

**CIVIL SERVICE COMMISSION
CITY AND COUNTY OF DENVER, COLORADO**

201 W. Colfax Avenue, Dept. 1208
Denver, Colorado 80202-5332

Case No. 15 CSC 06A

Respondent-Appellant

Jess Vigil,
Deputy Director of Safety, City and County of Denver

v.

Petitioner-Appellee

Choice Johnson (P03021),
Officer in the Classified Service of the Denver Police
Department.

DECISION AND FINAL ORDER

Before Commissioners Neal G. Berlin, Anna Flores, Joseph Sandoval, Federico Alvarez, and Larry Trujillo.

Denver Police Officer Choice Johnson was working off-duty at the 1Up Bar in Denver's LODO neighborhood. On the night of July 26, 2014, at approximately 11:00 p.m., he encountered the remnants of a bachelor party convened to celebrate the upcoming wedding of one Matthew Schreiber.¹ By 10:45 p.m., the bachelor party had been whittled down to five attendees: Matthew; his brother Brandon; their cousin Nate; and two friends, Brett and Brian.

¹ According to the Hearing Officer, prior to the incident at the 1Up, the party had commenced at 11:30 a.m. at the Denver Biscuit Company where the participants consumed Irish Whisky, maybe Irish Coffee (see Hearing Officer's Factual Finding 2 and its reference to a brunch which included "Irish with Irish Whiskey"), and Bloody Marys. Before arriving at the 1 UP, the party attended a Colorado Rockies' baseball game, where the attendees consumed five to six beers each. Between brunch and the baseball game, the partygoers went to the Denver Art Museum. The group had been drinking at the 1 Up for approximately ninety minutes before interacting with Officer Johnson.

Matthew had, evidently, fallen asleep at the bar.² The 1 Up does not tolerate patrons sleeping at their bar, so one of the club's bouncers escorted Matthew off the premises. Matthew was uncooperative. The bouncer alerted Officer Johnson to Matthew's resistance to his forced exit from the bar. Responding to this call, Officer Johnson advised Matthew that he should call it a night and take a taxi home. Matthew protested that he just wanted to go back into the bar and drink water. He also told Officer Johnson that he could not take a taxi home since he was from out of town. Officer Johnson recommended that Matthew use his cell phone to have his mates, who were still in the bar, come out and get him. Officer Johnson also told Matthew that if he tried to go back into the bar, Officer Johnson would have him taken to Detox.

Matthew left the presence of Officer Johnson. Twenty minutes later, however, Officer Johnson noticed Matthew back in line in an attempt to gain entry into the 1 Up. Officer Johnson plucked Matthew from the line and handcuffed him, without resistance, for the wait for the Detox van to come and pick him up.

Soon thereafter, Cousin Nate came out of the bar, noticed Matthew in handcuffs and asked Officer Johnson what was happening. Cousin Nate interacted with Officer Johnson in an appropriately civil manner, explaining to him about the bachelor party and asking if they could just take Matthew home.

Brandon, after having cleared out his party's bill at the bar, came out to find Matthew and Nate with Officer Johnson. Officer Johnson explained to the group that Matthew would be taken to the Detox facility located at 13th and Cherokee, that Detox is not jail but is, in fact, a medical facility, and that they could pick him up there after he had sobered up. Officer Johnson

² The Hearing Officer did not discount the possibility that he might have actually passed out from drinking.

explained further that if, on the other hand, tests proved that Matthew was not intoxicated, he would be released immediately.

Brandon protested – vociferously and profanely, hurling insults and invectives at Officer Johnson, and at Denver police generally. He also demanded that Officer Johnson release his brother. Officer Johnson demurred, attempted to calm Brandon down and further explained to Brandon that he was not helping his brother’s situation.

The remaining members of the bachelor party, Brett and Brian, arrived on the scene and the quintet began talking and arguing amongst themselves, though Brandon managed to continue his tirade against Officer Johnson. Officer Johnson remained stoic in the face of Brandon’s obnoxious protestations. Officer Johnson moved the group further from the bar and settled in a spot that was under the purview of a HALO³ camera.

The drunken group continued its drunken antics. Brandon continued his harangue against Officer Johnson. Officer Johnson repeatedly told them to break it up. He also advised Brandon, specifically, to stop interfering or he, too would be sent to Detox. In response to this last admonition, Brandon responded, “Fuck you, I’m not going anywhere.”

Sometime thereafter, Officer Johnson, apparently had had enough, and told Brandon to turn around so he could be handcuffed. Brandon responded with more choice words. Officer Johnson’s response to Brandon’s apparent lack of cooperation was to position himself directly in front of Brandon and shove him with both his hands⁴ with sufficient force to knock Brandon to the ground.⁵

³ High Activity Location Observation

⁴ This particular technique is part of Krav Maga, a fighting system originally developed for the Israel Defense Forces; formerly, but no longer taught at the Denver Police Academy.

⁵ During the course of this encounter, the bouncer employed by the 1 Up had signaled to Officer Johnson that he was available should he need assistance in dealing with Brandon, Matthew, *et al.* It would appear from the record that Officer Johnson never felt the need to avail himself of this offer of assistance.

As noted above, Officer Johnson's actions were captured by a HALO camera. Prior to this two-handed shove of Brandon, the video of the incident showed Cousin Nate trying to pull Brandon away from the scene, Brandon shaking him off, and Brett and Brian fist-bumping Brandon, and then walking away from the scene. Consequently, at the time of Officer Johnson's use of force against Brandon, Officer Johnson was dealing with Matthew, who was handcuffed and not causing a problem, Nate, who was not handcuffed and not causing any problems, and Brandon, who was not handcuffed and being obnoxious.

Brandon eventually filed a complaint against Officer Johnson on August 11, 2014. The matter was investigated. On March 23, 2015,⁶ Deputy Director of Safety (DDOS) Jess Vigil imposed a 30-day disciplinary suspension on Officer Johnson for violating RR-306, which provides, "Officers shall not use inappropriate force in making an arrest or in dealing with a prisoner or any other person."

To help define this standard, the Department, in its Operations Manual, published the following regulations (OMS 105.01):

- (a) When deciding whether to use force, officers shall act within the boundaries of the United States and Colorado constitutions and laws, ethics, good judgment, this use of force policy, and all other relevant Denver Police Department policies, practices and training. With these values in mind, an officer shall use only that degree of force necessary and reasonable under the circumstances
- (b) 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 or allows an officer greater distance in order to consider or deploy a greater variety of force options....
- (c) Use of force that is not lawful, reasonable and appropriate will not be tolerated. Department policy as well as relevant Federal, State, and Local laws shall govern use of force by officers.

⁶ The Hearing Officer's Finding of Fact 23 finds that the DDOS brought charges against Officer Johnson on March 23, **2014**. While we are bound to accept factual findings as true, we conclude that this date is a typographical error, and are confident that the DDOS did not impose discipline for misconduct which had not yet taken place and would not take place for another four months into the future.

- (d) The level of force must reflect the totality of the circumstances surrounding the immediate situation.
- (e) The community expects and the Denver Police Department requires that peace officers use only the force necessary to perform their duties.
- (f) The level of force employed must be commensurate with the threat posed by the suspect and the seriousness of the immediate situation.
- (g) Officers should recognize that, when reasonable to do so with safety to Officers and other persons in the vicinity, disengagement, repositioning, cover, concealment, barriers or retreat, although not required by law, may be a tactically preferable police response to a confrontation.

Officers should be aware of this OMS provision and the DDOS considered them in arriving at his decision to discipline Officer Johnson.

DDOS Vigil found, in his Order of Discipline, that Officer Johnson "used inappropriate force and violated departmental policies when he aggressively shoved the complainant [Brandon] to the ground at a time when the complainant was posing no credible threat to officer safety and was not engaged in any action that indicated he was an escape risk." The DDOS further found that although Brandon was telling his brother to run, he was doing nothing that indicated he would help his brother escape from custody; that Officer Johnson could again have issued verbal orders and commands but failed to do so and that even though Brandon was refusing to place his hands behind his back, he was not taking any physical action to prevent Officer Johnson from taking him into custody.⁷

Officer Johnson appealed his suspension to a Hearing Officer. The Hearing Officer overturned the suspension. In doing so, she reasoned that the DDOS had "applied a deadly force standard to the use of non-deadly force and applied 20/20 hindsight, which is a policy consideration of considerable importance and is clearly erroneous." In addition, she found the discipline to be "contrary to the overwhelming weight of evidence," and therefore, clearly

⁷ Hearing Officer Decision, p. 7, par. 26.

erroneous. The DDOS has appealed that finding to the Commission. Because we believe the Hearing Officer made several critical errors in her analysis and conclusions, we REVERSE the Hearing Officer and reinstate the thirty-day suspension.

First, the Hearing Officer incorrectly held that DDOS Vigil was clearly erroneous in his issuance of this discipline because he evaluated Officer Johnson's conduct against the "deadly force" standard enunciated in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985), as opposed to the "non-deadly force" standard enunciated in *Graham v. Connor*, 409 U.S. 386, 109 S.Ct. 1865 (1989).⁸ (Hearing Officer's Conclusions of Law #'s 1-6) There is much wrong to unpack here in this conclusion.

First, *Graham v. Connor* did not set a standard for use of non-deadly force as opposed to deadly force and the holding of the case was not intended to do so. Rather, the purpose of the decision was, "to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other "seizure" of his person" and to decide that "that such claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard. *Graham v. Connor*, 409 U.S. at 388. *Connor* and *Garner* do not establish the dichotomy perceived by the Hearing Officer.⁹

⁸ The Hearing Officer, at Conclusion of Law 6, found that DDOS Vigil used the *Tennessee v. Garner* deadly force standard in punishing Petitioner instead of the *Graham v. Connor* standard for non-deadly force, noting that the DDOS' cited language from OMS 105.01 (4)(c)(1)(a)(b) and (c) is taken directly from *Tennessee v. Garner*. But we believe it does not matter whether the language used in the provisions of the Operations Manual defining the Department's Use of Force policy is taken from *Tennessee v. Garner*, *Graham v. Connor*, or a source other than a court case. The Department's standards on uses of force go far beyond case law and the Department was free to borrow language from any source in drafting its policy. As we have noted previously, if the Use of Force standard was merely intended to be, "follow *Connor v. Graham*," or "follow *Tennessee v. Garner*," that is precisely how the standard would read. But it does not say that. The fact that the policy references language from *Tennessee v. Garner* does not, either logically or practically, limit the scope of the policy to the terms of *Tennessee v. Garner*.

⁹ "Today we make explicit what was implicit in *Garner*'s analysis, and hold that **all claims** that law enforcement officers have used excessive force—**deadly or not**—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham v. Connor*, 409 U.S. at 471 (emphasis supplied).

Even if they did, however we would still find the Hearing Officer to be in error. Officer Johnson was not disciplined for violating Brandon's Constitutional right to be free from an unreasonable seizure which involved the use of excessive force. Rather, Officer Johnson was disciplined of violating DPD's internal policy prohibiting the use of inappropriate force. The ultimate purposes of the two court decisions was to determine whether a citizen's constitutional rights were violated and the standards for conducting that analysis. The purposes of the DPD policy prohibiting the use of inappropriate force are to advise an officer of DPD's expectations regarding the use of force and to inform the officer as to how his actions can be made to conform to those expectations, that is, provide a guideline or code of conduct as to how the officer is expected to act, and should act, in a given situation.

Consequently, in creating a policy concerning the use of force, the Department is not limited to the holdings of *Connor* or *Garner*, even though the policy incorporates language and concepts from those decisions. That is, even assuming the Hearing Officer to be correct in her assessment that *Connor* creates one constitutional test for when a use of non-deadly force is unconstitutional and *Garner* creates a different test for determining when a use of deadly force is unconstitutional, the Department is free to adopt a policy that applies a more stringent standard, *e.g.*, the *Garner* standard, on officers implementing non-deadly uses of force.

As we read the Hearing Officer's decision, she appears to be under the impression that RR-306, the Department's policy prohibiting the use of inappropriate force, must be and is limited to two operant terms; 1) if an officer is using deadly force, he or she must abide by *Tennessee v. Garner*; and 2) if the officer is using non-deadly force, he or she must abide by *Graham v. Connor*. But this is not and need not be the Departments policy on use of force. The Department is free to create a use of force policy that goes beyond the floor set by case law

establishing constitutional violations. *Turney v. Civil Serv. Comm'n*, 222 P.3d 343, 350 (Colo. App. 2009) (“[P]olice Departments may – indeed, they should – impose higher internal standards on their officers than simply not violating state criminal law and avoiding federal damages liability.”). The Denver Police Department has, in fact, imposed higher standards on its officers than simply avoiding federal damages liability.¹⁰ By her holding, the Hearing Officer has taken an axe to the Department’s full use of force policy and re-written it to say: *Connor v. Graham*, or *Tennessee v. Garner*. The Hearing Officer lacked the authority to do this, was incorrect in her legal analysis in choosing to do this, and her decision runs afoul of sound public policy which gives the Department of Safety the right to make policy for the Police Department, and sound public policy which afforded the public the greater protections afforded by the Department’s more stringent policies prohibiting the use of inappropriate force.

Next the Hearing Officer determined that the DDOS had failed to meet his initial burden of providing evidence in justification of the disciplinary action and that even if he had, Officer Johnson had demonstrated the imposition of discipline to be clearly erroneous because it was not supported by any credible evidence. (Hearing Officer’s Standard of Review (SOR) findings 5 and 7).¹¹ We disagree. The video of the incident provides ample justification for the DDOS’

¹⁰ See DPD Operations Manual (OMS) Section 105.01.

¹¹ The Hearing Officer also found in her SOR finding 5 that the DDOS’ finding that Officer Johnson had options available to him other than his use of force against Brandon amounted to an improper use of 20/20 hindsight. It is not. *See, Ceccacci v. Civil Serv. Comm’n*, 13CV32789, Order, § V(d). The consideration of whether Officer Johnson had options short of a use of force is part and parcel of the DDOS’ analysis of whether Officer Johnson’s actions were in conformance with policy and the determination that Officer Johnson’s use of force, where it was not necessary, was in violation of policy. *In re Brian Marshall*, 13CSC04A at 9-12. The DDOS did not engage in any improper 20/20 hindsight. The Hearing Officer, in her SOR finding 6, further found the DDOS’ decision to be against public policy because the decision improperly applied a lethal force standard to a non-lethal force situation. We reject this conclusion. As we noted, *supra*, *Tennessee v. Garner* and *Connor v. Graham* did not create a lethal/non-lethal use of force dichotomy and, in any event, the Department’s actual policy is far more exacting than the holding of those two cases.

decision to impose a thirty-day suspension on Officer Johnson for violating the Department's use of force policy and RR-306.

We have reviewed the video entered into evidence which shows the four minutes and twenty seconds leading up to Officer Johnson's use of force. Because, in our opinion, this video plainly contradicts the testimony offered by Officer Johnson justifying his use of force, we consider the video¹² and hold that it provides sufficient evidence to prove to us that the DDOS was not clearly erroneous in issuing a thirty days suspension to Officer Johnson for what we find to be a plain use of inappropriate, unnecessary force in violation of the Department's policies.

The video shows that for the four minutes prior to Officer Johnson's use of force, no one made a threatening or aggressive move toward Officer Johnson. While Nate can be seen, on occasion, moving towards Officer Johnson and also continually speaking with him, Officer Johnson never evidenced any concern. The video shows Nate never having made an aggressive or threatening move, or taking an aggressive or threatening posture towards Officer Johnson.

Officer Johnson claimed during his testimony at hearing that Brandon puffed out his chest at him in a defensive manner.¹³ The video, however, showed that this never occurred. Brandon never puffed out his chest, either in a defensive or offensive manner.

Brandon's hands were both in and out of his pocket and Officer Johnson never re-acted with any concern whatsoever to either condition. And while Officer Johnson testified that Brandon acted in a threatening manner to him with his hands, the video shows this to be untrue.

¹² Per *Scott v. Harris*, 550 U.S. 372 (2007) and our decision in *In re Sparks & Murr*, 11CSC03A-2 & 11CSC04A-2, at 22 – 24.

¹³ This strikes us as odd. If Brandon puffed out his chest in a defensive manner, it would indicate that Brandon believed, maybe presciently, he was going to be hit by Officer Johnson. Nevertheless, Officer Johnson apparently interpreted this defensive act as an offensive act of hostility or aggression.

The video does not show Brandon acting towards Officer Johnson in a threatening manner and does not show Brandon utilizing any threatening hand gestures.

On one occasion Brandon actually removed something from his pocket, his identification, and advanced towards Officer Johnson to hand it to him. Officer Johnson gave no indication that he was concerned in the least about what Brandon might eventually pull out of his back pocket or that Brandon's advance towards him was aggressive or threatening. If Officer Johnson was ever concerned about Brandon having a weapon in his pockets, he never evidenced any concern and never attempted to discern, say by a pat down, whether Brandon did, indeed, have a weapon in any of his pockets. The video showed Brandon removing his cap and wiping his brow three times, with Officer Johnson, again, never acting in a manner indicating he was concerned or threatened by this action.¹⁴

The video reflects that at four minutes and twenty seconds into the video, Officer Johnson, for no apparent reason, suddenly moves directly in front of Brandon and shoves him to the ground. Prior to that time, no one had made any threatening move towards Officer Johnson; no one made any aggressive moves towards Officer Johnson; no one uttered any fighting words, aggressive, threatening or otherwise to Officer Johnson; no one attempted to flee from Officer Johnson; and Officer Johnson had never even given the slightest indication that he was concerned for his safety or that his companions would turn or were being threatening, hostile or

¹⁴ The Hearing Officer, in her Finding of Fact 10, credits the testimony of the 1 Up bouncer (a Mr. Roland) who claimed that Brandon's removal of his cap was an indication of his readiness to fight. The Hearing Officer referred to him as a "trained bouncer." The Hearing Officer did not indicate what school of bouncing Roland graduated from, his class rank, or what the curriculum at the bouncing school entailed; causing us to question whether he was truly qualified, as a bouncer, to offer expert testimony in a police disciplinary matter. In any event, after our review of the video, we have come to a different conclusion about the significance of this hat removal. We note that Brandon did not start a fight, that Brandon's removal of his hat with its subsequent wiping of his brow did not strike us as a threatening or hostile gesture, and that the video demonstrates Officer Johnson was utterly unconcerned with this innocent action.

aggressive.¹⁵ When Officer Johnson executed his Krav Maga move, Matthew was handcuffed and not offering any resistance or making any threatening or aggressive moves or gestures; Nate was doing nothing aggressive or threatening, just standing there with his hands by his side, and Brandon was similarly doing absolutely nothing – making no hostile or threatening moves, comments or gestures – with his hands in his pockets.

The DDOS saw nothing in the video which lent any credence or support to Officer Johnson's claims that he needed to use the force he used against Brandon at the time he did, or that he needed to use any force against Brandon at all. Our review of the video leads to the same conclusion.

The DDOS determined Officer Johnson's use of force to be inappropriate and in violation of departmental policy because: at the time of the use of force Brandon posed no credible threat to officer safety and was not engaged in any action that indicated he was an escape risk; Brandon was not threatening Officer Johnson or anyone else with physical harm and was doing nothing that indicated he would help Matthew escape or that he himself would flee from Officer Johnson; and Officer Johnson had other options than a use of force available to him, such as calling for officer assistance, issuing verbal orders and commands, or threatening Brandon with arrest if refused to comply; but did not call for assistance from anybody, issued no orders, and made no effort to avail himself of any non-force alternatives. He simply attacked Brandon.¹⁶ We agree

¹⁵ Eighty seconds before the shove, a security guard or bouncer appears in the scene speaking with Officer Johnson. Officer Johnson apparently did not seek any assistance from this person and showed no indication that he needed any assistance or that he was concerned about a potentially developing situation.

¹⁶ The Hearing Officer, at her Conclusion of Law 11, was impressed that Officer Johnson had attacked Brandon, that is, employed his Krav Maga training and had "executed this move perfectly." But it does not matter that Officer Johnson might have employed his Krav Maga take-down of Brandon with sufficient alacrity and precision to qualify him for a first ballot election to the Krav Maga Hall of Fame. The DDOS determined that the totality of the circumstances did not require any force, or at the very least, did not require force at the level employed. We believe the evidence supports this determination and the dexterity with which the force was applied does not change the fact that the use of force in and of itself was inappropriate.

with the DDOS in his conclusion that the force used by Officer Johnson was neither “commensurate with the threat posed by [Brandon] and the seriousness of the immediate situation” nor “objectively reasonable.”¹⁷

OMS 105.1 requires that Officers use only the amount of force necessary to perform their duties. In this case, video evidence proves that there was no need for Officer Johnson to use the amount of force he used, if any force at all, on Brandon while he was just standing, in an unthreatening, non-aggressive manner with his hands in his pocket. The DDOS was not clearly erroneous, either from a factual standpoint or a policy consideration, in determining that Officer Johnson’s attack on Brandon was in violation of RR-306 and OMS 105.01. The Hearing Officer’s decision is REVERSED. The thirty-day suspension originally imposed on Officer Johnson by the DDOS is reinstated in its entirety.

Filed the 12th day of April, 2016.

For the Civil Service Commission,



By: Earl E. Peterson, Executive Director

¹⁷The Hearing Officer took notice of the Denver District Attorney’s letter which explained his decision to not bring criminal charges against Officer Johnson for assault against Brandon. Ironically, in that letter, the DA noted that the video did make Officer Johnson’s push of Brandon to appear unnecessary and unjustified. (Finding of Fact 19) Of course, the fact that the DA found insufficient reason to bring criminal charges has no bearing on the DDOS’s decision, or the correctness of the DDOS’s decision finding that Officer Johnson, in applying the shove, violated DPD’s internal rules and regulations prohibiting the use of inappropriate force.

CERTIFICATE OF SERVICE

I hereby certify that this 12th day of April, 2016, I have electronically served the foregoing **DECISION AND FINAL ORDER**, in Case No. 15 CSC 06A, *Jess Vigil v. Choice Johnson (P03021)*, by arranging that a true and correct copy of the same be sent by email to the following attorneys of record at the email addresses listed:

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