CIVIL SERVICE COMMISSION  
CITY AND COUNTY OF DENVER, COLORADO  
Webb Municipal Bldg., 7th Floor  
201 W. Colfax Avenue, Dept. 1208  
Denver, Colorado 80202-5332

Case No. 12 CSC 01A

Respondent – Appellant: ALEX J. MARTINEZ,  
Manager of Safety, City and County of Denver  
v.  
Petitioner – Appellee: RICK GUZMAN(05008),  
Officer in the Classified Service of the Denver Police Department

DECISION AND FINAL ORDER

Before Commissioners Neal G. Berlin, Anna Flores, Cecilia E. Mascarenas and Hillary Potter.¹

INTRODUCTION

In August of 2007 Denver Police Officer Rick Guzman, along with his partner, responded to a call concerning an unruly shoplifter at a K-Mart on South Broadway in Denver. They arrested the shoplifter.

The matter was literally forgotten for several years until a videotape of unknown provenance came into the hands of the Denver Police Department. The video purported to show Officer Guzman using force against the alleged shoplifter. Based on the content of the video, DPD’s Internal Affairs Department conducted an investigation. After the investigation, Manager

¹ Commissioner Potter was unavailable and did not take part in this decision.
of Safety Alex Martinez issued Officer Guzman a four-day disciplinary suspension for violating RR-306 of DPD’s Operations Manual (which prohibits the use of unnecessary force).

Officer Guzman appealed his suspension. The Hearing Officer overturned the Manager’s Order of discipline. The Manager of Safety, in turn, appealed the Hearing Officer’s decision. Because we believe the facts found by the Hearing Officer support the Manager’s imposition of discipline, we reverse the Hearing Officer’s decision.

FACTUAL BACKGROUND

On August 4, 2007, Officer Rick Guzman and his partner, Officer J. Sartain responded to a call at the K-Mart located on Broadway in Denver. The call concerned a combative shoplifter (FOF 1). The call resulted in the arrest of one David Adam Lee (FOF 3).

Several years later, on May 31, 2011, a videotape depicting alleged misconduct by Officer Guzman in the K-Mart arrest was given to the Denver Police Department Internal Affairs Bureau by Fox News. An anonymous letter accompanied the video. The letter claimed the Denver police officer had used excessive force (FOF 9, 10).

Based on that video and the anonymous letter, DPD’s Internal Affairs Bureau initiated an investigation into Officer Guzman’s conduct in the arrest of Lee (FOF 11). As part of the investigation, DPD attempted to contact Mr. Lee, but the Department was unsuccessful in obtaining his cooperation (FOF 13).

---

2 The Hearing Officer made 33 separately numbered findings of fact based solely on evidence that he admitted into the record. The designation “FOF” followed by a number is a reference to the specific enumerated fact found by the Hearing Officer, referenced in his decision.
Also as part of the investigation, however, DPD was able to obtain information from K-Mart employees who allegedly witnessed the event. For example, DPD learned that Officer Guzman, in making the arrest and exchanging his handcuffs for those of the K-Mart loss prevention employees, pushed Lee into a wall while maintaining control of the handcuffs and then took him down to the ground, using a hair pull technique. While he had the suspect on the ground Officer Guzman controlled him by placing his knee on the upper torso head/neck region of the suspect (FOF 14).

In addition, while Mr. Lee exhibited an “attitude” towards Officer Guzman, the witness K-Mart employees observed no physical threat posed by Mr. Lee towards Officer Guzman (FOF 15).

At hearing, Officer Guzman had no recollection as to why he took Mr. Lee to the ground. Viewing the video did not refresh his recollection (FOF 16). Similarly, after reviewing the video neither Manager of Safety Martinez nor Captain John Lamb could determine any reason why Officer Guzman reacted to Mr. Lee in the manner he did (Id.); that is, why he needed to push Lee into a wall and take him to the ground. While Officer Guzman maintained throughout the investigation and at hearing that he had no recollection of the events surrounding the arrest of Mr. Lee, Officer Guzman did admit that it appeared to be him in the video, that he was familiar with the K-Mart detention room apparently depicted in the video, and that the room in the video appeared to be the room that he was familiar with (FOF 17).

Ultimately, the Hearing Officer ruled that the video was inadmissible as substantive evidence; that is, that the video could not be used for the purpose of proving that Officer Guzman used unnecessary force on Mr. Lee. He also determined that witness statements were not admissible substantively. The Hearing Officer concluded by finding that the Manager of Safety
failed to meet his burden of proving that Officer Guzman violated RR-306 in his arrest of Mr. Lee. He further concluded that Officer Guzman exerted necessary control over suspect Lee in the course of the arrest and that there was no evidence that Officer Guzman’s actions exceeded reasonable force or that they were outside accepted tactics. As a result, he vacated the Manager’s order of discipline imposed against Officer Guzman. (Hearing Officer Decision p. 15)

Because we believe that the facts as found by the Hearing Officer indicate that Officer Guzman did, in fact, use force on Mr. Lee; and because we find no evidence in the record supporting the Hearing Officer’s ultimate finding that Officer Guzman’s use of force was necessary; or that the tactics used on Mr. Lee, though taught or acceptable under certain circumstances, were acceptable or appropriate in this case, we come to a different ultimate conclusion concerning Manager’s Order of discipline.

PROCEDURAL HISTORY

On January 17, 2012, the Manager of Safety imposed the discipline at issue in this appeal. On January 25, 2012, Officer Guzman appealed that discipline. A hearing was held on June 5, 2012. The Hearing Officer issued his decision on August 13, 2012, in which he vacated the four-day suspension imposed by the Manager on Officer Guzman.

On August 28, 2012, the Manager of Safety filed for review of the Hearing Officer's decision. After hearing oral argument and full briefing of the issues, this decision follows.
A. Basis for Appeal

The Charter of the City and County of Denver (“City Charter”) limits our review of the Hearing Officer’s decision to certain defined circumstances. See City Charter § 9.4.15(F); Woods v. City & County of Denver, 112 P.3d 1050, 1052 (Colo. App. 2005). The Manager asserts in his Petition for Review that the Hearing Officer’s decision involves an erroneous interpretation of RR-306 of the DPD Operations Manual, as well as policy considerations that extend beyond the case at hand. The Commission agrees. Accordingly, we exercise our jurisdiction to consider the instant appeal.

B. Standard of Review

The Charter of the City and County of Denver (“City Charter”) and Commission Rule 12 address the standard of review for appeals to this Commission. The Panel’s findings of evidentiary fact are binding upon the Commission. City Charter § 9.4.15(F); Commission Rule 12 § 11(J)(5). The Charter expressly states that the Commission may not resolve contested issues of fact. City Charter § 9.4.15(F). The Commission is not bound by the Panel’s findings of ultimate fact, conclusions of law, or mixed findings of law and fact; these findings are subject to de novo review. See Vukovich v. Civil Service Com’n of City and County of Denver, 832 P.2d 1126, 1128 (Colo. App. 1992) (citing Blaine v. Moffat County School District RE No. 1, 748 P.2d 1280, 1287 (Colo. 1988)).

C. RR-306

The Manager of Safety imposed a four-day suspension on Officer Guzman for violating RR-306 (Unnecessary Force). RR-306 states:
Officers shall not use inappropriate force in making an arrest or dealing with a prisoner or with any other person.

We believe it critical to note that the Hearing Officer made certain factual findings (based on what he perceived to be admissible evidence) concerning Officer Guzman’s use of force. Specifically, he found:

Officer Guzman, in making the arrest and exchanging his handcuffs for the K-Mart loss prevention employees on August 4, 2007, pushed Lee into a wall while maintaining control of the handcuffs and then took him down to the ground, using a hair pull technique. While he had the suspect on the ground Officer Guzman controlled him by placing his knee on the upper torso head/neck region of the suspect. (Petitioner’s Exhibit A). (FOF 14)

It is clear that Officer Guzman used force on Mr. Lee in the process of effectuating his arrest. Of course, this alone does not establish a rules violation. RR-306 does not prohibit the use of force, only the use of inappropriate (unnecessary) force. Our inquiry then must turn to the justification for the use of force to determine whether it was inappropriate.

Again, we note that the Hearing Officer made findings concerning justification of the use of force in this instance. Specifically, he found:

No physical threat to the officer was observed by the loss control employees present. They did observe the suspect to have an attitude towards Officer Guzman and make sarcastic remarks towards him. (Petitioner’s Exhibit A); and

There was no indication as to why Officer Guzman reacted to the suspect causing him to push the suspect into the wall or take him down to the ground. (Lamb and Martinez). Officer Guzman had no recollection why he took the suspect to the ground. The video did not refresh his memory and he could only speculate. (Guzman) (FOF 15 and 16)

At this point, the Hearing Officer has established that there has been a use of force, and also that witnesses to the event and DPD management could not discern any justification for the use of force. We believe at this point, a violation of RR-306 has been established.

3 We believe the Hearing Officer intended to write “knee.”
The Hearing Officer, however, even with these findings, determined that the Manager failed to establish the RR-306 violation. But for this holding to make any sense at all, we believe there needed to be some evidence justifying Officer Guzman’s use of force, that is, some evidence which the Hearing Officer could properly credit, that would prove Officer Guzman’s use of force to be reasonable or necessary or appropriate. We see no such evidence in the record.

Such evidence could have come from documents or witnesses. At hearing, two witnesses testified on behalf of Officer Guzman; Corporal Al Archuleta, a DPD Academy Instructor, and Officer Guzman himself. Officer Guzman could provide no justification for his use of force because as the Hearing Officer found, he had no recollection of the events surrounding the arrest of Mr. Lee. (FOF 17; see also, hearing transcript pages 179:16-21; 180:25-181:5; 184:9-11(Guzman admitting he could see nothing in the video shown that would have caused him to initially react to Mr. Lee)).

We also believe that Cpl. Archuleta did not provide justification of Officer Guzman’s use of force. Admittedly, the Hearing Officer made specific factual findings around Cpl. Archuleta’s testimony. He found:

Corporal Archuleta testified that he is familiar with such disciplines taught by the FBI, the PBBCT, the Denver Police Academy, and also the Koga arrest control and defensive tactics system. All such tactics are acceptable and used in the Denver Police Department. (Archuleta);

The purpose of the hair takedown technique allegedly employed by Officer Guzman on August 4, 2007, was for the purpose of guiding a suspect to the ground in the direction of the pull of the head – the body follows the head. It was taught for the purpose of avoiding potential injuries to a suspect, particularly in a small space. (Guzman, Archuleta);

An officer is trained to sense cues or signals from a suspect when handcuffing such as tensing his hands and arms and react to maintain control. (Archuleta);
A handcuffed suspect is still a danger to police officers and others. If a handcuffed suspect is resisting an officer should close the distance, get as close as possible with the suspect, against a wall or taking the suspect to the ground. While on the ground an officer maintains control of a suspect by placing his weight on the suspect. (Archuleta);

A suspect is a threat to the officer and others even if handcuffed if he has not been searched. (Archuleta) (FOF 29-33).

What is both conspicuously and critically absent from all of these factual findings is any connection between these facts and the actual motivation or justification of Officer Guzman’s actions in this particular case. For example, while we are bound to accept the finding above that an officer is trained to sense cues or signals from a suspect when handcuffing, such as tensing his hands and arms, and react to maintain control, there is nothing in this record proving that Officer Guzman sensed any of these cues. While we accept as true that a suspect, even if handcuffed, may be a threat to an officer, there is no evidence in the record proving that Officer Guzman actually perceived Mr. Lee as a threat, nor any evidence that Mr. Lee made any threatening movements at all towards Officer Guzman that in any way could have justified his use of force. The record is clear that throughout his testimony, Cpl. Archuleta was merely speculating on what might have been happening between Officer Guzman and Mr. Lee. He admitted that he had no knowledge of what had actually happened, and further admitted, based on his viewing of the video, that he could discern no movement on the part of Mr. Lee that would have justified Officer Guzman’s use of force against him (see, hearing transcript pages 138:2-20 (sees Guzman push Lee against the wall but did not see Lee engage in any active resistance, can’t see what happened, doesn’t know what happened); 139:25 (“I don’t know why he [Guzman] did that” (push Lee hard into the wall)); 140:14-19 (assuming something happened to cause Guzman to act, but he doesn’t know); 145:9-10 (does not know why Guzman took Lee to the ground);
161:17-18 (sees nothing on video indicating Lee was a threat); 162:13-17 (prior to being shoved against wall, Lee appeared cooperative); 163:15-20, while on the ground, could see Lee offer no resistance, he was just in fetal position). Cpl Archuleta’s testimony does not provide any justification for Officer Guzman’s use of force.

We also see no documents in the record that justify Officer Guzman’s use of force against Mr. Lee. But we do note the DPD Operations Manual referencing state law, which indicates that an officer is justified in using reasonable and appropriate force when he reasonably believes it necessary to effect an arrest or prevent escape from custody of an arrested person; or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force. DPD Operations Manual Section 105.01(2); C.R.S. §18-1-707.

None of the factors listed above appear to be present here. Mr. Lee was in handcuffs when Officer Guzman arrived on the scene. There is no evidence indicating that Mr. Lee was a flight risk or that he attempted to flee. There is no evidence in the record indicating that Mr. Lee made any threatening movements or statements at all so that Officer Guzman could have formed a reasonable belief that he needed to use force to protect himself or third parties from a use of force or imminent use of force by Mr. Lee.

In sum, we believe that the Hearing Officer misinterpreted RR-306 when he made the factual findings he made, yet determined that the Manager had not proven a violation of that rule. In addition, we hold as a matter of public policy, when an officer uses force, and that officer can offer no justification whatsoever for his use of force, said use of force is, per se, unnecessary and unreasonable under RR-306.
D. Admissibility of the Video

While not necessary to the disposition of this appeal, we believe the Hearing Officer erred when he failed to admit the anonymous video as substantive evidence. As we have held before:

Administrative hearings, such as the type conducted by this Commission’s Hearing Officers, are not intended to be full-fledged trials. As such, the rules of evidence are not, and should not be, strictly enforced. See, e.g., Colo. Citizens for Ethics in Government v. Committee for American Dream, 187 P.3d 1207 (Colo. App. 2008) (“Administrative hearings need not comply with the strict rules of evidence. . . The standard to be applied is whether the evidence has probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.”) (Internal citations omitted.); Partridge v. State, 895 P.2d 1183, 1187-88 (Colo. App. 1995). As a general rule, it is important that the Hearing Officers have before them all of the evidence considered by the Department in making its disciplinary decisions. To the extent that such evidence is somehow deficient or tainted in some manner, these issues should generally go to the weight of the evidence, not its admissibility. While we decline to address the merits of the Panel’s decision in this case regarding the admissibility of the GPS evidence, we simply observe that materials contained in the Department’s investigation file should generally be admitted into evidence absent compelling reasons to the contrary.

Malatesta v. Torrez and Palomares, 11 CSC 02A, p. 7-8. Our hearings were never intended to be civil or criminal trials and the Hearing Officer’s strict adherence to the rules of evidence regarding the video was inappropriate.

In addition, we do not see the authentication problem seen by the Hearing Officer. At hearing, Officer Guzman admitted that it was him depicted in the video. In addition, the Internal Affairs file contained at least one interview, and Officer Guzman’s exhibits contained at least one factual summary of the events in question, that provided confirmation that the events
depicted in the video were factual. Consequently, we believe the video was properly and sufficiently authenticated and should have been admitted into evidence for substantive purposes 4. While it is possible the video was altered, Officer Guzman certainly had an opportunity to prove that. As our record stands, there is no indication that the video was, in fact, altered. We believe the Hearing Officer erred when he refused to admit the video for substantive purposes.

E. Penalty

This was a pre-matrix case. Given the totality of the circumstances presented in the record, we find the four-day suspension originally imposed by the Manager of Safety to be fair and reasonable.

CONCLUSION AND FINAL ORDER

For the reasons set forth above, the Hearing Officer’s order is REVERSED. The Manager of Safety’s disciplinary order is reinstated in its entirety.

Filed this 18th day of July, 2013.

FOR THE CIVIL SERVICE COMMISSION
CITY AND COUNTY OF DENVER

/s/ Earl E. Peterson
By: Earl E. Peterson
    Executive Director

4 We also find it rather inconsistent that the Hearing Officer, while not admitting the video for substantive purposes, permitted Officer Guzman and Cpl. Archuleta to view the video and offer justification for the use of force. It appears to us that while the Hearing Officer did not permit the Manager to use the video to prove that Officer Guzman used unnecessary force, he did allow Officer Guzman and Cpl. Archuleta to use the video to prove that unnecessary force was not used by Officer Guzman.