

**CAREER SERVICE BOARD,
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 19-17A

In the Matter of the Appeal of:

THAO NGUYEN,

Petitioner-Appellant,

v.

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

Respondent-Agency.

DECISION AND ORDER

Denver Deputy Sheriff Thao Nguyen (Appellant) was working Housing Unit 2D at the Downtown Detention Center. This is a special management unit which houses inmates who are violent, mentally ill, or otherwise requiring heightened security. These inmates remain locked in their cells for almost all of the day. They receive their meals on trays which are inserted into the cell through a slit in the cell door. The slit is covered by a flap which is to be secured when not in use.

On August 21, 2015, Appellant attempted to feed an inmate who had openly expressed hostility towards him. As Appellant attempted to secure the flap on the door, the inmate (who was still locked in his cell) became belligerent. By keeping his hands on the flap and attempting to grab Appellant, the inmate made it difficult for Appellant to secure the flap. Appellant stepped away from the door, prepared his taser, and went back to the cell door, and tased the prisoner's hand.

The prisoner filed a complaint against Appellant. The complaint resulted in an investigation which concluded that Appellant's use of the taser on the inmate violated several Departmental rules and policies concerning the use of inappropriate force generally and the use of the taser specifically. The Denver Sheriff Department (Agency) issued Appellant a ten-day disciplinary suspension for his inappropriate use of the taser.

Appellant appealed his suspension to a Hearing Officer. The Hearing Officer, after conducting a full evidentiary hearing, upheld the issuance of the ten-day suspension. Appellant has appealed the Hearing Officer's decision to this Board. We AFFIRM the Hearing Officer.

Appellant first argues that the Hearing Officer misinterpreted the Agency's use of force policy in that Appellant's use of the taser under the circumstances presented was consistent with that policy; specifically, he used the least amount of force available, his actions were objectively reasonable, and he was under no duty to retreat from an attack. (Appellant's brief, p. 7). Like the Hearing Officer, we disagree.

To the extent one would consider the inmate's resistance (from behind his locked cell door) as an attack, Appellant did, in fact retreat. He was able to, and did, step away from the door and step out of the reach of the flailing of the inmate. Once Appellant had stepped away from the door, the inmate was not a threat to him; he was no longer "under attack." Appellant's re-entry into the situation, with the intent of tasing the inmate, essentially made Appellant the aggressor at the time of the use of force. The record supports the Hearing Officer's conclusion that at the time Appellant administered force to the inmate, the inmate posed no immediate or imminent threat to him.

In addition, we do not believe the record supports Appellant's claim that used the least amount of force available to him. To the extent that, as the hearing officer found, there was a need to secure the cell door flap, but not an immediate need to do so, we see no reason why Appellant simply could not have employed the assistance of another deputy to help him secure the flap (Hearing Officer's decision, p.5).

Finally, we note that both the Agency and the Hearing Officer essentially found that Appellant's use of the taser under the circumstances was not objectively reasonable. We see nothing in this record to support Appellant's claim that it was objectively reasonable. Appellant had numerous options at his disposal to allow him to secure the door flap, and those options did not include the use of the high level of force presented by the taser. The Hearing Officer did not misinterpret the Agency's use of force regulation.

Appellant next claims the Hearing Officer misinterpreted the Agency's policy regarding the use of tasers (Departmental Order 5014.1K) by finding that Appellant's use of the taser violated said policy. The policy states clearly that the taser shall not be used as punishment or to effect compliance with verbal commands where there is no physical threat. While the Hearing Officer found no evidence that Appellant employed his taser to punish the inmate, he did find that Appellant admitted to using the taser to gain compliance with his verbal commands. The record supports the Hearing Officer's factual finding. And to the extent that the Hearing Officer found that the decision to deploy the taser and the actual deployment

occurred at a time when Appellant was not under physical threat¹, we find no misinterpretation of this Departmental Order by the Hearing Officer.

Appellant further claims that the Hearing Officer misinterpreted and misapplied a memorandum issued by then-Sheriff Gary Wilson. The Hearing Officer's analysis of Appellant's actions vis-à-vis this memorandum is found at page 5 of his decision. We see no error in the Hearing Officer's interpretation or application of this memorandum. Specifically, we approve the Hearing Officer's analysis concerning Appellant's justification for his use of force, that being that Appellant's knowledge of the inmate's past behavior and the possibility that the inmate, should he continue with his resistance, would disrupt food service on the tier, did not justify the use of the taser at the time. The Hearing Officer found it significant that Appellant's decision to deploy his taser came at a time when the inmate had no ability to inflict harm on Appellant or anyone else (because he was locked away securely in his cell) and at a time when Appellant was not being subjected to active aggression or a physical threat.² Appellant's argument is based on his claim that when he deployed his taser, Appellant was being subjected to active aggression. The Hearing Officer disagreed. The record supports the Hearing Officer's factual finding that Appellant was not being subjected to active aggression at the time Appellant deployed his taser and the Hearing Officer's interpretation of the phrase "active aggression" is reasonable, and, we believe, operationally correct.

Appellant also argues that the Hearing Officer erred by erroneously applying well-established rules to the facts.³ We note that we do not see where this particular argument fits into any of the grounds cited by Career Service Rule 19-61 for overturning the Hearing Officer's decision.

In any event, as best we can determine, what Appellant is claiming is that he was thoughtful in the performance of his duties and did what he believed to be the right thing. But at no time did the Agency allege or the Hearing Officer find that Appellant acted with malice, bad intent, or even a cavalier attitude towards his duties. Rather, the Agency chose to discipline Appellant for what it deemed to be an exercise of poor judgment regarding the use of his taser, where said use violated several Agency regulations. The Hearing Officer, after hearing evidence and argument, concurred with the Agency that Appellant's use of the taser violated Agency policies and warranted a ten-day suspension. The fact that Appellant thought he was doing the correct thing or the more humane thing by deploying his taser is immaterial given the charges, evidence and findings by the Hearing Officer. The fact that Appellant may have committed a "good faith" act of misconduct does not insulate him from receiving discipline for committing acts that are, nevertheless, plain, proven rules violations.

¹ See, for example, Hearing Officer decision p. 5, 4th full paragraph, where the Hearing Officer notes that it was not established at hearing that the inmate attempted to grab or otherwise attack Appellant as he re-approached the cell to deploy his taser on the inmate.

² See note 1.

³ Appellant's brief, p. 9.

Finally, Appellant claims that the Hearing Officer's decision sets bad precedent. First, Appellant claims that the Hearing Officer's decision will encourage inmates to refuse to follow deputies' orders. We reject this claim as unsupported speculation.⁴ Appellant also claims that the Hearing Officer's decision shifts control of the jails from the Denver Sheriff Department to the inmates. We reject this as absurd on its face.

For all of the above reasons, the Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on November 2, 2017, and documented this 18th day of January, 2018.

BY THE BOARD:


Co-Chair

Board Members Concurring:

Neil Peck

Karen DuWaldt

Patricia Barela Rivera

Tracy Winchester

⁴ This argument also implies that Hearing Officer decisions, as well as Board decisions, are popular items on the inmates' reading lists. We have yet to see evidence of this.