HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Consolidated Appeal Nos. A030-17, A033-17 and A032-17

DECISION AFFIRMING SUSPENSIONS

ERIKA GAJARSZKI,
DAWN HAVENS,
IWONA MEANEY, Appellants,

v.

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

I. INTRODUCTION

This is the consolidated appeal of the above-named Appellants, all deputy sheriffs at the Denver Sheriff's Department (Agency). The Agency alleged all three violated Career Service Rules and Agency rules, specified below, arising out of the same incident. A hearing concerning this appeal was held on August 31 and September 1, 2017 before Hearing Officer Bruce Plotkin. Appellants were represented by David Canter, Esq., and Mallory Revel, Esq., of the law firm Foster Graham Milstein & Calisher, LLP. The Agency was represented by Assistant City Attorney Richard Stubbs. Agency's exhibits 1-10, 12-14, 16-30, 35-39, 41, 44-49, and 51-56 were admitted as were Appellants' exhibits B, L-M, and P-S. The Agency called the following witnesses: Jerrod Firebaugh, Eishi Yamaguchi, Elias Diggins, and Shannon Elwell. Each Appellant testified on her own behalf. They also presented the testimony of Andrew Keefer, Sheldon Marr, Gary Phillips, and James Jeffery.

II. ISSUES

The following issues were presented for appeal:

A. whether Appellant Gajarszki violated Career Service Rule 16-29 A., or 16-29 R. via the Agency's RR 5011.1M, "Use of Force," or RR 300.22, "Inappropriate Force;"

B. whether Appellant Havens violated Career Service Rule 16-29 A., or 16-29 R., via the Agency's RR 200.4.1 "Misleading or Inaccurate Statements;"

C. whether Appellant Meaney violated Career Service Rule 16-29 A., or 16-29 via the Agency's RR 200.2, "Use of Force Reporting;" and

D. if an Appellant violated one or more of the aforementioned Career Service Rules, whether the Agency's choice of discipline conformed to the purposes of discipline under CSR 16-41.

III. FINDINGS

Deputy Erika Gajarszki has been employed as a Deputy Sheriff with the Denver Sheriff Department, for nine years; Deputy Dawn Havens for 12 years, and Deputy Iwona Meaney for 11 years. As is pertinent to their appeal, their primary job duties as Deputy Sheriffs are to provide

care and humane treatment of detainees, and to adhere to Agency and Career Service Rules. Agency rules require every use of force on an inmate - not just excessive force - to be reported by every officer who used or witnessed the use of force no later than the end of that shift. [Exh. 5-9; Firebaugh testimony; Exh. 3-3]. Grabbing an inmate's hair to force the head to move is such a reportable use of force, and is not an approved use of force. [Elwell testimony; Diggins testimony; Exhs. 40, 41].

On November 18, 2016, the three deputies accompanied inmate SM into an elevator in Denver's Downtown Detention Center. Havens had taken SM through the remand process after SM's court appearance. SM began to hit her head on the wall and make suicidal statements. Havens's supervisor instructed her to take SM to see a nurse. Gajarszki joined them while Meaney followed with another inmate. While waiting for the elevator, SM, who was handcuffed, was cooperative.

Gajarszki and Havens held SM by each arm and accompanied her to the back of the elevator, to face the wall, as they are trained to do. Meaney told the other inmate, who was cooperative, to face a side wall, but Meaney kept her attention on SM. SM was reluctant to face the wall, and turned toward Gajarszki. Gajarszki and Havens told SM to face the wall and pushed her arms toward the wall without excessive force. SM initially complied, but then turned toward Havens who directed SM to face the wall. SM turned her head again toward Havens. The deputies again pushed her arms toward the back wall, and SM turned completely to the back wall as directed. SM started to turn her head toward Havens again, but barely. Gajarszki grabbed SM's hair at the back of her head, shook her head, and thrust her head twice toward the back wall, then held SM's head against the wall by the hair until the elevator arrived at their destination. [Exh. 1-10; Exh. 4]. Gajarszki released her hold on SM's hair, and directed SM, with an open hand on her head, to turn and walk out of the elevator.

When Gajarszki thrust SM's head a second time toward the back wall, Meaney, who had been watching from behind, gently placed her opened hand on Gajarszki's shoulder. Gajarszki ceased pushing on SM's head, then released SM's hair altogether when the elevator arrived seconds later. Meaney kept her attention on SM and did not turn back to the other inmate until the elevator arrived at its destination.

Havens filed an Offense in Custody (OIC) report the same day. She did not report Gajarszki's grabbing SM's hair and shaking her head, but simply wrote "we asked her to step to the back and face the wall she was refusing and trying to pull away so we placed her against the wall." [Exh. 10-1].

Gajarszki also wrote an OIC report the same day in which she acknowledged grabbing SM by the hair and using it to hold her head against the elevator wall. [Exh. 10-2]. Meany wrote her report three days later, after being instructed to do so by a supervisor. [Exhs. 10-3; 18-7].

Gajarszki was served with a contemplation of discipline letter on March 21, 2017. A contemplation of discipline meeting was held on May 3, 2017, which Gajarszki attended with her attorney. On May 24, 2017, the Agency served its notice of 10-day suspension on Gajarszki, signed by the decision-maker, former Civilian Review Administrator Shannon Elwell. [Exhibit 1]. The appeal followed timely on June 1, 2017.

Meaney and Havens were served with letters in contemplation of discipline on March 21, 2017, and attended separate contemplation of discipline meetings with their attorney on May 16, 2017. The Agency served notices of suspension on Meaney and Havens on June 5, 2017. signed by the Elwell [Exhibits 18; 14]. Meaney and Havens filed timely appeals on June 5, 2017, June 12, 2017, respectively.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-20 A.1.b.[1], as the direct appeal of each Appellant's suspension. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion[2], throughout the case, to prove the Appellants violated one or more cited sections of the Career Service Rules, and to prove the degree of discipline complied with CSR 16-41. The standard by which the Agency must prove each violation is by a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-29 A. Neglect of duty or carelessness in performance of duties and responsibilities. (Gajarszki, Havens and Meaney)

To sustain a violation under CSR 16-29 A., the Agency must establish that Appellants failed to perform a known duty. In re Gomez, CSA 02-12 (5/14/12), *citing* In re Abbey, CSA 99-09, 6 (8/9/10). The only allegations by the Agency under this rule were that Appellants violated generally-stated duties under, respectively RR 5011.1M and 300.22 (Gajarszki), 200.2 (Meaney), and 200.4.1 (Havens).

When the only allegation under this rule is the Appellant neglected the same duty as stated under another, specified rule, then this rule becomes an impermissible redundancy of violations. In re Gordon, CSA 10-14, 2 (11/28/14); *see also* In re Wright, CSA 40-14, 7 (11/17/14). In the absence of a duty not already incorporated within another rule or order, no violation is found. *Id.*

2. CSR 16-29 R. Conduct which violates the Career Service Rules, the City Charter, the Denver Revised Municipal Code, Executive Orders, written departmental or agency regulations, policies or rules, or any other applicable legal authority.

As it pertains to:

Denver Sheriff Departmental Rules and Regulations

RR 300.19.1 – Disobedience of Rule (Gajarszki, Havens and Meaney)

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

[1] New appeals filed by uniformed members of the Denver Sheriff Department are now filed under CSR 20 (effective Oct. 20, 2017), or the newest version of CSR 20 (effective January 10, 2018).

[2] Under both versions of CSR 20, Deputy Sheriffs now bear the burden of proof in disciplinary appeals.

As it pertains to:

RR 5011.1M – Use of Force (Gajarszki)

… [t]he amount of force used will be reasonable and appropriate in relation to the threat faced to accomplish a lawful objective.

… an officer shall use only that degree of force which is necessary…under the circumstances.

… there are many reasons a suspect/inmate may be resisting ... A person's reasoning ability… or emotional crisis, are some examples. An officer's awareness of these possibilities, when time and circumstances reasonably permit, should then be balanced against the facts of the incident facing the officer when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.

Law enforcement requires that at times an officer must exercise control of a … resisting individual … to protect the officer, other officers … from risk of imminent harm… Sound judgment and the circumstances of each situation will dictate the force option the officer deems necessary.

…

The force option applied must reflect the totality of circumstances surrounding the immediate situation… Officers must rely on training, experience, and assessment of the situation in deciding an appropriate force option to be applied.

The community expects and the DSD requires that peace officers use only the force necessary to perform their duties.

…

The use of force rule requires officers to assess the situation and use only the least force to achieve a legitimate law enforcement function. The Agency claimed Gajarszki's grabbing SM by the hair and shaking her head served no legitimate function, and was therefore excessive. Gajarszki claimed SM failed to obey an order to face the back wall and was a threat to spit on her or fellow officers, so controlling her head was imperative.

Contrary to Gajarszki's assertions, when she gave her report to the Internal Affairs Bureau (IAB), she acknowledged she had never dealt with SM before. "This is a person we do not know. We have no track record of what she is like; if she if violent, if she is not…" [Exh. 7-6]. Despite that acknowledgment, Gajarszki told IAB she grabbed SM's hair to avoid "the chance of her biting her [Havens] or spitting on her…" Since Gajarszki had little information about SM, other than having heard some banging and seeing a puddle of saliva, her concerns about biting and spitting are more likely after-the-fact justification rather than legitimate caution. Moreover, Gajarszki was not controlling SM's head as they entered the elevator; and, as they were leaving the elevator, Gajarszki let go of SM's head entirely, holding SM only by the arm, and seemed unconcerned about the possibility of spitting or biting by SM's uncontrolled head.

The above circumstances and video evidence suggest it was likely Gajarszki became fed up with SM's perceived non-compliance after SM turned her head twice, rather than acting out of concern about being bitten or spit upon. Also, SM had just tried to injure herself, and had difficulty focusing on officers' directions. Despite her restive state, SM had complied with

directions to face the wall. She moved her feet and body toward the back wall when directed to do so by Havens and Gajarszki pushing her shoulders. Only her head turned toward first Gajarszki then Havens. Under those circumstances, a simple redirection of SM's head, if such was even necessary, would have sufficed to turn her head toward the back wall.

Together, these circumstances indicate the amount of force Gajarszki used on SM was neither reasonable nor appropriate, given the lack of credible threat posed by SM. The force used was not necessary under the circumstances, and did not take into account circumstances including such lack of threat, SM's fragile mental state, and SM's agitation. The Agency proved this violation by a preponderance of the evidence.

RR 300.22 – Inappropriate Force (Gajarszki)

Deputy sheriffs and employees shall not use inappropriate force in … dealing with a prisoner.

As stated above, Gajarszki claimed her use of force was justified by her concern that SM might bite or spit. For the same reasons as stated above, Gajarszki's concerns were unreasonable under the circumstances. (1) Gajarszki acknowledged she was unfamiliar with SM and therefore had not even heard second-hand reports of those concerns, had not observed SM spitting or biting.[3] (2) Tellingly, after shaking SM's head by the hair, Gajarszki can be seen letting go completely of SM's head, and holding only her arm, seemingly unconcerned about the prospect of an unhygienic assault, as Gajarszki looked straight ahead and no longer at SM. [Exh. 4 @ 14:33:42-43]. (3) Shaking an inmate's head by the hair with force is neither taught nor approved by the Agency, according to a Division Chief who had also run the cadet training academy. [Diggins testimony].

Appellants presented testimony of Deputies Keefer, and Marr who suggested that hair grabbing may be permissible to avoid spitting. Their testimony was unpersuasive since they all addressed spitting as a hypothetical situation which was not present. That SM became sick and spit into a waste basket provides no basis to reasonably believe she later presented a threat to spit at the deputies in the elevator. Consequently, it was inappropriate force for Gajarszki to grab SM's hair and shake her head when no credible threat existed.

RR 200.4.1 – Misleading or Inaccurate Statements (Havens)

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

The Agency alleged that, while Havens filed a report as is required by RR 200.2, [see above; Exh. 10], she knowingly made a misleading or inaccurate statement in her report by omitting any reference to Gajarszki's use of force on SM. Havens responded (1) she did not believe she was required to report on anyone's actions other than her own [Exh. 8-22]; Havens testimony], and (2) she did not believe Gajarszki used inappropriate or excessive force and (inferrably) therefore had no duty to report it.

1. Duty to report. Several Agency rules and its training establish it was part of Havens's official duties to report the use of force by another officer. (a) The Agency's use of force policy

[3] Gajarszki reported when she arrived to assist with SM, she "saw saliva on the floor… thus I assumed [SM] had spit on the floor, and that perhaps she even had an illness like Hepatitis C." [Exh. B-1]; however she never stated a basis for these assumptions other than having also heard banging from the elevator, and Havens, who was with SM before Gajarszki arrived, observed that after SM banged her own head against the wall, "started spitting on the floor as if she was gonna throw up." Havens gave SM a trash can in case she threw up, but never mentioned being concerned about SM spitting at anyone. [Exh. 10-1; Havens testimony].

requires reporting the use of physical force, including open hand or closed hand contact, even when such force is unlikely to result in serious physical injury [Exh. 5-9, 5-10]. (b) Departmental Order 1115.1A, "Reporting System" established the policy for submission of written reports. [Exh. 41-1]. It requires reports must be completed by any officer who witnessed or participated in a use of force no later than the conclusion of that shift. [*Id* at 2]. The report must contain "a detailed chronological description of the incident," and must "provide a complete depiction of the incident to include actions both taken and observed." [*Id* at 3]. Finally, the rule requires officers to be familiar with the requirements therein and to comply with them. [*Id* at 5, 6].

In addition to the requirement, by rule, to report observed use of force, the Agency teaches and regularly reinforces the duty to report the use of force, including the duty to report the use of force by another officer, from the time a cadet enters the Agency's training academy. [Exh. 42-2; 42-4; 31-3; 32-5; 33-5; 34-5; 35-3; 36-5; 37-5; 38-5; 39-6; 40-1; 40-6; 41-1; 41-2; 41-3; Yamaguchi testimony]. Given the Agency's repeated and frequent training on the subject, it is more likely than not Havens understood her obligation to report even an observed use of force.

2. Whether observed force was excessive. Gajarszki grabbed SM's hair and used it to shake SM's head with force, forward and back and side-to-side. Such force was closed-hand contact unlikely to result in serious physical injury, and therefore met the definition of a

reportable use of force under both D.O. 5011.1M and 1115.1A. The report of such use of force must contain a complete depiction of the use of force. [See above].

Havens acknowledged seeing Gajarszki grab SM's hair. [Exh. 8-7, 8-17], and the video evidence affirms Havens looked directly at Gajarszki using SM's hair to shake her head. [Exh. 4 @ 14:33:28-36]. The above reporting requirements, along with Havens's observation of Gajarszki's use of force, required Havens to report it. [*See also* In re Lewis, CSB 51-14A (11/9/15)].

Havens's claim that Gajarszki held SM by the hair only to avoid spitting or biting, is unrelated to her duty to report in detail Gajarszki's use of force. Moreover, in the video recording of the incident, Havens is seen "getting in the face" of SM, seemingly unconcerned about the possibility of being spit on or bitten as she claimed. [*Id.*]. As stated above, the repeated and frequent training on the duty to report makes it more likely than not that Havens knew to report, in detail, Gajarszki's use of force. Her failure to do so was misleading or inaccurate reporting in violation of RR 200.4.1.

RR 200.2 – Use of Force Reporting (Meaney)

Deputy Sheriffs and employees who use force or witness the use of force shall immediately report the use of force to a supervisor and complete a written report.

Following her observation of Gajarszki's pulling SM's hair, Meaney did not file a use of force report by the end of her shift, as required by this rule. Meaney later acknowledged she was mistaken in assuming no report was required regarding Gajarszki's use of force on SM. [Elwell cross-exam]. At the time, she did not believe Gajarszki's grabbing and shaking SM's head by the hair was a reportable use of force. [Meaney testimony]. She believed SM's verbal refusal to comply with instructions to face the wall justified Gajarszki's actions because no pain was inflicted, because "it totally worked" to halt SM's refusal to comply, and because she believed she was responsible for writing a use of force report only if she was the one using force ("hands-on"). [Meaney testimony].

As to Meaney's explanations concerning SM feeling no pain and the efficacity of Gajarszki's hair-pulling technique,[4] neither justifies the failure to comply with the plain requirements of several Agency rules requiring witnesses to the use of force to file incident reports immediately or, at latest, before the end of their shift. [Exh. 41-1, 2, 3, 5, 6; 5-9, 10; Yamaguchi testimony]. It was evident in the video recording that Meaney observed Gajarszki grab and pull SM's hair.

As to Meaney's assertion that observing the use of force does not require reporting it, Agency rules plainly require it. [Exh. 5-9; 6-100; *see also* Departmental Order 115.1A.]. Moreover, grabbing an inmate's hair and pulling it falls within the range of actions that constitute a reportable use of force under Agency rules. [*Id.*]. Thus, an officer who observed, but failed to report, another officer grabbing and pulling an inmate's hair violates this Departmental rule. The Agency proved this violation by a preponderance of the evidence.

V. DEGREE OF DISCIPLINE

The purpose of discipline under the Career Service Rules is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-41 to consider the severity of the offense(s), the employee's past record, and the penalty most likely to achieve compliance with the rules. [CSR § 16-41]. The measure of these considerations is whether the penalty assessed is within the range of penalties that could be imposed by a reasonable and prudent administrator, or is clearly excessive. In re Ford, 48-14A, 8 (CSB 9/17/15).

A. Seriousness of the proven offenses

1. Gajarszki.

Elwell determined that, under the Agency's disciplinary matrix, there were both mitigating and aggravating circumstances. [Exh. 1-12]. Elwell found the following factors were aggravating.

"Gajarszki Kusa's[5] actions escalated the situation and created a risk of further incident to all of the parties involved." [*Id.*]. It was uncertain to what this accusation applied. Taken alone, it is insufficient notice of wrongdoing or risk thereof to constitute aggravation.

"Deputy Gajarszki Kusa's hair pull and subsequent escalation of the situation caused actual harm to the Department and City in the form of potential civil liability." First, while it was apparent that pulling SM's hair was excessive, there was neither an explanation nor apparent evidence of how the "situation" was "escalated." Second, it is unenforceable doublespeak to conclude that "potential civil liability" creates "actual harm" to the City. Third, even assuming the intent of the previous sentence was that Gajarszki's hair pulling subjected the City to potential liability, there was no evidence of actual or potential harm, no evidence SM experienced pain, no evidence SM complained about the incident, and no medical report of harm. In short, if there was any potential for liability, the risk was extremely remote as no evidence supported a finding of such risk.

Next, the Agency found the following was a factor in aggravation. "Furthermore, the circumstances of the incident are not favorable to Deputy Gajarszki, as there was absolutely no need to use force whatsoever, let alone non-departmentally approved or taught force on a

[4] The evident danger in accepting Meaney's assertion - "it totally worked" - is that such justification of the ends by use of the means would also justify punching, pain-compliance holds, or the use of lethal force when none of them complies with the Agency's requirements to use the **least** amount of force to effect compliance with a **lawful objective**. Neither requirement was served by Gajarszki's hair pulling.

[5] Appellant Gajarszki was referred to as "Gajarszki Kusa" in her notice of discipline, but chose only "Gajarszki" at hearing.

vulnerable inmate." While the Agency's evidence proves Gajarszki used more force than was required under the circumstances, hair pulling, or hair pulling on a mentally unstable inmate are not, per se aggravating circumstances. Nonetheless, the discipline here is consistent with a highly-similar case, In re Romero, CSA 28-16 (9/9/16), *aff'd* In re Romero, CSB 28-16A (6/15/17), in which a deputy, frustrated by a mentally unstable inmate who had just kicked her clothes toward the deputy, grabbed and pulled the inmate's hair. Romero, who had an otherwise excellent record as did Gajarszki, received a 10-day suspension.

Lastly, the Agency found the following factor was aggravating. "Deputy Gajarszki Kusa's conduct also jeopardized the Department's Mission and Guiding Principles." [Exh. 1-12]. This is a conclusion without a basis.

In sum, the Agency's claim of aggravating factors was unsubstantiated. Taken alone, the act of grabbing an inmate's hair and using it to shake the inmate's head without the need to control the inmate might justify the assessment of a 10-day penalty by a reasonable and prudent administrator. However, the Career Service Rules require more than considering the incident out of context. Our rules require consideration of the employee's past record along with the likelihood of reform. [*See* CSR 16-41; *see also* In re Ford, CSB 48-14A, 8-9 (12/17/15); see also Khelik v. City & Cty. of Denver, No. 15CA0832 (Colo. App. July 21, 2016). In the absence of establishing any basis for aggravation, including the employee's past record and likelihood of reform, no more than the presumptive penalty should be assessed. [6] The Agency's election of the degree of discipline was aligned with that assessment.

The Agency acknowledged mitigating factors including her performance evaluations, and lack of discipline during her nine-year employment in the Agency.

2. Havens.

Elwell deemed Havens's omission from her report "impacted the 'department's integrity and ability to protect itself from potential future liability." [Exh. 14-9]. The evidence did not support these conclusions. There was no evidence of any impact on departmental integrity. The Agency produced no evidence indicating even a remote possibility of liability beyond the statement itself. These conclusory statements fail to establish aggravation.

In finding Havens's conduct fell under the Agency matrix Category D violations, Elwell determined Havens's omission of Gajarszki's use of force from her OIC report was "substantially contrary to the guiding principles of the Department or that substantially interferes with is mission, operations, or professional image, or that involves a demonstrable serious risk to deputy sheriff, employee, or public safety." In comparison, a Category C violation describes "conduct that has a pronounced negative impact on the operations or professional image of the department or on relationships with other deputy sheriffs, employees, agencies or the public."

Whether Havens's omission fell more within Category D than C was a subjective assessment, but one to which the Agency is entitled to some deference. To wit: the failure to report excessive force by another officer prevents the Agency from properly investigating and correcting those behaviors. That interference may be said to have a "pronounced negative impact" on that aspect of Agency operations (investigating internal wrongdoing). The same omission may equally describe a "substantial interference" with such operations. One interpretation is not more accurate than the other.

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[6] Not alleged by the Agency, but notable as part of the seriousness of Gajarszki's violations, was that her actions caused Meaney to stop paying attention to the inmate she was guarding. It appeared the other inmate was not a threat, but Gajarszki's unnecessary force could have created a security issue by drawing Meaney's attention away from a potentially violent inmate.

Elwell also concluded Havens omission in her reporting was an aggravating factor as it "jeopardized the Department's Mission and Guiding Principles" [Exh. 14-10], without establishing a nexus between the two, or even identifying what part of the Agency's mission or guiding principles were jeopardized. [Exh 14-10]. Also in aggravation, Elwell determined Havens training and experience should have made her aware of the requirement to report the use of force as a witness. However, nothing in this allegation suggests any factor in aggravation beyond the rule violation itself.

Lastly, Elwell determined "her culpable state indicates an attempt to avoid reporting her fellow deputy's misconduct and her attitude indicates an utter lack of acceptance of responsibility." [Exh. 14-10]. To the extent the first clause suggest deceit, none was charged and may therefore not be used as an aggravating factor. [*See* In re Rocha, CSB 19-16A, 7 (3/16/17)]. As to a lack of responsibility, the evidence, as noted below, was insufficient to determine whether Havens is likely to reform, rather than assuming she will not.

3. Meaney.

Meaney failed to report Gajarszki's use of force as required by Agency rules. She did not file a report until ordered to do so three days later. The Agency determined her failure to file a required use of force report fell under its matrix Category C. As noted above, Category C violations define conduct as having "a pronounced negative impact on the operations or professional image of the department or on relationships with other deputy sheriffs, employees, agencies or the public."

As noted by Elwell in the notice of discipline, the duty to report use of force is "essential for the Agency to control the application of force and ensure accountability." For that reason, the failure to report excessive force is more egregious than the failure to report force employed within the Agency's policy.

B. Prior Record

1. Gajarszki.

Gajarszki had no prior disciplinary actions in her nine years as a deputy sheriff. Her annual reviews were positive.

2. Havens.

Havens had no prior discipline in her 12 years with the Agency. She has a record of positive work evaluations.

3. Meaney

Meaney had no prior discipline in her 11 years with the Agency. Her work reviews were positive.

C. Likelihood of Reform

1. Gajarszki.

Gajarszki denied wrongdoing throughout the investigation and appeal. Thus, it remains unknown to what extent she could and would reform.

2. Havens.

Twice, Havens stated the purpose of the use of force report as it relates to the actions of another officer is "they're wanting us to try to throw everbody under the bus. I get it" [Exh. 8-15] and she clarified at hearing "the way things are going today with this department, that everybody is trying to throw everybody under the bus, that is what I was trying to say." [Havens testimony at 11:51:50].

This unfortunate response demonstrates a belief that appears to persist among some in the Agency, that reporting witnessed unlawful force is ignoble. The Agency has a legitimate interest in correcting that misperception. Investigations into wrongdoing, including the excessive use of force, may successfully change such perceptions only by eliciting the truth and holding those who engage in wrongdoing, whether purposefully or ignorantly, accountable. The still-persistent attitude that it is wrong to report wrongdoing prevents access to the truth and therefore prevents meaningful change.

Havens's twice-repeated statement with the evident inference that reporting wrongdoing is itself wrong, leaves it tenuous whether she appreciates the legitimate concerns of the Agency and whether she is willing to reform.

3. Meaney

Meaney acknowledged she was wrong not to have reported Gajarszki's use of force and apologized for it. [Elwell cross-exam; Meaney cross-exam]. There was no evidence indicating Meaney would be unable or unwilling to amend her failure to report witnessed uses of force.

D. Conclusions regarding the Agency's election of the degree of discipline.

1. Gajarszki.

While Gajarszki's employment history would entitle a decision-maker to consider a mitigated penalty, the election of the presumptive 10-day penalty under the Agency's penalty matrix does not run afoul of the range of penalties which would be assessed under the Career Service Rules - that penalty which falls within the range of reasonable alternatives available to a reasonable and prudent agency administrator. In re Economakos, CSB 28-13, 2 (3/27/14).

2. Havens.

Having determined the Agency's election of what category of discipline to assess was proper within its disciplinary matrix, I am obligated to uphold the Agency's imposed discipline if it is within the range of alternatives available to a reasonable and prudent administrator. Economakos; *see also* Adkins v. Division of Youth Services, Dept. of Institutions, 720 P.2d 626, 628 (Colo.App.1986). The Agency's election of a 10-day suspension did not infringe on this measure of discipline. Based on Havens's stated distain for the legitimate function of corrective discipline, the Agency would have been within its rights to assess a more significant penalty.

3. Meaney.

The Agency's findings, above, regarding the seriousness of Meany's failure to report, along with its consideration of her otherwise positive history and acknowledgment of wrongdoing comport with the objectives and measures of the Career Service Rules, to assess discipline that is

restorative, and which could be imposed by a reasonable and prudent administrator. The lesser suspension imposed on Meaney appropriately reflects the seriousness of the violation, as tempered by her acknowledgment of wrongdoing and likelihood of reform.

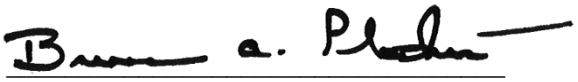
VI. ORDER

The Agency's 10-day suspension of Gajarszki's employment, beginning June 5, 2017, is affirmed.

The Agency's 10-day suspension of Havens' employment, beginning June 19, 2017 is affirmed.

The Agency's 2-day suspension of Meaney's employment, beginning June 19, 2017 is affirmed.

DONE January 11, 2018.



Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. See Career Service Rules at www.denvergov.org/csa. **All petitions for review must be filed with the:**

Career Service Board
c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

Career Service Hearing Office
201 W. Colfax, Dept. 412, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.