewed and summarized all the Reports of the Incident for transmittal to his then supervisor, Major Michael Than, Sr. Chief Connie Coyle, then the second ranking person at the Internal Affairs Bureau (IAB), also reviewed the reports and video and then had Captain J. Romero seek a decision from Major Than whether they should refer the Incident to Internal Investigations, which decision Captain Romero requested via an August 4, 2011 Memorandum. [Exh. C]. Major Than failed to respond. On July 16, 2013, Major Than finally responded with a Memorandum declining any IAB action against Mr. Keller, which he authored three days before his deposition in the Lawsuit when he first viewed the video to prepare for it. By then, Chief Coyle had assumed different duties. So, for over two years, the decision on whether to initiate disciplinary action against Mr. Keller remained unresolved.

D. Mr. Keller's Statements

On May 29, 2013, Mr. Hunter's attorney deposed Mr. Keller in the Lawsuit. Prior to and during the deposition, Mr. Keller viewed the video of the Incident and his Report. Mr. Keller denied any (1) thought of Mr. Hunter having a weapon in his Report [Exh. 25, p. 109, In. 22-5 – p. 110, In. 3], (2) fear of Mr. Hunter killing Mr. Keller [*Id.* at In. 4-9], (3) possibility of Mr. Hunter striking Mr. Keller [*Id.* at In. 10-16], (4) threatening gestures by Mr. Hunter to Mr. Keller or threats of physical injury by Mr. Hunter to Mr. Keller or any other sheriffs [*Id.* p. 64, In. 20 – p. 65, In. 16], (5) fear of Mr. Hunter [*Id.*, p. 66, In. 9-10], (6) attempt by Mr. Hunter to strike Mr. Keller [*Id.*, p. 87, In. 21-3], (7) any other instigation by Mr. Hunter as justifying his takedown prior to that recorded in the video [*Id.*, p. 87, In. 2-14]. However, Mr. Keller now characterized the content of this video to show Mr. Hunter: (1) taking a fighting stance [*Id.* at p. 25, In. 3-5], (2) was resisting aggressively [*Id.*, p. 85, In. 15-20], (3) turning on Mr. Keller aggressively and violently [*Id.*, p. 85, In. 23-5], and (4) taking an aggressive step toward Mr. Keller [*Id.*, p. 86, In. 9 - p. 87, In. 1]. Mr. Keller also testified that he had not choked Mr. Hunter and that he had put his hands around Mr. Hunter's collarbone area but not around his neck. [Exh. 25, p. 86, In. 3 – 8; p. 88, In. 12 – 18].

On November 21, 2013, Sergeant Kenneth Juranek of the IAB interviewed Mr. Keller, who appeared with counsel. Sergeant Juranek allowed Mr. Keller to view the video of the Incident and his Report during the interview. Mr. Keller now stated that he "thought [Mr. Hunter] was going to start to fight." [Exh. 3, In. 792]. Mr. Keller stated that he thought that Mr. Hunter was going to fight because Mr. Hunter was going to swing when his right arm went back as he stepped forward with unknown intentions, but possibly to assault Mr. Keller. [*Id.*, In. 881-95]. Mr. Keller confirmed that he thought Mr. Hunter was going to assault him so he took Mr. Hunter down. [*Id.*, In. 1350-54]. Mr. Keller also stated that he took Mr. Hunter down to avoid any chance of Mr. Hunter hitting him or Deputy Ford. [*Id.*, In. 1284-5].

On July 7, 2014, the Agency notified Mr. Keller that it was contemplating disciplinary action against him due to his inappropriate force on Mr. Hunter. [Exh. 2]. On September 8, 2014, the Agency notified Mr. Keller of his discipline, including dismissal for several violations. [Exh. 1]. On September 15, 2014, Mr. Keller filed this timely appeal, seeking as relief the reversal of the discipline, a reinstatement to his position, and a reimbursement of his foregone compensation.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper in the Career Service Hearing Office pursuant to CSR 20-20 A.1., as Mr. Keller appeals his dismissal. Review is not *de novo* in this disciplinary appeal. CSR 20-56 A.

B. Burden and Standard of Proof

Mr. Keller retains the burden of persuasion, throughout the case, to prove the Agency's decision that he violated the CSRs and Agency policies was clearly erroneous and/or that the Agency's application of the Denver Sheriff Department Discipline Handbook's (Handbook) matrix in assessing his level of discipline was clearly erroneous. CSR 20-56 A. Mr. Keller's burden of proof is by a preponderance of the evidence.

C. Career Service Rule Violations

Section 16-60² Discipline and Dismissal

The following may be cause for the discipline or dismissal of a Career Service employee:

- A. Neglect of duty. ...
- E. Any act of dishonesty, which may include, but is not limited to: ...
 - 3. Lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours.
- L. Failure to observe written departmental or agency regulations, policies or rules.
- M. Threatening, fighting with, intimidating, or abusing employees or officers of the City, or any other member of the public, for any reason.
- Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.
- Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

DENVER SHERIFF DEPARTMENT RULES AND REGULATIONS

1. RR 200.4.1 Misleading or Inaccurate Statements

Deputy sheriffs and employees shall not knowingly make a misleading or inaccurate statement relating to their official duties.

The Agency disciplined Mr. Keller with a 60-day suspension based on its finding that he made Misleading or Inaccurate Statements in violation of RR 200.4.1, through which it concluded that he violated CSR 16-60 A (neglect of duty), E (act of dishonesty), and L (failure to observe regulations, policies or rules).

The Agency supported its dismissal of Mr. Keller with the following: Mr. Keller did not accurately represent the circumstances and events of the use of force incident and made inconsistent statements throughout the entirety of the investigation. In his Report, Mr. Keller stated that Mr. Hunter "turned on" and was "fighting with" Mr. Keller and Deputy Ford and failed to state that Mr. Hunter complied with the escort to his cell and was not threatening.

The Hearing Officer concludes that Mr. Keller overcame this alleged violation, relying mostly on the video evidence and his Report. First, Mr. Keller stated in his Report that Mr. Hunter turned on him, which Mr. Hunter did to an extent. Mr. Keller stated imprecisely that Mr. Hunter had "began to fight with Deputy Ford and myself."³ Mr. Keller did not state that Mr. Hunter was threatening; or that he complied on being escorted to the cell which he also did not deny. Mr. Keller did state that Mr. Hunter pulled away and turned on him, which caused Mr. Keller to instinctively grab Mr. Hunter by the neck to take him down. In fact, Mr. Keller had pushed Mr. Hunter away. But in general, Mr. Keller's Report is accurate. [See In re Lewis, 51-14A (11/5/14).]

² The Agency dismissed Appellant under this version of CSR 16, which was then in effect.

³ When Mr. Keller described Mr. Hunter as fighting during this time, he meant that, "He was squirming and not cooperative." [Exh. Ln. 837-40].

Hence, Mr. Keller proved that the Agency was clearly erroneous in finding that he committed this violation. Accordingly, the Hearing Officer reverses his discipline based on RR 200.4.1.

2. RR 200.4.2 Commission of a Deceptive Act

In connection with any investigation or any judicial or administrative proceeding, deputy sheriffs and employees shall not willfully, intentionally, or knowingly commit a materially deceptive act, including but not limited to departing from the truth verbally, making a false report, or intentionally omitting information.

The Agency dismissed Mr. Keller based on its finding that he committed deceptive acts in violation of RR 200.4.2, through which he violated CSR 16-60 A (neglect of duty), E (act of dishonesty), and L (failure to observe regulations, policies or rules).

The Agency supported its dismissal of Mr. Keller with the following: on May 29, 2013, Mr. Keller testified under oath at a deposition in Mr. Hunter's civil lawsuit. At that proceeding, Mr. Keller contradicted his Report that "...I then grabbed Hunter by the neck..." by alleging that "he did not choke Mr. Hunter and that he put his hands around Mr. Hunter's collarbone area and not around his neck." He also now characterized Mr. Hunter's action precipitating his use of force on Mr. Hunter as "resisting aggressively," turning "aggressively and violently," "taking an aggressive step toward Mr. Keller", and "taking a fighting stance."

The Agency also relied on Mr. Keller's November 22, 2013, IAB interview, in which he stated that he "thought [Mr. Hunter] was going to start to fight," because Mr. Hunter was going to swing when his right arm went back as he stepped forward possibly to assault Mr. Keller. He confirmed that he thought Mr. Hunter was going to assault him so he took Mr. Hunter down. He reiterated that he did not choke Mr. Hunter and that his hands were on Mr. Hunter's collarbone area and not around Mr. Hunter's neck. He also stated that he took Mr. Hunter down to avoid he or Deputy Ford being hit by Mr. Hunter.

Mr. Keller sought to overcome this discipline by testifying at the hearing consistent with these more exculpatory statements, that Mr. Hunter was going to assault him and thus he took him down, while insisting that his testimony also conformed to both the videos and his Report.

The Hearing Officer concludes that Mr. Keller failed to overcome this basis for his dismissal, finding that the video evidence and Mr. Keller's Report are more reliable. First, the Hearing Officer describes what constituted Mr. Keller's *Inappropriate Use of Force*. The video evidence clearly shows that Mr. Keller grabbed Mr. Hunter by the neck, as he stated in his Report, in an apparent chokehold. The Report also showed that chronologically, Mr. Hunter's first cursing accusation of Mr. Keller being a racist precipitated Mr. Keller's forcible removal of him to the cell. It also shows Mr. Hunter's next cursing demand that Mr. Keller unhand him precipitated Mr. Keller's punitive action of grabbing of Mr. Hunter by the neck to take him down and also to silence him. Mr. Keller had testified in his deposition that he had tired of Mr. Hunter's constant "flapping of his gums," during their interaction and also of Mr. Hunter's yelling from his adjacent cell. [Exh. 25, p 35 ln. 24 – p. 36, ln. 11.] The video evidence shows that Mr. Hunter did not employ aggression, adopt a fighting stance, or prepare to assault Mr. Keller, or that Mr. Hunter could have hit Deputy Ford as Mr. Keller stood between them. So, Mr. Keller's takedown of Mr. Hunter was unwarranted, and he did so by the neck, an inappropriate tactic. [See In re Lovingier, CSA 48-13 (4/7/14), *aff'd In re Lovingier*, CSB 48-13A (11/7/14).]

The Hearing Officer does not consider the actions of the Deputies inappropriate once Mr. Hunter is being restrained on the bunk. From this point forward, they had to handcuff Mr. Hunter to take control of him. Although he did not fight the Deputies, Mr. Hunter was uncooperative. That Mr. Keller took him down improperly did not give Mr. Hunter license to resist. He had to

allow himself to be handcuffed and controlled, and to determine subsequently how to seek relief for Mr. Keller's Inappropriate Use of Force.

Prior to the Incident, Mr. Hunter had behaved annoyingly and would have taxed anyone's patience. Regardless, when Mr. Keller exhausted his patience necessary to tolerate Mr. Hunter, he used the Inappropriate Use of Force in retaliation and as punishment. Having done so, Mr. Keller tried to avoid the consequences therefrom by justifying his violations with evolving, exculpatory statements, contradicting clear video evidence and his Report in the process. Mr. Keller made these deceptive statements after deliberation, that is, after having had ample time to review this evidence, consult counsel, and prepare his responses to expected questions.

A violation of RR 200.4.2 constitutes Conduct Category F, defined as:

Any violation of law, rule or policy which: foreseeably results in death or serious bodily injury; or constitutes a willful and wanton disregard of Department guiding principles; or involves any act which demonstrates a serious lack of the integrity, ethics or character related to a deputy sheriff's fitness to hold his or her position; or involves egregious misconduct substantially contrary to the standards of conduct reasonably expected of one whose sworn duty is to uphold the law; or involves any conduct which constitutes the failure to adhere to any condition of employment required by contract or mandated by law.

The presumptive penalty for a Conduct Category F is dismissal. Accordingly, the Hearing Officer affirms Mr. Keller's dismissal arising from his violation of RR 200.4.2/CSR 16-60 A, E. and L.

3. RR 300.11.2 Aggravated Conduct Prohibited by Law

Deputy sheriffs and employees shall not violate any state or federal statutes, specifically as they involve: ... (b) Any conduct prohibited as a Class One Misdemeanor; or, (c) Any criminal conduct committed on duty or under color of authority.

The Agency dismissed Mr. Keller based on its finding that he committed a third degree assault (C.R.S. 18-3-204) and thus violated RR 300.11.2, and in turn violated CSR 16-60 A (neglect of duty) and L (failure to observe regulations, policies or rules.)

The Agency supported Mr. Keller's dismissal based on the following: Mr. Keller, lacking a legitimate correctional purpose, choked Mr. Hunter, forcibly took Mr. Hunter down to his bunk, struck his head against the wall, pushed his head to the ground, and sat on him after Sergeant Mazzei had shot him with a taser. It assessed Mr. Keller's actions as punishment of Mr. Hunter for having been annoying and for cursing at Mr. Keller.

Mr. Keller sought to overcome this dismissal by claiming generally that he executed a legitimate correctional purpose in controlling Mr. Hunter's active aggression with appropriate use of force under the circumstances. Mr. Keller also sought to overcome this discipline by arguing that the Agency needed to have proven the violation beyond a reasonable doubt rather than by a preponderance of the evidence.

The Hearing Officer rejects Mr. Keller's argument on the burden of proof. The Handbook authorizes discipline for a RR 300.11.2 violation proven by a preponderance of the evidence. [See Appendix C – Application Considerations Regarding Certain Areas of Misconduct – Definitions and Explanation of Terms, at Conduct Prohibited by Law; Exh. 35-60]. The Hearing Officer also finds instructive of Black v. Black, 2018 COA 7, ¶ 93, reh'g denied (5/7/18), which held that, in a civil case, a party may recover damages for a criminal theft by proving the theft by a preponderance of the evidence. [See also CSR 16-61 (effective 1/7/13 – 2/12/16)].

Next, the Hearing Officer concludes that Mr. Keller failed to overcome his violation of C.R.S. 18-3-204/RR 300.11.2/CSR 16-60 A and L, based on the evidence, including his Inappropriate Use of Force. The elements of assault in the third degree, a class one misdemeanor, are that: (1) a person, (2) knowingly or recklessly, (3) causes bodily injury, (4) to another person. C.R.S. §18-3-204(1)(a) and (3). "Bodily injury" means physical pain, illness, or any impairment of physical or mental condition. C.R.S. §18-1-901(3)(c).

However, the Hearing Officer finds that Mr. Keller proved that the Agency's application of its disciplinary matrix to assess his violation as Conduct Category F was clearly erroneous. The Agency has categorized violations of use of force to the neck with minimal injury as Conduct Category D. [See In re Fuller, CSA 39-14 (7/7/14), *Aff'd In re Fuller*, 39-14A (8/6/15); In re Jackson, CSA 42-16 (11/21/16), *Aff'd In re Jackson*, CSB 42-16A (6/15/17); see also CSR 20-56 B.c.ii].

Mr. Keller's Inappropriate Use of Force is more serious because he violated his duty to maintain the safety and security of an inmate who was vulnerable. Mr. Hunter's injury likely rendered him incapable of fighting Mr. Keller, a visibly larger, heavier, and stronger man. Mr. Keller knew of Mr. Hunter's injury, and the conversation preceding Mr. Keller's actions involved Mr. Hunter's demand for medical attention. Thus, to achieve reasonable consistency based on the totality of the circumstances,⁴ independent of Mr. Keller's RR 200.4.2 violation, the Hearing Officer reduces the Conduct Category of Mr. Keller's violation to an E,⁵ "Conduct that involves the serious abuse or misuse of authority, unethical behavior, or an act that results in an actual serious and adverse impact on deputy sheriff, employee or public safety, or to the professionalism of the Department." With a prior violation, this violation carries a Discipline Level 7 penalty, presumptively a 60-day suspension. Accordingly, the Hearing Officer modifies the Agency's dismissal of Mr. Keller arising from his violation of RR 300.11.2 to a 60-day suspension.

4. RR 300.11.6 Conduct Prejudicial

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

- (a) May or may not specifically be set forth in Department rules and regulations or the Operations Manual; or
- (b) Causes harm greater than would reasonably be expected to result, regardless of whether the misconduct is specifically set forth in Department rules and regulations or the Operations Manual.

The Agency dismissed Mr. Keller based on its finding that he assaulted Mr. Hunter for retaliation in violation of RR 300.11.6 and CSR 16-60 Z (conduct prejudicial), and thereby violated CSR 16-60 A (neglect of duty) and L (failure to observe regulations, policies or rules).

The Agency supported its dismissal of Mr. Keller based on following: through his unlawful use of force, Mr. Keller brought disrepute on the DSD and Department of Safety as they both received extensive negative publicity nationally and locally, in both televised and written media with a prejudicial impact on both agencies. Mr. Keller also engaged in conduct prejudicial to the DSD as he unnecessarily diverted and expended its resources when he required the assistance of its other staff during the Incident.

⁴ Since Mr. Keller's dismissal, the Career Service Board has issued several decisions instructive on the appropriate penalties for inappropriate use of force, including In re Ford, CSB 49-14A, FN 12., (12/17/15).

⁵ *Id.*, at pp 8-9.

Mr. Keller sought to overcome this and the other dismissals that are discussed below by claiming generally that he executed a legitimate correctional purpose by responding to Mr. Hunter's active aggression with appropriate use of force under the circumstances. The Hearing Officer notes that Mr. Keller's position applies to each dismissal described below.

The Hearing Officer concludes that Mr. Keller failed to overcome his violation of RR 300.11.6/CSR 16-60 Z/CSR 16-60 A and L, based on the evidence. The videos of the Incident and his Report confirm that Mr. Keller took down Mr. Hunter inappropriately. The video of the takedown, leaked to the media, shows five Deputies appearing to gang up on an injured and unarmed inmate who is not actively fighting them. Another six Deputies arrived at the location of the Incident and six Deputies escorted Mr. Hunter out. The nine additional Deputies who assisted Deputy Ford and Mr. Keller in the Incident had to interrupt their duties to do so. Chief Coyle, Sergeant Ness and Deputy Ford testified that they and others saw the video in the public media. Mr. Shapiro, best informed about the Lawsuit during the publicity, testified that it exposed the City and County of Denver (City) to sensationalized, negative press, with negative effects on it.

However, the Hearing Officer finds that Mr. Keller proved that the Agency's application of its disciplinary matrix to assess his violation as Conduct Category F was clearly erroneous for the reasons described above regarding his RR 300.11.2 violation. Applying the same analysis as in the RR 300.11.2 violation, the Hearing Officer again reduces Mr. Keller's discipline on this violation to a Conduct Category E. With a prior violation, this violation carries a Discipline Level 7 penalty, presumptively a 60-day suspension. Accordingly, the Hearing Officer modifies the Agency's dismissal of Mr. Keller arising from his violation of RR 300.11.6 to a 60-day suspension.

5. RR 300.19.1 Disobedience of Rule (Pertaining to DO 5011.1J and RR 300.22)

Deputy sheriffs and employees shall not violate any lawful Departmental rule (including CSA rules), duty, procedure, policy, directive, instruction, order (including Mayor's Executive Orders), or Operations Manual section.

Departmental Order 5011.1J – Use of Force

2. Policy: It is the policy of the Denver Sheriff Department (DSD) that officers use physical force only as prescribed by the Colorado Revised Statutes (CRS) and internal Department standards to perform any legitimate law enforcement or detention related function. The amount of force used will be reasonable and appropriate in relation to the threat faced. In all cases, force will be de-escalated once the legitimate function is achieved or the resistance has ceased.

RR 300.22 Inappropriate Force

Deputy sheriffs and employees shall not use inappropriate force in making an arrest, dealing with a prisoner or in dealing with any other person.

The Agency dismissed Mr. Keller based on its finding that he assaulted Mr. Hunter for retaliation in violation of RR 300.19.1 as it pertains to DO 5011.1J and RR 300.22, and thereby violated CSR 16-60 A (neglect of duty) and L (failure to observe regulations, policies or rules).

The Agency supported its dismissal of Mr. Keller based on the following: Mr. Keller used inappropriate force against Mr. Hunter, more than both the force necessary to perform his duties and the force reasonable and appropriate in relation to the threat faced. Mr. Keller used inappropriate force after successfully placing Mr. Hunter in his cell, by lunging toward Mr. Hunter, grabbing him by the neck, choking him, taking him down to his bunk, moving his head

and striking it against the wall, and then sitting on him after Sergeant Mazzei shot him with a Taser. Mr. Keller used the inappropriate force to punish Mr. Hunter and not to perform his duties.

Mr. Keller relied in part on Deputy Sheldon Marr, expert witness on the use of force, but who the Hearing Officer found unconvincing. Until recently, Deputy Marr had for many years been the Agency's defensive tactics instructor at its academy that Deputies attend when hired and at its annual in-service classes. However, the Agency has replaced him as its instructor and last year ceased teaching his "C4" defensive tactics system. Also, Deputy Marr believes that the Agency has falsely accused him of violating its Rules and Regulations. These dynamics seem to have influenced Deputy Marr's testimony and rendered it questionable.

First, Deputy Marr departed from his role as an expert by disregarding apparent facts. On July 23, 2013, he testified in a deposition for the Lawsuit that the Agency does not teach its Deputies to place their hands on the front of the neck of an inmate, which he confirmed in this hearing. Yet, in this hearing, he testified that Mr. Keller did not use inappropriate force, despite the clear video evidence of Mr. Keller's force to the front of Mr. Hunter's neck. Mr. Keller also disputed the video evidence, but he testified that the Agency does not teach force to the neck and that such force is inappropriate. Deputy Ford also testified that the Agency does not so teach and that a takedown by the neck is not Agency policy.

Next, Deputy Marr undermined some clauses of the Agency's use of force policy, articulated in Department Order 5011.1J, Exhibit GG, including:

... The amount of force will be reasonable and appropriate in relation to the threat faced. In all cases, force will be de-escalated once the legitimate function is achieved or the resistance has ceased. ...

Officers should rely on departmentally approved use of force techniques that are taught in training. ...

With these values in mind, an officer shall use only that degree of force which is necessary and objectively reasonable under the circumstances. ...

When reasonable under the totality of the circumstances, officers should use advisements, warnings, verbal persuasion, and other tactics and recognize that an officer may withdraw to a position that is tactically more secure ...

Deputy Marr grudgingly conceded that the Agency sets its policy by interpreting its rules regarding force, including its policy that Deputies are to use the least amount of force. [See In re Jordan, CSA 30-14, 7 (8/25/14); In re St. Germain, CSA 24-14, 3 (11/7/14); *aff'd* CSB 24-14A, 5-6 (9/3/15)]. Nevertheless, he disagrees that "only that degree of force which is necessary" means the least amount of force necessary. Thus, Deputy Marr testified that he did not teach Deputies to use the least amount of force. Yet he did not articulate clearly any parameter on the force that may be used. He appears to have taught Deputies the defensive tactics but left them to educate themselves about the Agency policies. But Deputy Director Vigil and Deputy Ford testified that Agency policy is to use the least amount of force. So, Deputy Marr's view of the use of force policy that he effectuates differs from other Agency employees' view of it.

If Deputy Marr disagrees with an approved tactic, he signifies that it should not be used by stating that he does not teach it. An example of this reaction is his response, when asked whether Mr. Keller could have just pushed Mr. Hunter into the cell or closed the door rather than taking him down, that he does not teach pushes or retreating. He thereby states his opposition to the Agency policies that Deputies use the least amount of force necessary as well as that, when reasonable, an officer may withdraw.

Deputy Marr also treated expediently the Agency policy that Deputies should use its approved force tactics. He testified that a Deputy's use of an unapproved tactic is not, in and of itself, inappropriate and he refused to criticize Mr. Keller's force to Mr. Hunter's neck. However, Deputy Director Vigil and Captain Bruning testified that Deputies should adhere to approved force techniques. Again, Deputy Marr's view of the Agency policy differs from other Agency employees' view of it. Deputy Marr has the incorrect impression that he determines which Agency policies its employees learn and to which they are subject, an impression that no other witness supported.

Deputy Marr also applied a subjective standard when analyzing the use of force, reliably concluding that all circumstances justify it. Although the video of the Incident has no audio, he testified that it shows Mr. Hunter apparently disregarding verbal commands from Mr. Keller as they speak. Since Mr. Keller's back was then to the camera and he was not making apparent gestures, a viewer cannot determine that he had made any commands. After Mr. Keller's push of Mr. Hunter into the cell when Mr. Hunter turned partially, facing the side wall, Deputy Marr described Mr. Hunter's action as a full turn to square up to Mr. Keller. He testified that this can be a fighting stance and that Mr. Hunter posed a threat to Mr. Keller, neither of which the video bears out. He testified that, at this point, the issue was Mr. Keller's perception that Mr. Hunter was going to use active aggression, that is "A threat or overt act of an assault, coupled with the present ability to carry [it] out..." [Exh. GG, p. 7]. Yet, as described above, Mr. Keller had denied at his deposition any threats, threatening gestures, or the possibility of being struck from Mr. Hunter, which Deputy Marr did not review or factor into his opinion of Mr. Keller's perception. When asked whether former Sheriff Diggins, more knowledgeable of the basis for Mr. Keller's discipline, could better render an opinion on Mr. Keller's thoughts regarding his actions, Deputy Marr responded dismissively that former sheriff is not the expert and once was his student. Deputy Marr could not identify from the video what Mr. Hunter had in his hand (papers), but his first reaction was that it could have been a weapon, which would justify force. Deputy Marr also disregarded Mr. Hunter's injury to his genital area, although Agency policy required a Deputy to consider it, that had rendered him vulnerable and likely incapable of engaging in a fight.

Deputy Marr's testimony was not an objective discussion of the issues in dispute in this case. Within the other evidence, Deputy Marr's testimony was not credible and assisted the Hearing Officer minimally, if at all, in resolving the issues herein.

The Hearing Officer concludes that Mr. Keller failed to overcome his violation of RR 300.19.1/DO 5011.1J and RR 300.22/CSR 16-60 A and L, based on the evidence, specifically his Inappropriate Use of Force. As Captain Bruning testified, once Mr. Hunter was in the cell, Mr. Keller should have closed the cell door if it could be closed and, had Mr. Hunter turned on Mr. Keller in a violent manner, should have shoved him back with his hand to close the cell door. Stated otherwise, Mr. Keller should have deescalated the Incident.

However, the Hearing Officer again finds that Mr. Keller proved that the Agency's application of its disciplinary matrix to assess his violation as Conduct Category F was clearly erroneous for the reasons described above regarding his RR 300.11.2 violation. Applying the analysis as in the RR 300.11.2 violation, the Hearing Officer reduces Mr. Keller's discipline on this violation to a Conduct Category E. With a prior violation, this violation carries a Discipline Level 7 penalty, presumptively a 60-day suspension. Accordingly, the Hearing Officer modifies the Agency's dismissal of Mr. Keller arising from his violation of RR 300.19.1 to a 60-day suspension.

6. RR 400.4.1 Cruel and Unusual Treatment of Prisoners/400.6 Abuse of Prisoners

RR 400.1 Cruel and Unusual Treatment of Prisoners

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

RR 400.6 Abuse of Prisoners

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

The Agency dismissed Mr. Keller based on its finding that his inappropriate force and assault on Mr. Hunter, violated RR 400.4.1 (cruel and unusual treatment) and RR 400.6 (abuse), and thereby violated CSR 16-60 A (neglect of duty), L (failure to observe regulations, policies or rules) and M (threatening, fighting with, intimidating or abusing others.)

The Agency supported its dismissal of Mr. Keller with the following: Mr. Keller, intending to punish Mr. Hunter for being a constant annoyance during which he had called Mr. Keller a "racist motherfucker," used inappropriate force by choking Mr. Hunter, striking his head against the wall, pushing his head to the ground, and sitting on him after Sergeant Mazzei had shot him with the taser. Mr. Keller knew that Mr. Hunter had been severely injured and was under medical care such that his abuse of Mr. Hunter constituted cruel and unusual punishment.

The Hearing Officer concludes that Mr. Keller overcame the alleged violation of RR 400.4.1 as the facts do not meet its elements. The Hearing Officer generally understands: (1) humiliation to mean to make someone ashamed or embarrassed, (2) an indignity to mean an act that offends against a person's dignity or self-respect, or humiliating treatment, and (3) cruel and unusual punishment to mean punishment that is very harsh and too severe for the crime. "humiliation," "indignity," "cruel and unusual punishment." Merriam-Webster Online Dictionary. 2018. <https://www.merriam-webster.com/> (14 June 2018). While Mr. Keller inflicted Inappropriate Use of Force on Mr. Hunter, his violation was not an extraordinary one, with minor injury albeit with pain inflicted on him. Mr. Keller made no humiliating or insulting comments to Mr. Hunter. Once Sergeant Mazzei incapacitated Mr. Hunter with the taser, Mr. Keller handcuffed him and the Deputies promptly lifted Mr. Hunter from the floor and escorted him to the Medical Unit. These actions do not constitute humiliation, indignities or cruel and unusual punishment. Hence, Mr. Keller proved that the Agency was clearly erroneous in finding that he committed this violation. Accordingly, the Hearing Officer reverses Mr. Keller's discipline based on RR 400.4.1.

However, The Hearing Officer concludes that Mr. Keller failed to overcome his violation of RR 400.6/CSR 16-60 A and L, physical abuse of Mr. Hunter, based on the evidence, including his Inappropriate Use of Force as described throughout this Decision.

Nevertheless, the Hearing Officer finds that Mr. Keller proved that the Agency's application of its disciplinary matrix to assess his violation as Conduct Category F was clearly excessive for the reasons described above regarding his RR 300.11.2 violation. And applying the same analysis as in the RR 300.11.2 violation, the Hearing Officer again reduces Mr. Keller's discipline on this violation to a Conduct Category E. With a prior violation, this violation carries a Discipline Level 7 penalty, presumptively a 60-day suspension. Accordingly, the Hearing Officer modifies the Agency's dismissal of Mr. Keller for his violation of RR 400.6 to a 60-day suspension.

7. CSR Section 15-110/Executive Order 112 [Preventing Violence in the Workplace]

CSR Section 15-110 states in part: Violence, or the threat of violence, will not be tolerated in any City work locations. Any violence or the threat of violence will subject the employee to serious corrective action, up to and including dismissal and possible criminal charges. ...

Executive Order 112 states in part: 2.0 Policy: Violence has no place in any of the City and County of Denver's work locations ... and is strictly prohibited. Moreover, violence committed by employees of the City and County of Denver, whether on-duty or off-duty, reflects poorly on the City and County of Denver and is strictly prohibited ..."

The Agency dismissed Mr. Keller based on its finding that, through his assault against Mr. Hunter, he violated CSR 15-110 (preventing violence) and EO 112 (no workplace violence), and thereby violated CSR 16-60 A (neglect of duty), L (Denver's governing authorities).

The Agency supported its dismissal of Mr. Keller with the following: Mr. Keller, intending to punish Mr. Hunter, used inappropriate force in the workplace by choking Mr. Hunter, striking his head against the wall, pushing his head to the ground, and sitting on him after Sergeant Mazzei shot him with his taser. Mr. Keller's conduct was unjustified, beyond the DSD's use of force policy, constituted prohibited punishment, and violated the criminal third degree assault statute.

The Hearing Officer also concludes that Mr. Keller failed to overcome his violation of CSR 15-110 and EO 112⁶/CSR 16-60 A and L, based on the evidence, including his Inappropriate Use of Force, which constituted violence, that is, physical force, in a City location.

However, the Hearing Officer finds that Mr. Keller proved that the Agency's dismissal of him for this violation was clearly excessive. The Hearing Officer concludes that the discipline for the violation of this CSR and EO should not exceed the penalties recommended by the Handbook's matrix. While the matrix addresses force specific to inmates, 15-110 and EO 112 are general authorities. As such, the matrix's recommended penalties for inappropriate force against inmates should be the more influential guide toward determining an appropriate penalty and the general authorities, which the matrix does not address, should not overwhelm it. The Hearing Officer therefore applies the analysis described above regarding RR 300.11.2 to designate Conduct Category E as applicable to this violation. Accordingly, the Hearing Officer modifies Mr. Keller's dismissal arising from his violation of CSR 15-110 and EO 112 to a 60-day suspension.

D. Other Legal Issues

Mr. Keller's 60-day suspensions are to run concurrently as they arise from one incident. Handbook, 32.8, 32.9. [Exh. 35-44]. The Hearing Officer finds that no facts, as described below in V. Degree of Discipline, support any aggravation or mitigation for these violations.

The Agency's delay in disciplining Mr. Keller is problematic. The Handbook promotes timely disciplinary actions. Handbook 1.4, 2.9, 8.2, and 31.3,⁷ [Exh. 35-8, 9, 15, and 41]. However, no legal authority prevents the Agency from reopening a discipline case or imposes a limitation of time by when the Agency must prosecute a discipline case. Therefore, whether Mr. Keller can obtain relief based on the Agency delay depends on whether he can show prejudice to his due process rights, that the delay impaired his defense against the alleged misconduct. [See In re Espinoza, CSB 14-16A, 2 (3/8/17)].

⁶ These authorities, although not specific to force by Deputies against inmates, have been held to support Agency discipline. [See In re Ford, *supra*, at 11.]

⁷ However, footnotes 2 and 3 caution generally against delays affecting the actual appropriate discipline.

For this analysis, the Hearing Officer finds inapposite Mr. Keller's position that his reduced income since his dismissal invalidates his discipline. More on point, Mr. Keller testified at the hearing that he had trouble recalling the facts due to the passage of time. However, he could have refreshed his recollection with his Report and the videos at any time. Next, Mr. Keller could have reviewed the transcript of his deposition along with the other evidence prior to making statements at his disciplinary interview. Mr. Keller did not claim to forget the more exculpatory facts to which he testified at his deposition or stated at his interview. Rather, Mr. Keller just described the Incident in an evolving, more exculpatory manner in those proceedings, contrary to clear, objective evidence. Others who viewed the videos readily described their contents. The Hearing Officer also notes that Mr. Keller mounted a vigorous prosecution of his case, given its facts. Thus, the Hearing Officer concludes that Mr. Keller did not show that the Agency's delay in imposing its discipline prejudiced him, as is needed to reduce the amount of discipline. [Espinoza, *supra*].

V. DEGREE OF DISCIPLINE

CSR Section 16-20⁸ Purpose of discipline states:

The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

The test for discipline is not whether the discipline is the next step under progressive discipline, but rather whether the degree of discipline is reasonably related to the seriousness of the offense. [In re Vigil, CSA 110-05, 8 (3/3/06), *citing* In re Champion, CSB 71-02A, 8 (7/31/02)].

1. Seriousness of the proven offense

The Hearing Officer first concludes that Mr. Keller's Inappropriate Use of Force against Mr. Hunter was a serious but not extraordinary violation. In violation of Agency policy, he used inappropriate force on an injured inmate to punish him for insults. Fortuitously, when Mr. Keller took Mr. Hunter down, they landed on the bunk with a mattress on it rather than to the floor. Mr. Keller did not use any weapons. Mr. Keller did not injure Mr. Hunter with his Inappropriate Use of Force but he did instigate the context for additional force from the Deputies. Mr. Hunter experienced pain not only from Mr. Keller taking him down but also from Mr. Keller pushing his head against the floor and sitting on his legs, from Sergeant Mazzei's drive stun with the taser, and from Deputy Enriquez's pain compliance tactic with the nunchucks.

Nevertheless, Mr. Keller saddled the Agency with negative consequences from his ill-advised Inappropriate Use of Force. Nine more Deputies responded to this incident and interrupted their other duties to do so. In addition, Mr. Hunter and three officers were shocked by the taser that Sergeant Mazzei deployed. As several witnesses testified, the use of force provides negative optics. The video of the Incident, disseminated by the media, shows five Deputies appearing to gang up on an injured and unarmed inmate who is not fighting them. This evidence also provided Mr. Hunter with significant, additional, leverage to in his Lawsuit.

Mr. Shapiro, the witness most informed about the Lawsuit until he withdrew as defendants' counsel, testified that the publicity of the video exposed the City to financial liability,

⁸ Since Appellant's conduct, Rule 16-20 has been modified but the relevant substance remains identical.

sensationalized, negative press, and inflicted negative effects on it. Although Mr. Shapiro assessed the Incident as secondary to that which occurred one week earlier, he could not state that it did not create financial exposure for the City. He identified the City's initial offer at an Early Neutral Evaluation to settle both incidents as a five-figure sum. He agreed that, even when damages are minimal, the exposure to the City for a plaintiff's legal fees could be hundreds of thousands or even millions of dollars. While the Hearing Officer agrees with Mr. Shapiro that Mr. Keller did not create a \$3.25 million liability for the City, Mr. Keller's actions nevertheless created financial exposure and extensive negative publicity for it. Mr. Keller could have avoided these consequences by deescalating his interaction with Mr. Hunter.

Mr. Keller's deception prior to his discipline is a more serious matter as the Agency has prioritized honesty from its employees through its policies. On the two more substantive points, (1) whether Mr. Hunter posed a threat to Mr. Keller to justify a takedown, and (2) whether Mr. Keller took down Mr. Hunter by the neck, Mr. Keller's explanations evolved to become more favorable to him. At the hearing, Mr. Keller testified that his poor recollection of the Incident caused his statements to vary. However, Mr. Keller's allegedly poor recollection did not cause his deceptive statements at his deposition or at his disciplinary interview. His claimed memory loss is merely a request that his deception be overlooked. In addition, Mr. Keller provided more leverage to Mr. Hunter in the Lawsuit by describing the Incident contrary to the videos and his Report, thereby facilitating the impeachment of his own credibility and an adverse result for the City.

2. Prior Record

On September 11, 2012, Mr. Keller received a 52-day suspension for his violation of the rules regarding Sexual Harassment, Full Attention to Duties, Discrimination and Conduct Prejudicial. Mr. Keller's prior record precludes any mitigation of his discipline in this case.

3. Likelihood of Reform

The Hearing Officer concludes that Mr. Keller is not a candidate for reform on his violation of deception. He fails to recognize the Agency's policy limiting the use of force or that his application of force was inappropriate. He instead rationalizes his inappropriate use of force by exaggerating the context of the Incident and refuses to take responsibility therefor, ignoring the reality that he has viewed on video several times. Yet he testified at the hearing that he was honest at all times. Due to his prior discipline, Mr. Keller understood the consequences of being deceptive in the disciplinary process, yet he deliberately persisted with this tactic throughout it.

As stated earlier, on September 11, 2012, Mr. Keller had been disciplined for violations including sexual misconduct. Yet on August 11, 2014, Mr. Keller commented⁹ to a female Deputy that he would love to see her naked and cautioned that his comment should not be disclosed to either's spouse, indicating that he understood its impropriety. Two female Deputies had been discussing the physical changes caused by pregnancy when Mr. Keller attempted to reassure the female Deputy that her changes did not degrade her appearance. Thus, before two years elapsed, Mr. Keller had lost the import of his prior discipline.

The Hearing Officer concurs with the Agency's finding that Mr. Keller will not reform.

⁹ The Agency investigated this incident but then stopped the investigation due to its termination of Mr. Keller. Nonetheless, he generally acknowledged making these comments in its interview of him.

VI. ORDER

For the reasons described above, the Hearing Officer **AFFIRMS** Mr. Keller's dismissal related to his violation of RR 200.4.2; **MODIFIES** his dismissals related to his violations of RR 300.11.2/CRS 18-3-204, RR 300.11.6, RR 300.19.1, RR 400.6, and CSR 15-110/EO 112, to concurrent 60-day suspensions; and **REVERSES** his discipline related to the allegations of RR 200.4.1 and RR 400.4.1.

DONE June 14, 2018.



Federico C. Alvarez
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements 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 decision's certificate of delivery. See Career Service Rules at 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
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.