HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal Nos. A041-17 and A042-17

DECISION MODIFYING HAMMERNIK SUSPENSION FROM 18 DAYS TO A WRITTEN REPRIMAND AND MODIFYING TRUJILLO SUSPENSION FROM 60 TO 30 DAYS

MATTHEW HAMMERNIK and DANIEL TRUJILLO, Appellants,

v.

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

I. INTRODUCTION

A hearing in this consolidated appeal for alleged violations of specified Career Service Rules, and Agency rules, regulations and orders was held on October 19, 2017, before Hearing Officer Bruce Plotkin. Appellants Matthew Hammernik and Daniel Trujillo were represented by Reid Elkus and Zach Wagner of the law firm of Elkus & Sisson, PC. The Agency was represented by Assistant City Attorney Natalia Ballinger. Agency's exhibits 1-16 were admitted. Appellants' exhibits A and A-1, C, D, and F–H were admitted. The Agency called the following witnesses: Acting Civilian Review Administrator Luis Lipchak and Senior DSD IAB Investigator Gregory Huff. Each Appellant testified on his own behalf, and also presented the testimony of Sergeant Stephen Petit.

II. ISSUES

The following issues were presented for appeal:

A. whether each Appellant violated Career Service Rules (CSR) 16-29 A. or R.;

B. if either Appellant violated either of the aforementioned Career Service Rules, whether the Agency's decision to suspend him conformed to the purpose of discipline under CSR 16-41.

III. FINDINGS

At the time of the incident underlying this appeal of hearing, Matthew Hammernik had been employed as a Deputy Sheriff at Denver Sheriff's Department for 9 months and was still on new-employment probation. Daniel Trujillo had been a Deputy for two years. Their duties include the care and custody of inmates, and adhering to all Agency orders and rules, including orders and rules addressing the use of force.

On October 16, 2016, Hammernik and Trujillo were supervising the distribution of meals to inmates in a special management unit in pod 3D at the Downtown Detention Center (DDC), housing difficult and mentally-ill inmates. [Exh. F]. Inmates there remain in their cells except for highly-monitored sorties. Flaps in the cell doors pivot down and permit staff to pass meal trays to inmates without unlocking the cell door. Door flaps must remain locked when not in use.

Trujillo handed inmate BR a container with the inmate's meal. BR, who was known to be assaultive to staff, extended his hands through the door flap and would not retract them, preventing the Appellants from securing the door flap. Trujillo and Hammernik ordered and tried to talk BR into retracting his arms, but BR refused. Trujillo then placed BR's right hand in a pain-compliance "gooseneck hold," while Hammernik assisted by pushing on BR's arm. [Exh. 5 at 17:02:38]. The deputies struggled with BR. Trujillo alternatively applied the gooseneck hold and tried to force BR's arm back into the cell, while Hammernik pushed on BR's arm but also met with BR's resistance. BR threw a cup of juice he had just received with his meal through the door flap onto Trujillo's pants. [Exh. 5 at 17:02:50]. Trujillo immediately unholstered his Department-issued OPNs[1], and alternately twisted them on BR's arm, and used the butt-end to hammer the top of BR's hand, injuring it. [Exh. 5 at 17:02:55-17:03:07; Exh. 9].

While BR continued to struggle, Hammernik also applied OPNs. [Exh. 5 at 17:03:26]. About one minute later, the deputies stopped using their OPNs and attempted, unsuccessfully, to force BR's arm back through the flap. [Exh. 5]. Hammernik re-applied his OPNs. Both Hammernik and Trujillo twisted the OPNs on BR's arm with excessive force, leaving a deep crease above BR's wrist. [Exh. 5 at 17:04:32-17:05:09; Exh. 8]. Hammernik applied a second set of OPNs on BR's arm. [Exh. 5 at 17:05:13 –17:05:58]. BR eventually withdrew his arm into the cell and the deputies secured the flap. During the entire struggle, the cell door remained locked with BR secured inside. Aside from throwing liquid at Trujillo, BR did not strike at either deputy, but only resisted efforts to force his arm back to his cell.

Inside his cell, BR examined the deep grooves in his injured arm where the Appellants applied OPNs. [Exh. 6; Exh. 8]. He fell to the floor, convulsing. [Exh. 6 at 17:08:31]. Trujillo, who had been observing from outside the cell, immediately called for medical assistance.

An Internal Affairs Bureau investigation ensued. Trujillo attended his contemplation of discipline meeting on June 20, 2017. The Agency subsequently assessed a sixty-day suspension on July 11, 2017. Hammernik attended his contemplation of discipline meeting on June 28, 2017, and was assessed an 18-day suspension on July 17, 2017. Both filed timely appeals.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A.1.b, as the direct appeal of a suspension. I am required to conduct a *de novo* review,[2] 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, throughout the case, to prove Hammernik and Trujillo violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend their employment complied with CSR 16-41. The standard by which the Agency must prove its claims is a preponderance of the evidence [but *see* n. 2, below].

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[1] OPNs (Orcutt Police Nunchaku) refers to Department-issued nunchucks. [See In re Hernandez & Garegnani, CSA 25-17 & 26-17 (11/3/17).

[2] In disciplinary appeals of sworn Sheriff's Department officers filed after October 20, 2017, review is no longer *de novo* and the appellant retains the burden of proof regarding discipline.

C. Career Service Rule Violations

1. CSR 16-29 A. Neglect of duty or carelessness in performance of duties and responsibilities.

To sustain a violation under CSR 16-29 A, the Agency must establish 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). Where, as here, duties were identified only as they pertain to other, specified rules, then no violation is found under this rule. *See* In re Gordon, CSA 10-14, 2 (11/28/14), *aff'd* In re Gordon, CSB 10-14A (7/16/15); *see also* In re Wright, CSA 40-14, 7 (11/17/14).

2. CSR 16-29 R. Failure to observe written departmental or agency regulations, policies or rules.

As it pertains to:

Denver Sheriff Departmental Rules and Regulations

RR 300.19. 1 – Disobedience of Rule

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.

As it pertains to:

RR 5011.1M – Use of Force

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 to accomplish a lawful objective. In all cases, force will be de-escalated once the legitimate function is achieved or the resistance has ceased.

The DSD recognizes the value of all human life and is committed to respecting human rights and the dignity of every individual… With these values in mind, an officer shall use only that degree of force which is necessary and objectively reasonable under the circumstances…

Officers should recognize that their conduct immediately connected to the use of force may be a factor which can influence the force option necessary in a given situation. When reasonable under the totality of 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…

The Department will support the use of reasonable and appropriate force by officers in the performance of duty. Use of force that is not lawful, reasonable and appropriate will not be tolerated.

The Agency claimed Appellants violated the use of force rule by applying excessive force when they applied a gooseneck pain-compliance hold and used OPNs, on inmate BR through his door flap. The Agency alleged Appellants failed to use the least amount of force necessary

to achieve a legitimate detention-related function, and that the deputies should have used advisements, warnings, verbal persuasion, or even should have withdrawn. [Lipchak testimony; Exh. 3-4]. It is well-established that the Agency requires its deputies to use the least amount of force necessary to achieve a legitimate detention-related function. *See* In re St. Germain, CSA 24-14, 3 (11/7/2014), *aff'd* In re St. Germain, CSB 24-14A (9/4/15); *see also* In re Nguyen, CSA 19-17, 5 (7/25/17), *aff'd* In re Nguyen, CSB 19-17A (1/18/18).

Trujillo and Hammernik claimed they were required by policy to open only one door flap at a time; however, they produced no written policy to that effect. They also claimed they were untrained what to do with inmates who refuse to remove their hands from door flaps. While that may be true, not every situation can be subject of specific training, or training would become the primary activity of deputies. Both Appellants, however were trained in and expected to comply with use of force policies and practices, and failed to implement that knowledge and training when they injured BR unnecessarily. Both Appellants also claimed the requirement to secure door flaps obligated them to use force when BR resisted persuasion and lesser force. While the obligation to secure door flaps was not in dispute, it should be apparent that excessive force to do so is not permitted under these rules. In re Roybal*, CSA 44-16* (10/3/16)*, aff'd* In re Roybal*, CSB 44-16A* (5/18/17); In re Nguyen*, CSA 19-17 (7/25/17), aff'd* CSB 19-17A, 2 (1/18/18).

Trujillo also claimed BR may have thrown urine on him, thus escalating the nature of the assault against him which, in turn, justified a higher degree of responsive force. Several facts weigh against that reasoning. First, Trujillo was the initial aggressor in using a gooseneck hold before the juice/urine assault. Second, Trujillo had a clear view of BR inside the cell through the plexiglass portion of the cell door, and likely would have seen if BR had something to throw other than juice from his cup. Third, the liquid came from the position where BR had just retracted the hand holding the cup of juice. [Exh. 5 at 17:02-40-17:02:50]. Finally, after they secured the door flap to BR's cell, Trujillo did not rush to the medical unit or even change clothes, but returned to BR's cell to observe BR less than a minute later – an unlikely reaction of someone concerned about just having been assaulted with urine. [17:07:46].

Together, those facts indicate Trujillo likely knew BR threw juice on him, not urine, thus undermining his justification for a higher degree of force. Moreover, even if the evident extreme twisting of his OPNs on BR's wrist was a reaction to BR's assault, it was still an after-the fact reaction to BRs assault. It did not prevent, de-escalate, or otherwise address an imminent threat, and, therefore was unjustified.

Most importantly, BR was secured behind his cell door and was not actively resisting when Trujillo and Hammernik applied the OPNs with sufficient force to leave deep bruising in BR's arm. Under these circumstances, both Appellants engaged in force that was unreasonable and inappropriate in violation of RR 5011 1M. That violation, in turn, violated CSR 16-29 R., via RR 300.19.1.

Appellants' additional defenses were similarly unpersuasive. Trujillo claimed he was unable to retreat and allow the flap to remain open because BR was known as assaultive and other inmates would imitate the behavior, resulting in other potential assaults through unsecured door flaps. According to Trujillo, door flap assaults by other inmates have included throwing urine and feces. Hammernik echoed Trujillo's sentiment, claiming inmates might become upset if the meal service didn't continue, and the only option without securing the door flap was to stop the "feed."

The Agency consistently finds when an inmate is secured in his cell, a high degree of force to coerce him into retracting his hands from a door flap is prohibited. [*See* Roybal and Nguyen,

supra]. BR did not throw liquid on Trujillo until after Appellants already used excessive force, and BR did not otherwise attempt to strike at or assault deputies.

Trujillo also claimed he used both command presence and attempted to convince BR to remove his hands, using a child-like tone. While not in doubt, the failure of a lesser degree of force on an otherwise passive-resistant inmate does not automatically justify the use of a significantly-higher degree of force.

Hammernik claimed BR shifted from passive resistant when he was refusing to move his hands inside his cell, to active resistant when BR grabbed onto the door flap, which justified both the gooseneck hold and OPNs for pain compliance. Hammernik claimed he learned all the techniques he and Trujillo used in this situation during his time in the Academy, and also testified he and Trujillo did as they were trained to do when they progressed through the types of force available to them under the Agency's Use of Force Policy, from command presence and verbal commands, to control holds, to OPNs.

The progression of the degree of force is not in dispute, and there is also no doubt Appellants believed they were following progressive force in the face BR's failure to comply with a lawful order. The issue is the degree of force used in relation to the threat faced and circumstances at the time the force was exerted. BR was secured in his cell; he posed no imminent threat to himself, to the Appellants, or to anyone else outside the cell; BR was not actively resisting; alternatives existed, including leaving BR alone, or requesting advice from a supervisor. In view of those circumstances, no force was required, and therefore the excessive use of pain compliance and weapons (the OPNs) by both Appellants was unreasonable and inappropriate in relation to the threat faced, in violation of this rule 5011.1M.

RR 300.22 – Inappropriate Force

Deputy sheriffs and employees shall not use inappropriate force in making an arrest, dealing with a prisoner or in dealing with any other person.

The same evidence which established a violation of the above use of force policy also establishes a violation of this RR. When the degree of force used was excessive under the circumstances, it is also inappropriate use of force under this rule.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-41 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-41; *see also* In re Ford, 48-14A, 8-9 (CSB 9/17/15).

A. Seriousness of the proven offenses

Appellants' unnecessary use of force on BR caused significant injuries, as seen in the photographic evidence. It, therefore, also created an undue risk of liability to the City.

B. Prior Record

Hammernik. The Agency assessed a mitigated 18-day suspension against Hammernik, based on his being new at the position and having no previous discipline. This mitigation failed to account for the extraordinary circumstances in this case. [*See below*, "Additional Factors – Hammernik"].

Trujillo. The Agency improperly escalated the penalty for Trujillo based on an alleged previous discipline. [*See n.* 4, below; In re Trujillo, CSA 18-17 (8/16/17); Exh. 3-8; Lipchak testimony; Matrix at p. 86].

C. Likelihood of Reform

The Agency presented no reason either Appellant would be unable to reform their actions in dealing appropriately with inmates in door-flap situations.

D. Additional Factors – Hammernik

The decision-maker acknowledged that assigning Hammernik, as a probationary deputy, to a special management unit, was contrary to the Agency's own policies. [Lipchak cross-exam]. "Staff who are assigned to work directly with inmates in special management units are to be selected based on a criteria that includes completion of probationary period…" [Exh. F-3]. As a recent graduate of the Agency's Academy, Hammernik was still on probation at the time of the incident underlying this appeal. He expressed concern to his supervisor, Sergeant Petrie, about being placed in a Special Management unit so soon, but his concern was ignored. [Hammernik testimony]. Trujillo testified he was "surprised" Hammernik was assigned the unit as a probationary deputy.

Hammernik, regardless of assignment, was responsible for complying with the Agency's use-of-force rules. However, the Agency was responsible for placing him in a position to fail that duty by assigning him in violation of its own policy.

The Agency was also required, but failed, to document and weigh these material circumstances. [See Matrix pp 29, 30, 33]. The result, therefore, was a disciplinary decision that did not reflect the totality of the circumstances, and was not within the range of alternatives available to a reasonable and prudent administrator as required under the CSRs. *See* In re Ford, CSB 48-14A, 8-9 (12/17/15); In re Lacombe, CSB 10-14A (7/16/15); In re Jenkins, CSB 54-14A (11/9/15).

The Agency's violation of its own policy constitutes special circumstances which compel the assessment of a penalty outside the matrix. [Matrix at 27-28]. Moreover, the Agency's failure to address the relevant circumstances violates the dictates of CSR 16-41. The Agency's culpability, more than a procedural error, was a material and significant factor in Hammernik's violations. *See* In re Rocha, CSB 19-16A, 5 (7/6/17). Consequently, no more than a nominal penalty is justified.

E. Additional factors – Trujillo

The Agency failed to prove its stated basis to increase Trujillo's discipline from level 6 to level 7. [Lipchak testimony; Matrix Appendix E, pp 1, 6].[3] However, a 30-day suspension is within the range of alternatives available to a reasonable and prudent administrator, [*See* In re

[3] Under the Agency's disciplinary matrix, the use of force violations fell under Catergory E. [Matrix p. 91]. A first violation in Category E is assigned to a penalty at level 6, which carries a presumptive penalty of a 30-day suspension [*Id* @ p.86]. A second violation in Category E is assigned a penalty level 7, which carries a presumptive penalty of a 60-day suspension. [Id]. Lipchak testified the matrix required him to increase the level of discipline from 6 to 7 based on Trujillo's prior 30-day suspension. However, he acknowledged the 30-day suspension was reversed. He testified the Agency filed a Petition for Review of that reversal to the CSB, as if to justify the increased penalty. [Lipchak testimony]. First, discipline must be assessed based on the record at the time discipline is assessed. Second, the pendency of an appeal does not justify an increased penalty in a subsequent discipline; in other words, an agency may not increase the penalty in a new discipline based on the assumption that the pending appeal of the prior discipline will be decided a particular way. Third, subsequent to Lipchak's testimony, the Agency withdrew its Petition for Review in the prior case. [In re Trujillo, 18-17A, "Agency's Unopposed Motion to Dismiss Appeal" (11/3/17)]. Consequently, no justification remains to increase the penalty here from 30 to 60 days based on a non-existent prior discipline.

Economakos, CSB 28-13 (3/24/14)], and otherwise complies with the Agency's matrix. Trujillo's suspension is modified accordingly.

VI. ORDER

The Agency's 18-day suspension, assessed to Matthew Hammernik on July 17, 2017, is modified to a written reprimand.

The Agency's 60-day suspension, assessed to Daniel Trujillo on July 11, 2017, is modified to 30 days.

DONE March 21, 2018.

Bruce A. Plotkin
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 § 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the 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

and

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.