DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

FRANK KEMP, II, Appellant

vs.

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

The hearing in this appeal was held on October 24 and 30, 2013 before Hearing Officer Valerie McNaughton. Appellant was present and was represented by Dan Foster, Esq. and Marcy Ongert, Esq. Assistant City Attorney Franklin Nachman represented the Agency in these proceedings, and DSD Capt. Deric Wynn served as advisory witness. The Agency presented the testimony of Darrell Jordan, Jeff Wood, Deric Wynn, Christine Martinez, and Ashley Kilroy. Appellant testified and offered the testimony of Sheldon Marr and Dwaine Cook. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order.

I. STATEMENT OF THE APPEAL

Appellant Frank Kemp, II appeals his May 21, 2013 dismissal from the Denver Sheriff's Department (Agency). The following exhibits were admitted into evidence: Agency Exhibits 1 - 104 to -132, 2, 3, 5 - 7, 10, 16 - 21, 45 - 51, 53, 57, 58, 61 - 76, 79 - 84, 90, 92, and 94. Also admitted were Appellant's Exhibits A - H.

II. ISSUES FOR HEARING

The issues in this appeal are whether the Agency established by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR); and if so, whether termination was within the range of penalties that could be imposed by a reasonable administrator for the proven violations.

III. FINDINGS OF FACT

Appellant Frank Kemp, II served as a Deputy Sheriff with the Denver Sheriff's Department since his hire on Aug. 17, 1998. He was dismissed in 2013 based upon a 2011 incident with an inmate. Appellant filed this appeal to challenge his termination under the Career Service Rules.

On June 2, 2011 at 5:08 am, Appellant entered the County Jail's break room provided for inmate kitchen staff. Eleven low-security inmates employed in the kitchen were seated around the wall and a large table. Appellant asked if anyone had seen Shaggy, a nickname for one of the inmate employees. One of the inmates pointed several times to the kitchen door. [Exh. 65]
Inmate Luis Hechavarrias was seated at the far end of the table. He asked Appellant, "Why you look so angry?" Appellant asked him, "Do I know you?" Hechavarrias replied that he did not. Appellant countered, "Then how would you know if I'm angry? Why do you look angry?" Hechavarrias replied that he had spilled his orange juice. Appellant pushed past inmates seated at the table and leaned into Hechavarrias, who told him it wasn't necessary. Appellant stated that he had the authority to be there. He leaned in farther, pressed Hechavarrias closer to the wall, and poked him in the chest and face for several seconds. Hechavarrias raised his arm to hold Appellant away. Appellant grabbed Hechavarrias' outstretched hand. When Hechavarrias pulled his hand away, Appellant moved in close again. He pressed both hands into the base of Hechavarrias' neck, and pushed his head against the wall for four seconds. Appellant disengaged, slapped him in the face with the back of his hand, and stalked out of the room after pointing angrily at Hechavarrias. A few seconds later, Appellant reentered the room and told Hechavarrias that the uniform was just a job, and that he was from the same streets as he was. Hechavarrias asked to see a supervisor. [Exh. 65, video of break room; Exhs. 7, 70, statements of Hechavarrias.]

At that moment, Deputy Jordan was walking by in the outside hallway, and sensed something was happening when he saw inmates gathered at the break room door. He looked in, and saw Appellant angrily addressing the inmate at the far end of the table. Jordan asked Appellant to step out of the room, and then took Hechavarrias to a holding tank used as a cooling-down area. On the way, Hechavarrias told Jordan that Appellant had choked him. Hechavarrias was taken to the nurse, where pictures showed red marks on either side of his lower neck. [Exhs. 61, 62.] He was later rehoused outside of Appellant's area to prevent further contact between the two.

Jordan went to find Appellant and told him about Hechavarrias' accusation. Appellant "seemed a bit worked up". He told Jordan that the inmate was trying to stand up and "told him to stay out of his space." [Jordan, 10/24/13, 9:32 am.] Jordan then called Sgt. Christine Martinez and told her an inmate wanted to speak to her. She promised to see him after the shift change. During the morning meal, Jordan radioed Martinez that the inmate claimed Appellant had assaulted him. When Sgt. Martinez questioned Appellant about the incident later that morning, Appellant told her that he had gone to the break room to get a crew ready when Hechavarrias "started mouthing off." He walked over to the inmate and stood over him. Hechavarrias asked him not to do that, and stood up. Appellant reported to Martinez that he pushed Hechavarrias back down into the chair, and Appellant's hands ended up around Hechavarrias' neck. [Martinez testimony; Exh. C.]

Appellant filed a written report five hours after the incident. He stated that he entered the break room to assemble a crew of inmate workers to push carts out to the buildings.

[Hechavarrias] began to question me in an escalated voice and accused me of coming in acting tough and talking hard. I got my crew and was about to leave before I stopped, turned around and asked him if he knew me. He replied, [no]. I told him if the message was not for him then I was not talking to him and to relax. [He] began to mouth off so I turned and walked over to him to escort him out. [He] was seated and started to speak in a threatening manner for me not to come up on him... I leaned forward and informed him that I was within my authority to be as close to him as I needed. At that time, before Hechavarrias could jump up to his feet I attempted to restrain him in his chair by pressing down on his upper
chest area... I ordered him to relax and that I was going to let him go. Hechavarrias complied. I disengaged, walked out to find D/S Jordan. ...

[Exh. C.]

The jail security video lacked sound, but showed that the entire incident occurred in less than two minutes. Appellant strode into the room and paced back and forth. His forceful demeanor was so pronounced that two inmates raised their glasses in mock salute as soon as Appellant turned away. On his second trip across the floor, he stood at the near end of the table, gesturing and pointing angrily at Hechavarrias. A few seconds later, Appellant pushed his way past two inmates seated at the right side of the table. He approached Hechavarrias, who was seated at the far end of the room against the wall. Appellant leaned in towards Hechavarrias, partially obscuring Hechavarrias' face from view by the camera. Hechavarrias did not move. Appellant leaned in closer, and slapped or poked Hechavarrias in the face several times. Hechavarrias extended his arm to deflect Appellant, who stepped back briefly. Appellant then grabbed Hechavarrias' outstretched hand and closed in again, putting his hands around Hechavarrias' neck for four seconds. Hechavarrias was not visible for most of that time, as Appellant's upper body was between Hechavarrias and the security camera.

Appellant disengaged, and then quickly struck Hechavarrias on the left side of the head. Hechavarrias' head snapped to the right, and the inmate to his right jerked back in reaction. The physical contact between the two was over in twenty-two seconds. Hechavarrias remained in the same leaning position from the time Appellant began to address him until the end of the incident.

Immediately after Appellant slapped Hechavarrias, two kitchen staff peered at Appellant from the kitchen window into the break room. Appellant pointed with evident heat at Hechavarrias, and left the room with a heavy tread. He returned a few seconds later, and briefly addressed Hechavarrias from the head of the table. One of the kitchen staff looked through the window, and, seeing Appellant, quickly moved out of view. Appellant turned and left the room. [Exh. 65.]

The inmates' reaction to the encounter was telling. All turned their heads toward Appellant as he approached Hechavarrias, and one sat forward intently. None moved or appeared to speak. The two saluting inmates continued to eat, but kept their heads turned toward Hechavarrias. After Appellant left the room for the second time, an inmate who had been reading a paper folded it and threw it onto the table.

Hechavarrias and four other inmates who were present in the break room were interviewed within a few days. Inmate AB confirmed Hechavarrias' account, and added that Hechavarrias seemed to be trying to "break the ice" in Appellant's manner when he said he had spilled orange juice on himself. Inmate AB observed that Hechavarrias looked shocked during the incident, and that his only movement was to push Appellant's hands away from him as he was being poked. [Exh. 66.] Inmate GE stated that Appellant grabbed Hechavarrias by the neck and pushed his head against the wall. GE heard the sound of a slap as Appellant hit Hechavarrias' head with the back of his hand. "He shouldn't have made that comment ['why you look mad?’] because he didn't know [Appellant's] personality, but I don't think he intentionally meant to offend him." Hechavarrias said nothing and "looked real scared." [Exh. 68.]
Inmate BL stated that he was seated next to Hechavarrias. He confirmed the verbal exchange between Appellant and Hechavarrias. He observed that Appellant poked Hechavarrias' face, and that Hechavarrias raised his hand to protect his head. [Exh. 67.]

Inmate LT recalled that when Hechavarrias asked Appellant why he looked mad, Appellant turned back and asked Hechavarrias if he knew him. When he answered no, Appellant said, "then why the hell you say I look like I'm mad?" Appellant went up to Hechavarrias, poked him in the head several times, and said, "You need to find someone else to play with." Hechavarrias said, "You don't got to get up on me." Appellant leaned even further toward the inmate. Hechavarrias put his arm up to prevent Appellant from continuing to poke him. Appellant grabbed him by the neck and held his head against the wall. He slapped Hechavarrias with his hand and left the room. When he reentered, he said to Hechavarrias, "Now you look like you mad. You crossed the line. This uniform is just a job. I'm from the streets just like you. We can do this." [Exh. 69.]

The day after the incident, Hechavarrias filed a grievance in which he alleged that Appellant poked him in the head, choked and slapped him after he asked Appellant why he looked upset. The grievance led to an Internal Affairs investigation into the incident. [Exh. 7.]

Appellant was thereafter reassigned to a job within the jail that prohibited any contact with inmates.

Almost a year after the incident, Appellant was shown the video for the first time at the start of his Internal Affairs interview. Appellant told interviewer Capt. Deric Wynn that he went to the break room to identify a work crew. Hechavarrias began to "mouth off" by saying "[y]ou look mad", and the inmate to Hechavarrias' right was "steadily egging him on." Appellant decided to escort him out. Appellant later said he was trying to reason with Hechavarrias by telling him, "[l]et it go, we all have bad mornings. In a few hours you'll be allowed to go back to your pod, and this will be a thing of the past. We can talk, come on out here." Appellant added that Hechavarrias did not comply.

Appellant continued that he walked around the table, approached Hechavarrias and leaned into him so he could remove him from the room. Appellant told Hechavarrias to relax, mind his own business and let this go. Hechavarrias reacted by saying, "[d]on't be leaning over me". Appellant admitted that this "got to me", and stated he interpreted it as a threat. He told Hechavarrias that he had the authority to be as close as he needed to be, and pressed closer. Appellant said he saw Hechavarrias move his feet at 5:09:36 am. At that time, the video shows the inmate was leaning back and pulling his hand away from Appellant's grasp. [Exh. 65, 05:09:36; Exh. 79.] Appellant later said he had been walking away when he saw Hechavarrias slide his feet under his chair, "building a base" to stand up. Appellant also considered that a threat, and "that's when I went into action." He told Capt. Wynn that while trying to hold him down, his arms slid up to Hechavarrias' neck. He denied slapping Hechavarrias in the face, and said that last arm motion was a gesture in the air to indicate his disgust. "I was unhappy with myself ... It should never have happened that I allowed myself to get to that point." Appellant returned to the break room a few seconds later and told Hechavarrias that the whole incident was stupid. Hechavarrias asked to see a supervisor. Appellant told the interviewer that he left the break room to get Jordan, and then called Sgt. Martinez and reported the incident. [Exh. 79.]

When asked why he didn't remove Hechavarrias from the room as he had initially intended, Appellant said that the inmate "went limp" and was no longer a threat after he pressed his upper chest. "At that point he was almost like an infant." Appellant acknowledged that he had been trained that after going hands-on with an inmate, he was to secure and
remove him and report the incident to the supervisor. Appellant stated he had the authority to escalate or deescalate as his experience and the circumstances warranted, and added that he would take the same action if it occurred now.

“One thing that did get under my skin is that I allowed him to get under my skin, and we got to that point. That should never have happened, because I was trying to deescalate the situation. As [the physical contact] happened, I was trying to decide how to handle it as best I can. When he deescalated, I deescalated by walking away.” Appellant stated he did not escort Hechavarrias out of the room because “once it got to that point, it was really way out of control.” He described the incident as “a bad situation [that] didn’t even need to happen.” It was “stupid”, and “all for nothing.” [Exh. 79.]

During the follow-up IAB interview, Appellant stated that he did not recall what he said when he returned to the room after the incident. He had asked Jordan to take Hechavarrias to the nurse, but did not recall whether he told Jordan that the inmate got up from the chair and raised his arm. Appellant also said that he reported the use of force to Sgt. Yamada about fifteen minutes. [Exh. 81.] Appellant confirmed that the red marks on Hechavarrias’ neck are consistent with where he restrained him. [Exh. 82.]

At the October 2013 hearing, Appellant confirmed that Agency policies require deputy sheriffs to treat inmates with respect, regardless of how the inmates talk to the deputies. He testified that he went into the break room to get a work crew so that a kitchen employee who had complained about Hechavarrias would not have to do it. As he was about to leave, Hechavarrias accused him of coming on strong or bullying them. “I was not angry”, and was talking in a relaxed manner. At that point, Appellant considered Hechavarrias a threat to discipline and order because he was behaving in a way that “was inciting a riot”. He noticed that the inmate next to Hechavarrias was whispering to him,” egging him on. . . . he was being defiant, so I had to get him out of the there, but I didn’t think I had to call my supervisor . . . I asked, then told him to come out.” He testified that Hechavarrias ignored his order.

After their verbal exchange at either end of the table, Appellant decided to escort Hechavarrias out. He rounded the table and leaned in, closing the space between them “to tell him this is real, I’m not playing.” Hechavarrias appeared upset, and told him to back off. Appellant leaned in even closer. Hechavarrias pushed him away. Appellant did not consider him a threat at that point, and so he did not escalate. Hechavarrias then pulled his feet under him “in a defensive stance to start an aggressive stance.” Appellant pressed his body weight against Hechavarrias to keep him in his seat. He put his right thumb against the left side of Hechavarrias’ neck, and his left hand against the right side of the inmate’s neck. Hechavarrias’ head hit the wall. Appellant denied slapping Hechavarrias at the end of the encounter, stating that he waved his hand in the air to give him the message that he should “[s]top being a knucklehead.”

During his testimony, Appellant was of two minds about the incident. Sometimes he expressed unhappiness with himself for letting Hechavarrias “get to me”, and thought he should have had the sergeant come in before approaching the inmate. At other times, he stated that he had the authority to do what he did based on his skills and experience, and said he would do nothing different if it happened again. He described his pressure to Hechavarrias’ neck as a “control hold” permissible under the circumstances.

As to his perception of a threat justifying his use of physical force, Appellant gave varying explanations. He testified that he sensed Hechavarrias was inciting a riot during their verbal
exchange, but conceded that he did not believe a riot was about to break out. He stated that
the inmate to Hechavarrias’ right was whispering to him and egging him on. The video shows
that the inmate in question never leaned toward Appellant close enough to whisper. Appellant
said Hechavarrias was belligerent at that point, and admitted he intended to remove him from
the break room. However, he denied that the policy governing removal of belligerent inmates
was applicable. [Exh. 94.]

Appellant viewed Hechavarrias’ arm push as a physical threat, but decided not to act
upon that threat. Instead, he contended that it was the foot movement that caused him to
believe Hechavarrias required a control hold. He described that movement as a preparation to
stand in order to attack him. Appellant admitted that his final gesture to the inmate’s head
occurred after Hechavarrias “went limp”, and that any threat was already over.

At hearing, Appellant presented the testimony of Deputy Sheriff Sheldon Marr as an
expert witness in the use of force. Marr is a defensive tactics instructor at the Police Academy
who has been used by the Agency as an expert on that subject. Marr testified that Appellant is
an effective officer who appears to have a good understanding of use of force rules. Appellant
is in Marr’s opinion very professional and a good role model who treats inmates with compassion
and dignity. Marr acted as Appellant’s representative during the Internal Affairs process, and
made a statement on his behalf at the end of both interviews. [Exhs. 79, 82.]

Deputy Marr based his opinion on his review of the video, the inmate’s grievance, and
Appellant’s initial report. Marr did not review the witness statements or any other documents
related to the investigation. Marr believed that Appellant approached the inmate because the
latter had refused to comply with an order to keep quiet. He also believed that Hechavarrias
had initiated the physical contact and was preparing to stand. He accepted Appellant’s denial
that he had poked or slapped the inmate, and concluded that Appellant’s use of force was
reasonable. Marr acknowledged that poking and slapping are not authorized uses of force,
and admitted that a proper control hold is administered with one hand on the chest and the
other hand on the inmate’s arm or shoulder.

Acting Manager of Safety Ashley Kilroy made the disciplinary decision in this appeal,
applying the standards set forth in the departmental disciplinary matrix and the Career Service
Rules. In preparation, Ms. Kilroy viewed the video of the incident, listened to all interview audios,
and reviewed the entire Internal Affairs file, including prior commendations and discipline.

Kilroy first found that Hechavarrias presented no threat to Appellant. She based that on
the fact that the video showed no threatening movements by Hechavarrias, who was totally still
and leaning back in his chair at the far end of the room during the encounter. The video
showed that Appellant, in contrast, entered the room displaying an angry demeanor. The
witnesses confirmed that Appellant appeared upset by the inmate’s verbal challenge to him.
Kilroy viewed Appellant’s movement toward Hechavarrias as an exercise of poor judgment in
that it placed the officer in a dangerous position among the inmates without first calling a
supervisor, as required by the belligerent inmate policy. Invasion of an inmate’s personal space
was recognized in the Paul Childs case as a ploy designed to instigate a fight, and is now
prohibited by Agency policy. [Exh. 94.] Kilroy viewed Appellant as acting like a bully when he
poked at the inmate at close range while standing over him. She saw Hechavarrias’ arm
movement as an attempt to defend his space, a reasonable reaction that Appellant should
have foreseen based on his training and experience. [Exh. 92-15.]
Kilroy found that Appellant's slap to the inmate's head was especially egregious. The blow was demeaning and humiliating, administered as it was in front of the rest of the kitchen crew. Hechavarrias was seen to have been crying after the incident. Appellant himself admitted that Hechavarrias posed no threat at all at that point, having "gone limp" and been reduced to "almost an infant."

Kilroy rejected Appellant's claim that Hechavarrias moved his feet to "build a base" for an attack as unworthy of belief. Appellant's credibility was harmed in her view by his changing statements over time, especially after he was shown the jail video of the event. Kilroy noted that the video did not show that Appellant was looking down at Hechavarrias' feet just before he closed in and put his hands around the inmate's neck. She observed that Appellant appeared to be reacting in anger to Hechavarrias' outstretched arm. Kilroy gave great weight to the video, which contradicted Appellant's version that he was calm and that the inmate was out of control or posed an imminent threat. Further, Appellant made no move to secure Hechavarrias or escort him out of the room, in violation of D.O. 5010.1D(S)(c)(1). [Exhs. 94-2.] She found that Appellant's claim of threat was not corroborated by the objective facts. Kilroy concluded that his use of force was not objectively reasonable based on the facts known to the officer at the time, and was therefore in violation of Agency policy and the standards established in state law. [Exhs. 10-6, 94.]

Kilroy also found that the evidence contradicted Appellant's claim that Hechavarrias resisted an order. None of the five witnesses reported hearing Appellant order Hechavarrias to come with him out of the room. The video showed Appellant made no motion to direct Hechavarrias up out of his chair.

The last factor in determining the reasonableness of the force used by an officer is the seriousness of the inmate's actions leading to the use of force. Kilroy found that that action was Hechavarrias' question to Appellant, "Why do you look mad?" Appellant took that question as a verbal challenge, and reacted with anger. The question did not give Appellant authority to "go hands on," or to disregard the policies requiring him to call a supervisor, maintain appropriate personal space, and avoid any escalation of force not necessary to perform his duties. [Exhs. 10-2, 92-15, 94.] Kilroy specially noted that departmental policy prohibits the use of physical force as punishment. [Exh. 10-1.]

Kilroy determined that based on the facts known to him, Appellant used unreasonable force when he slapped the inmate in the head and caused red marks on his neck. Those facts included the absence of a threat or resistance to an order, and the trivial nature of Hechavarrias' comment which triggered the event. She separately found that Appellant's slap to the inmate's head in front of the crew, inflicted after the inmate was compliant, was demeaning, punitive, and rooted in the officer's own anger rather than any detention-related duty. Based on the same facts, Ms. Kilroy found a violation of the rule prohibiting abuse of prisoners, a rule directly related to the Agency's mission to maintain safe custody of inmates, and its core value to treat each prisoner with dignity and respect. She found that the conduct also constituted cruel and unusual punishment, intimidation, and the ethical and departmental orders related to use of force. [Exh. 3.]

Kilroy rejected Appellant's claim that Hechavarrias moved his feet to "build a base" for an attack against him as unworthy of belief. Appellant's credibility was harmed in her view by his changing statements over time, especially after he was shown the jail video of the event. Kilroy noted that the video did not show that Appellant looked down at Hechavarrias' feet before he closed in and put his hands around the inmate's neck. She observed that Appellant appeared
to be reacting in anger to Hechavarias' outstretched arm. Kilroy gave great weight to the video, which contradicted Appellant's version that Appellant was calm and that Hechavarias was out of control or that he posed an imminent threat. Further, Appellant made no movement to secure Hechavarias or escort him out of the room, contrary to his testimony. [D.O. 5010.1D(5)(c)(1): Exh. 94-2.] She found that Appellant's claim of threat was not corroborated by the objective facts. Kilroy concluded that his use of force was not objectively reasonable, and was therefore in violation of Agency policy and the standards established in state law. [Exhs. 10-6, 94.]

Kilroy noted a number of contradictions between Appellant's statements and the video and witness statements. First, Appellant told three officers that the inmate was coming at him, and getting out of his chair. His written report a few hours later stated that he tried to restrain him "before he could jump to his feet". Appellant changed his statement after seeing the video at the IAB interview, which clearly showed that the inmate had not attempted to stand. Appellant then related that he perceived a threat when Hechavarias "built a base" to stand up by shuffling his feet under his chair.

Second, Kilroy found that Appellant lied when he said he saw Hechavarias shuffle his feet. She based that on her observation that Hechavarias was being passive, and that Appellant did not look at the inmate's feet at the time in question. Witnesses confirmed that Hechavarias did not move. She also noted that Appellant failed to mention this in his contemporaneous reports. Kilroy concluded that Appellant retreated from his original statement that the inmate was "coming at him" after seeing that the video did not corroborate that version of events.

Third, Kilroy found that Appellant lied when he denied slapping Hechavarias. She relied on the video, which showed that Hechavarias' head reacted to the force of the slap just as Appellant was shown bringing his hand to the side of the inmate's head. In addition, five witnesses confirmed that Appellant slapped Hechavarias. Kilroy found that these three false statements regarding his performance of duties were intentionally deceptive.

The Agency next was required to make a determination about the penalty most appropriate given the Agency's disciplinary matrix and the factors described in C.S.R. § 16-20. Kilroy sustained all six specifications dealing with Appellant's use of force, three of which are in category F in the disciplinary matrix. Category F contains the most serious violations within the matrix, and carries a presumptive penalty of termination. The three remaining use of force specifications are in Category E, a presumptive 30-day suspension, and therefore run concurrently with the Category F specifications. Kilroy also sustained the two specifications related to dishonesty, one of which - commission of a deceptive act - is a Category F offense. The Category E offense likewise runs concurrently as to the dishonesty allegations. The one specification related to performance issues carries a presumptive penalty of two days' suspension, and is therefore largely irrelevant to the penalty decision. [Exh. 3-1, 3-2.] Kilroy also found that Appellant violated Career Service Rules 16-60 A, B, E, L, Y and Z, and ten departmental regulations.

The Agency decision-maker then weighed the factors affecting the penalty decision. Kilroy found that Appellant's conduct was a willful and wanton violation of the Agency's guiding principles and an abuse of his authority. She determined that his false statements during the investigation demonstrated a critical lack of integrity, contrary to his sworn duty to uphold the law. Kilroy noted that Appellant's conduct had a very serious negative effect on the professional image of the Agency, and upon relationships and trust within the jail community.
Kilroy noted Appellant's commendations and positive evaluations, but found the aggravating factors outweighed the positive considerations. The former included the fact that Appellant as a defensive tactics instructor was well aware of what constitutes reasonable force, yet demonstrated a complete lack of understanding of those policies and no remorse for his actions. Kilroy acknowledged that she had considered Appellant's 2007 written reprimand as previous discipline for abuse of an inmate, but that a closer reading of it actually shows that the offense was failing to report a use of force. [Exhs. 3-2; 53.] Kilroy testified that she did not consider the incident as an aggravator, and it therefore had no effect on the decision made.

IV. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and that termination was within the range of discipline that can be imposed under the standards set in the Career Service Rules. In re Roberts, 40-10, 9 (11/15/2010); see also Department of Institutions v. Kinchen, 886 P.2d 700, 707 (1994), citing Colo. Const. art. XII, § 13(8).

A. VIOLATION OF DISCIPLINARY RULES

1. Use of Force

The Agency found that Appellant violated several applicable rules related to use of force. Kilroy determined that Appellant applied excessive force in the absence of an imminent threat of physical force, and failed to notify a supervisor prior to escalating his use of force, as required by Agency rules and the standards incorporated from Colorado statutes.

The facts related to this issue are largely undisputed. Appellant had a verbal exchange with Hechavarrias at 5:08 am on June 2, 2011, pointing at him several times. He approached the inmate a few seconds later and leaned in closely against Hechavarrias. The inmate pushed Appellant away. Appellant immediately pushed into Hechavarrias with his body weight, and pressed his hands against the base of his neck. The inmate did not resist. Appellant slapped the inmate and walked out of the room.

Appellant argues that his use of force was justified by Hechavarrias' "mouthing off" by asking him why he was angry, which led to Appellant's decision to remove him from the break room. Appellant testified that he leaned in to the inmate to "make it real". Appellant contends that his use of a control hold to the inmate's neck was a reasonable use of force because he saw Hechavarrias slide his feet under him in order to "build a base" to stand up. Appellant states he reasonably believed that the inmate's action presented an imminent threat, and that he acted appropriately to restrain Hechavarrias. Appellant denies that he thereafter slapped Hechavarrias.

The Agency relied upon its policies and related training to define and describe an appropriate use of force, and the standards by which an incident involving an officer's use of force will be measured.

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. Physical force will not be used as a punishment, under any circumstances.

[Department Order 5011.1J – Use of Force; Exh. D10-1.]

The Colorado laws incorporated in the departmental policies provide as follows:

... [A] person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

C.R.S. 18-1-704(1).

As used in this section, “excessive force” means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.

C.R.S. 18-8-803.

A force is determined to be objectively reasonable based on three factors: a) whether the subject presents an "imminent threat of injury" to any person, b) whether the inmate actively resists a lawful command, and c) the severity of the act at issue. [Exh. 10-7.] "The force option applied must reflect the totality of circumstances surrounding the immediate situation. The officer need only select a force option that is within the range of 'objectively reasonable' options. The reasonableness of an officer's use of force is based upon the totality of the circumstances known by the officer at the moment the force is used." [Exh. 10-6.] Officers must rely on their training, experience, and assessment of the situation in deciding an appropriate force option to be applied. The nature of the inmate's resistance is one of the circumstances to be considered in determining whether force is objectively reasonable. [Exh. 10-7.] Colorado law and departmental training both direct that the force is presumed to be excessive when an officer continues to apply force after the person is incapable of resisting arrest. C.R.S. § 18-8-803; Exh. D-68.

This decision turns on which version of events is most consistent with the totality of the persuasive evidence. Appellant denied that he was angry, testifying instead that he was trying to reason with Hechavarrias. The inmates stated that Hechavarrias appeared scared and in shock when Appellant confronted him. Deputy Jordan testified that Appellant looked angry when addressing Hechavarrias, and "seemed a bit worked up" later when he told Jordan the inmate told him to "stay out of his space." The video and witness statements are inconsistent with Appellant's claims that Hechavarrias was inciting a riot or defiantly refusing an order. The kitchen employees stared at Appellant, not Hechavarrias, as the key actor in the incident. Appellant's obvious anger and Hechavarrias' stillness contradict Appellant's claims about the nature of the incident. At hearing, Appellant insisted that he had a right to escalate or deescalate based on his experience and training. However, Appellant failed to apply the
guidelines and rules controlling use of force and dealing with a belligerent inmate. The testimony of Appellant's own expert witness, the Academy instructor on use of force, makes it apparent that Appellant did not use an authorized control hold when he made marks on both sides of the inmate's neck. Appellant himself acknowledged that he was unhappy with himself for letting the inmate get under his skin, and that this was "a bad situation [that] didn't need to happen." [Exh. 79.]

The expert testimony of Deputy Marr was weakened by the fact that he did not review the entire file, and that he based his conclusions solely on Appellant's version of events. In contrast, the Agency decision-maker reviewed all witness interviews, statements and Agency summaries, and prepared a detailed analysis of the evidence in support of each specification. [Exh. 3.]

Ms. Kilroy had the benefit of a thorough picture of Appellant's changing statements over time, which negatively affected her perception of Appellant's credibility. After viewing the video over twenty times, gauging the credibility of the witnesses, and listening and reviewing the entirety of the evidence, I come to the same conclusion as Ms. Kilroy: Appellant was not presented with an imminent threat or resistance to a lawful command. Instead, Appellant needlessly escalated an annoying comment by an inmate, and engaged in an unreasonable use of force. His actions violated the cited departmental and Career Service Rules, including C.S.R. § 60-60 L and departmental rules 300.22, 300.23, 400.4.1, 400.6, and Departmental Orders 2440.1 5.C.3, 5011.1J.

2. Dishonesty, CSR § 16-60 E

Violation of this rule is proven by evidence of any knowing misrepresentation made within the employment context. In re Mounim, CSB 87-07, (7/8/08). The Agency here alleges that Appellant made three false statements when he told the Agency that 1) the inmate stood up or attempted to do so, 2) Hechavarrias shuffled his feet, and 3) Appellant did not slap the inmate.

Kilroy determined that Appellant told three officers that the inmate stood up right before Appellant restrained him. In Appellant's written report on the day of the event, he stated that he tried to restrain him "before he could jump to his feet". After seeing the video at the IAB interview a year later, Appellant stated that he perceived a threat when Hechavarrias "built a base" to stand up by shuffling his feet under his chair.

In Sept. 2011, three officers familiar with the event were interviewed. Deputy Jordan told Internal Affairs that he could not recall what Appellant told him about it. [Exh. 73.] Ten months later, Jordan repeated that he did not recall what was said. [Exh. 80.] At hearing, Jordan testified that he did not remember Appellant's explanation. But when examined further on the subject, he recalled that Appellant "seemed a bit worked up", and told him that Hechavarrias was trying to stand up. [Jordan testimony 10/24/13.] Yamada told IAB that Appellant said Hechavarrias was "getting out of the chair or coming at him." [Exh. 71.] None of them recall the exact words Appellant used in his verbal reports on the day of the incident. Capt. Wood never interviewed Appellant or Hechavarrias, and his report and testimony were based on information he received second-hand from Sgt. Yamada. [Exh. 72; Wood testimony, 10/24/13.] Only Sgt. Martinez consistently said that Appellant told her Hechavarrias had stood up before he was restrained. [Exh. C; Martinez testimony, 10/24/13.]

Appellant's version of events changed little in the two years between the incident and the hearing, altered only by emphasis. His statements are not so irreconcilable that they should be found by a preponderance of the evidence to be deliberate lies on that issue. A single witness testified that Appellant claimed the inmate had stood up. Sgt. Martinez wrote her
statement later that day, after numerous intervening events occurred. In that statement, she said Appellant told her Hechavarrias was sitting down when Appellant hovered over him, then got up in a threatening manner. This version is so contrary to the video and all other witness accounts that it is more probably the product of an imprecise memory. Tellingly, Appellant claimed later that morning in his report that he restrained the inmate "before Hechavarrias could jump to his feet", a statement he would not have made if he intended to deceive the Agency about the nature of provocation for his use of force. I find that Appellant was not dishonest in his statements to the Agency about whether the inmate tried to stand or shuffled his feet before Appellant restrained him.

Next, Kilroy found that Appellant was dishonest when he told IAB that he did not slap the inmate. [Exh. 79.] All five witnesses stated that they saw Appellant slap Hechavarrias on the head, and one, Inmate GE, told the interviewer that he heard the sound of the slap, which was "not extremely loud." [Exh. 68.] The video confirms that account, showing Appellant's hand connecting to Hechavarrias' head, and the head snapping back. I find that Appellant intended to deceive the Agency when he denied that he slapped Hechavarrias during the Internal Affairs interviews, in violation of C.S.R. § 16-60 E and Y, and departmental rules 200.4.1 and .2.


As there was no evidence presented in support of these allegations, I find that the Agency did not establish violation of those rules or departmental rule 200.19.

4. Conduct prejudicial to the department or city, CSR § 16-60 Z

This rule requires proof that Appellant's conduct resulted in actual harm to the mission of the Agency or to the reputation of the city. In re Jones, CSB 88-09A (9/29/10). Ms. Kilroy testified that Appellant's conduct in front of the rest of the kitchen crew harmed relationships and trust within the jail. This conclusion was unsupported by evidence from which I could determine whether the Agency suffered actual harm to its mission as a result of Appellant's conduct, or if the city's reputation was harmed thereby. As a result, the Agency failed to establish a violation under this rule.

B. DEGREE OF DISCIPLINE

The Agency established that Appellant violated several Career Service Rules and departmental policies with regard to the use of force and dishonesty. Four of those rules are categorized at the highest level of offense within the Agency's disciplinary matrix, and as such carry a presumptive penalty of termination. The Acting Manager of Safety testified that Appellant's misconduct is counter to the Agency's mission to safely care for inmates, and that a law enforcement officer's dishonesty in reports and investigations cannot be tolerated.

In determining the appropriate penalty, Ms. Kilroy weighed Appellant's previous evaluations and commendations, but found that they did not justify an exception to the presumptive penalty of termination on four substantive specifications related to the Agency's core values of honesty and humane treatment of prisoners. She evaluated the factors which must be addressed under Career Service Rule 16, and noted that any discipline short of termination would not correct the misconduct, since Appellant told the IAB investigator that he would take the same actions if confronted by a similar incident. Kilroy found his denial of fault
especially significant since Appellant has been employed as a Deputy Sheriff for thirteen years and served as a defensive tactics instructor.

At hearing, Appellant repeated his denial of fault, and again insisted that his actions were appropriate under the rules. His version of events was inconsistent with all the other evidence presented. I find that Appellant’s actions and statements demonstrated that he either lacks understanding of or disagrees with the Agency’s rules on the care and custody of prisoners. In either case, any discipline but termination would be inconsistent with the purpose of discipline under the Career Service Rules. I find that dismissal was within the range of reasonable penalties that could be imposed by a reasonable administrator for the proven violations.

Order

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that the Agency’s disciplinary action imposed on May 21, 2013 is AFFIRMED.

DONE this 2nd day of January, 2014.

Valerie McNaughton
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 § 19-60 et seq., within fifteen calendar days after the date of mailing of the Hearing Officer’s decision, as stated in the decision’s certificate of delivery. The Career Service Rules are available 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

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.