

DECISION AND ORDER

WILLIAM JACKSON, Appellant,

v.

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 Oct. 4 and 5, 2016 before Hearing Officer Valerie McNaughton. Appellant appeared and was represented by Douglas Jewell, Esq. Assistant City Attorney Richard Stubbs appeared for the Agency. Shannon Elwell testified for the Agency. Appellant testified on his own behalf, and presented the testimony of Steven Zarnow, Stephanie McManus, Smajo Civic and Rufina Dumiye.

I. PROCEDURAL HISTORY

Appellant William Jackson appeals his June 27, 2016 dismissal from the position of Deputy Sheriff for the Denver Sheriff's Department (Agency or Department) based on a use of force incident with an inmate on Nov. 24, 2014. The parties stipulated to the admission of Exhs. 1 – 5, 7, 9, 11, 17 – 26, A, C-2, P-2, S, Y, and CC. Appellant's Exhibits Q-3 to Q-8, U, V, BB and DD were admitted during the hearing.

II. FINDINGS OF FACT

Appellant has been a Deputy Sheriff since 2005. At the time of this incident, Deputy Sheriff William Jackson was assigned as housing officer in 3D, a special management unit for inmates excluded from the general inmate population based on a mental illness classification. On Nov. 24, 2014, after attempting to escort prisoner MW into his cell, Appellant forcefully jerked the inmate out of the doorway. MW was propelled backward, and hit his head on a table behind them. Appellant and another officer handcuffed MW and took him to the nurse's office, which found minor bruises and cuts. Appellant was placed on investigatory leave based on this incident. Before he left, he was re-called to the Sheriff's Office and assigned instead to the Vehicle Impound Facility. He served there until April, 2016, when he was re-assigned to the Downtown Detention Center's (DDC) control center until his termination on June 27, 2016.

The inmate was charged with four offenses in the Conduct Adjustment Board, the internal inmate disciplinary system. MW was declared unfit to enter a plea. After a hearing on Nov. 28, 2014, MW was found guilty of resistance, disruption, possession of contraband and failure to obey an order. A 60-day penalty was assessed. [Exh. V.]

The Agency's Internal Affairs Bureau (IAB) investigated the event to determine if Appellant had violated any rules in his handling of the prisoner. During his interview, Appellant related the circumstances leading to the conflict at the cell door. Appellant had spotted MW shoving something shaped like a tablet into the back of his pants. Appellant instructed MW to give it to him. MW slid the item under the door, and Appellant observed that it was the cover of a Bible. Since inmates in 3D cannot possess hard cover books, Appellant considered it contraband and threw it down the corridor for later pick-up by an inmate worker. [Exh. 9-13.]

During his free time, MW asked Appellant for his Bible back. Appellant responded that it was not a Bible anymore, it was contraband because it was just a hard cover. MW did not seem to understand. Appellant decided to give him a visual aid, and walked MW down to the end of the corridor. He pointed to the cover, and repeated that it was not a Bible. MW told Appellant that God had come down from the clouds and given him that Bible. Appellant again told him it was not a Bible, it was contraband. MW asked Appellant, "Is Jesus Emmanuel?" Appellant answered, "Yes, according to the Bible." MW asked Appellant more questions of a religious nature. Appellant told him he could either go back and enjoy the rest of his free time or he could lock down in his cell. MW continued to ask religious questions. Appellant then pointed up the corridor and said, "It's time for you to lock in." [Exh. 9-20.]

Appellant told the investigator that he placed his right hand on MW's left shoulder and started walking him back toward MW's cell. MW tensed up and did not move forward. Appellant cinched up the prisoner's shirt and pushed him along. MW resisted by dragging his feet, pushing back against Appellant, and bracing himself against the wall. In this manner they got to the sally port door and walked toward MW's cell. At the threshold, MW used both his hands to push against the outside of the door. [Exh. 9-26.] Appellant described himself as a "big guy", and MW as perhaps 160 pounds. [Exh. 9-29, 9-50.] "I wasn't budging as far as getting him into the cell. ... So then he pushed back ... when I felt that I was not going to get him into that cell that way, that's when I used momentum to take him to the ground." [Exh. 9-26.] The investigator asked if the inmate was a physical threat. Appellant answered, "[a] little bit when he didn't go --- when he pushed the outside of the door he was. ... For whatever reason, I don't know if he turned on a switch or something, but he became pretty strong when he had his hands on the doorway". [Exh. 9-28, 29.] "I just used his shirt and took him to the ground. I mean, mostly, it was just him pushing back with enough force that, you know, all I had to do was just guide him." [Exh. 9-27.]

When shown the jail video, Appellant was embarrassed to discover that the inmate was shorter than he recalled, and that MW had only his right hand on the doorway, and not the left. "I thought it was [both], just the amount of pressure that he was pushing against me". [Exh. 9-50, -52, -61.]

The Agency's Conduct Review Office (CRO) independently reviews the findings and asserted rule violations from the Internal Affairs investigations, drafts its own findings on the rule specifications and penalty, and submits them to the Sheriff for his recommendation. The final CRO report in this case was issued and signed by the Sheriff on June 7, 2016. [Exh. BB; Elwell, 9:16 am.] The specification under RR-200.3, Accurate Reporting, was not sustained because it found that Appellant did not intend to deceive when he reported that the inmate had both hands braced against the door

frame, before being shown the video. [Exh. BB-9.] As to the inappropriate force specification, it determined that Appellant's initial objective to return MW to his cell was legitimate, and therefore reasonable force could be used to accomplish that goal. Appellant had tried lesser force options before physically guiding MW down the hall, including command presence and repeated verbal orders. MW then increased his resistance by bracing himself against the door jamb, planting his feet, and pushing back against Appellant. "Deputy Jackson escalated the type of force he used only in response to the increasing resistance and threat posed by [the inmate]". Based on that increasing resistance, Appellant was also justified in changing his objective from putting MW in his cell to taking him down to the ground. However, it found the force method used – reaching around MW's neck and pulling him backwards – was not departmentally approved. By implication, the CRO found that the degree of force used was more than that needed to accomplish the purpose, given Appellant's "much larger" size and the minimal threat posed by the inmate at the doorway. The report also found that the injuries were not intentionally caused by Appellant, but rather resulted from the totality of the circumstances, including MW's momentum in pushing back against Appellant and the location of the table directly behind them. [Exh. BB-10 – 12.]

The CRO's conduct category assignment is less clear. The preliminary and final discipline levels are both level 6, which would be a 30-day suspension at the presumptive level. [Exhs. BB-12; 3-86.] However, the preliminary and final conduct categories are shown in the report as E and D, respectively. Category E carries a 30-day presumptive penalty, while category D is a presumptive 10-day suspension. The CRO's final recommendation is restated in the chart on the last page of the report. It sets the conduct category as D, penalty level 6, and a resulting 30-day recommended suspension. [Exh. BB-13.] That conclusion is internally inconsistent, since category D is actually a ten-day suspension. [Exhs. 3-86, -90, -91.] Thus, if the CRO and Sheriff intended to apply conduct category D and chose not to mitigate or aggravate, the penalty should have been a 10-day suspension under the Discipline Handbook's penalty table. [Exh. 3-86.]

The final report was then transmitted to the Civilian Review Administrator (CRA) for consideration of discipline. The Agency initiated disciplinary proceedings against Appellant based on the use of force allegations under Career Service Rules (CSR) § 16-60 A and L, and departmental rule RR-300.19.1 (disobedience of rule) as it pertains to DO 5011.1M (use of force), and RR 300.22 (inappropriate force). At the pre-disciplinary meeting, Appellant told the panel, "I take this job very seriously and --- and when I'm dealing with inmates, I treat them as I would want even myself or my family member to be treated ... so I understand [MW] did sustain an injury, and to let you know, that was never my intention. My intention was to get him under control and back in the cell." [Exh. 18-10.]

CRA Shannon Elwell made the decision after reviewing the entire Internal Affairs file and relevant departmental policies. Elwell concurred that the accurate reporting specification was not proven, and also found that Appellant's actions before and after pulling MW away from the cell door were justified by the inmate's behavior.

The factual findings made by the CRA were based on the jail video, just as those made in the CRO report. The findings differ in three respects: nature of the threat,

appropriateness of the detention-related function, and Appellant's intent in using force. As to the threat, Ms. Elwell noted that the video shows MW put his right hand up against the door frame. She found that he "does not appear to be planting his feet or pushing back against Deputy Jackson. In fact, his feet show forward progression and movement into the cell." [Exh. 1-6.] In contrast, the CRO report had found that MW "continued and escalated the degree of his defensive resistance by again planting his feet, placing his hand on the doorframe, and pushing back against [Appellant] to resist entering his cell." [Exh. BB-10.]

The type and degree of force used by Appellant was also interpreted differently. Elwell did not credit Appellant's version that he "used the inmate's momentum to take him to the ground", instead finding that Appellant "forcefully slammed [MW] into the metal table", based only on the "little bit" of a threat posed by a much smaller inmate placing his arm on the door jamb. [Exh. 1-7.] She found that Appellant's force far exceeded the amount needed to achieve the legitimate function of placing MW back in his cell, which could have been met by "simply pushing [him] into the cell and shutting the door", if any force at all was needed. She also found persuasive the fact that Appellant took action one second after opening the cell door, and that the force method used was not approved or taught by the Department. Elwell found that Appellant's behavior "was an extreme and unnecessary reaction to [MW's] minimal level of resistance, at a time when [the inmate] was not posing a threat to anyone." Elwell concluded that Appellant appears to have been motivated by "a desire to punish a frustrating, uncooperative and uncomprehending inmate." [Exh. 1-9, -10.] She expressed great concern that Appellant used force in the context of a dispute with a mentally ill inmate over an object with purported religious significance. In her view, Appellant failed to MW's mental condition or their relative size in determining which tactic would be most appropriate to resolve the situation, despite having the time and circumstance to employ lesser force options.

On the same evidence, the CRO and Sheriff had found that MW's increased resistance justified Appellant's decision to take MW to the ground, and that the injuries resulted from the totality of the circumstances, including MW's pushing back against Appellant and the location of the table directly behind them.

Ms. Elwell agreed with the CRO that Appellant did not intentionally throw MW into the table, but found that he "exposed [MW] to unnecessary risk of serious bodily injury in the form of a severe head injury." [Exh. 1-10.] Appellant stated that he pulled the inmate backward because he thought there were more things they could both run into within the cell. Based on this choice, Elwell found Appellant was "deliberately indifferent" to the presence of the metal table behind them because he chose the force option he thought was less dangerous to himself rather than considering risks to the inmate.

On the basis of her findings, Elwell concluded that Appellant neglected his duty to ensure the safety of the inmate, and violated the Agency's use of force rules by using disproportionate and unauthorized force in the face of a minimal threat. She assigned conduct category F based on her findings that he used inappropriate force in multiple ways, violating rules which constituted a willful and wanton disregard of department guiding principle, a serious lack of integrity, and egregious misconduct substantially contrary to the standards of conduct. Elwell considered Appellant's "lack

of significant discipline, record with the Department, mitigating information, and the nature and circumstances of his misconduct", but found that mitigation was inappropriate based on three factors: the egregious nature of the conduct, his failure to acknowledge wrongdoing, and the harm done to the City in the form of potential civil liability. Elwell therefore imposed the presumptive penalty of dismissal for all violations arising from the incident.

At hearing, Elwell testified that her viewing of the video led her to conclude that the inmate reached his hand to the doorway because he was caught off balance and sought to steady himself, a factual finding not included in the disciplinary letter. [Elwell, 10:01, 10:08; Exh. 20.] The CRA also testified that she believed the force was used as punishment because of his body language: "you can see him getting increasingly agitated on the video" based on the inmate's inability to understand him. [Elwell, 11:27.]

III. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and to show that dismissal was within the range of discipline that can be imposed by a reasonable administrator under the circumstances. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

A. VIOLATION OF DISCIPLINARY RULES

1. Violation of Departmental Rules under CSR § 16-60 L.¹

Appellant is charged with violating two rules related to the use of force in the performance of his duties, and another rule prohibiting violation of any departmental rule. The first permits use of force "if it is reasonable and appropriate in relation to the threat faced to accomplish a lawful [detention related] function." DSD Departmental Order (D.O.) 5011.1M. That rule specifically prohibits the use of physical force as punishment. "Officers should rely on departmentally approved use of force techniques that are taught in training." [Exh. 2-2.] The second rule is more general, and prohibits in relevant part "inappropriate force" in dealing with a prisoner. DSD Rules and Regulations (RR) 300.22. The third rule bans a violation of departmental rules, directives, or instructions, among other authorities, and is the vehicle by which the Departmental Order was sustained. RR-300.19.1.

The parties agree that Appellant used an unauthorized force method when he wrapped his arm around MW's neck and lifted him over his shoulder. The Agency contends that he did so in the face of minimal or no resistance and without considering lesser force options. Appellant argues that MW's increased resistance caused him to abandon his efforts to lock him in his cell. He decided instead to take the inmate to the floor where he could be handcuffed, after having tried other control methods without success.

¹ CSR Rule 16 was amended on Feb. 12, 2016. Since the events upon which the discipline was based occurred on Nov. 24, 2014, the former version of Rule 16 is applicable in this appeal. Am. Comp. Ins. Co. v. McBride, 107 P.3d 973, 977 (Colo.App.2004.)

As in many use of force cases, the disputed facts in this discipline occurred in a few seconds, this time in front of a cell door. The discipline imposed was not based on Appellant's minimal force during the escort, nor on Appellant's efforts to handcuff MW after the latter was thrown to the floor. The only issue here is the appropriateness of the force used by Appellant at the entry to the cell.

A review of the jail video supports the CRO's findings that Appellant initially tried verbal persuasion to resolve MW's issue with the Bible cover. Appellant testified that he was using his Conflict Intervention Training (CIT) in order to try to de-escalate the situation. [Appellant, 10:09 am.] When that failed, he escorted MW to his cell, using reasonable force to do so. During the escort, the inmate escalated from passive noncompliance to defensive resistance. MW dragged his feet, pushed himself against Appellant, and attempted to resist the escort by holding his arm against the right wall, tactics that made forward movement more difficult. [Exh. 25 at 12:10:02 – 08.] The CRO found that MW escalated his resistance when they reached the cell door by bracing his arm against the front of the door jamb, planting his feet and pushing backward into Appellant. [Exh. BB-10.] The video shows that MW may have stumbled after emerging from the sally port door, but quickly righted himself after placing his hand on the cell's door frame. As the cell door opened, MW is seen moving forward three steps, then standing on both legs, one foot slightly in front of the other, arm still extended to the outside of the door. His body moved back, and Appellant's arm becomes visible around MW's neck. MW was quickly lifted off at least one of his feet, and propelled backward. [Exh. 20 at 12:10:13 – 16.]

The video can be interpreted to support either Appellant's or Elwell's version of events. MW's backward movement could lend support to Appellant's testimony that he felt the inmate bracing himself, planting his feet and pushing back in resistance. It could also be seen as consistent with Elwell's interpretation that MW was reaching out merely to support himself while he was moving forward. However, the only evidence of a stumble was MW's long stride between the sally port and cell doors, after which MW put his arm up to the frame. If he was using his hand as support, he would have removed it once he regained his balance, just as the cell door was opened. If he intended to comply by walking into the cell, he would have dropped his arm as his feet moved forward into the cell. Instead, the video shows that MW kept his hand on the frame while walking three steps, and left it there as he stood with his feet flat, arm now behind his body, just before he is pulled back. [Exhs. 20 and 23, at 12:10:12 - :16.] Elwell's finding on the resistance issue also fails to take into consideration MW's similar behavior in the corridor, where MW braced his arm against the wall, and his feet moved forward even as he fought against the escort. As seen through the cell camera, MW showed no signs of having changed from resistance to compliance. It is notable that the jail's internal Conduct Adjustment Board found MW guilty of resistance and failure to obey an order. In accord also were both the CRO report and the interview of MW, both of which noted MW's increased resistance at the cell door. [Exh. BB-5, -10; Exh. 17-14.] Another inmate present at the scene told the CRO investigator that he did not think MW wanted to cooperate with the officers. [Exh. BB-7.]

I find that the most credible and internally consistent evidence on the threat issue shows that MW escalated his defensive resistance by bracing his right arm against the door frame, planting his feet, and pushing against Appellant in order to avoid being

placed in his cell. In response to that higher degree of resistance, Appellant testified that after feeling the resistance, he took him to the ground immediately, without thinking about the presence of the table a few feet behind them. [Appellant, 10:34 am.] His action was consistent with his training to avoid taking a resistant inmate into a cell. However, the unauthorized technique by which he threw MW over his shoulder caused greater harm to the inmate than would have been caused by an authorized takedown method. Appellant's precipitous action was unnecessary because he already had physical control over MW, who had not escalated to physical aggression. The force was unreasonable and inappropriate in light of the minimal threat presented by MW's resistance. Appellant acknowledged that MW was only "a little bit" of a threat at the cell door, and none at all after the takedown. [Exh. 9-28.]

Using force as punishment is also a violation of DO 5011.M. Elwell found that Appellant took this action out of frustration in order to punish the inmate. She based that finding on her observation of Appellant's body language during the incident, which she believed showed that Appellant became increasingly agitated as the event proceeded. The jail videos reveal Appellant's face only while the two were walking toward the Bible cover at the beginning of the incident. Elwell testified that at that point, their body language was "very relaxed." [Elwell, 9:54 am.] As the inmate continued to talk, Appellant used command presence and verbal orders to indicate that the conversation was over. When those tactics failed, Appellant took MW by the shoulder and began the escort, displaying no sudden movements or apparent agitation. At the cell door, Appellant is visible only as a shape behind MW. Again, after many viewings from all available camera angles, I can detect no sign that Appellant was agitated at the cell door.

Appellant was consistent throughout that his intention at the cell door was to handcuff MW because he believed he could not get him into the cell. He testified that they are trained not to bring resistive inmates into the cells, and that because of his size, he is especially aware that they could knock into cell fixtures. Elwell agreed that deputy training addresses this issue. [Elwell, 11:39 am.] Appellant also considered that if he continued to push MW, he could have dislocated MW's shoulder or hurt his arm, which was still on the outside of the door frame. [Appellant, 10:41 am.] He chose what he believed at the time was a safer option of pulling MW out instead of pushing him into the smaller space.

During his eleven years as a deputy sheriff, Appellant received no discipline over inappropriate force. Appellant testified without contradiction that he has become used to inmate conduct in the special management unit, and never chooses to use force "right off the bat". [Appellant, 10:48 am.] Three years before this incident, he had been injured in a thirty-minute struggle with a violent prisoner, and had been commended for his ability to "bring the situation to a safe conclusion." [Exh. A-66.] Appellant believes he remained professional during the entire current incident. When he saw that MW's head had hit the table, he "felt bad. It was never my intent to throw him into the table." [Appellant, 10:46 am.] Since his main focus is to make sure inmates are safe, it became second nature to apply his CIT training to get to the root of a problem. His instincts told him it was not working in the corridor when MW raised his voice and his biblical questions came more rapidly. [Appellant, 10:25 am.] The IAB investigator found Appellant's statements "100% honest", and Elwell too believed that he had not engaged in knowing misrepresentation during the investigation. [Exh. 9-62; Elwell, 1:33 pm.] The

evidence does not support a finding that the force was taken in an effort to punish the inmate.

After consideration of all of the reliable evidence, I find that Appellant used inappropriate force in taking down the inmate, and that he used an unauthorized method in doing so. Thus, Appellant violated RR-300.19.1, which prohibits disobedience to departmental orders and other rules, as it pertains to D.O. 5011.1M (use of force) and RR-300.22 (inappropriate force).

2. Neglect of duty, CSR § 16-60 A.

Neglect requires proof of a failure to perform a known duty, rather than an inadequate or delayed performance of that duty. In re Gutierrez, CSB 65-11, n1 (4/4/13). The Agency argued at hearing that Appellant neglected his duty to keep MW safe by using excessive force to gain compliance with his orders. It is undisputed that Appellant was performing his duty to provide safety and security within the jail by escorting a noncompliant prisoner to his cell. The fact that he did so using more force than necessary by an unauthorized method does not establish a failure to perform that duty. Therefore, the evidence did not prove a violation of this rule.

B. APPROPRIATENESS OF PENALTY IMPOSED

1. Use of force findings

The Civilian Review Administrator found that Appellant's use of force far exceeded that necessary to accomplish the purpose of getting MW in his cell because the prisoner was moving forward, and not resisting. Elwell viewed the force as punishment motivated by Appellant's frustration with MW. She further noted that Appellant had used force strong enough to lift MW off his feet, without considering their size difference or the part MW's mental illness may play in his behavior, and had done so without considering other options. The CRA was also "greatly concerned" that the context of the use of force was a dispute with a mentally ill inmate over an object with religious meaning to him. [Exh. 1-10.] Elwell considered Appellant's use of the phrase "excessive resistance" to describe MW's conduct as "a gross exaggeration and extremely self serving." [Exh. 1-7.] Finally as to this issue, Elwell found that Appellant had not admitted to any wrongdoing.

The evidence at hearing did not support the Agency's findings that MW had stopped resisting at the cell door. It showed instead that MW increased his defensive resistance by keeping his arm braced against the door jamb. In light of the training given to deputies to avoid taking resistant inmate into a cell, I find - as did the CRO report - that Appellant reasonably changed his detention purpose to taking MW down to the floor where he could handcuff him. Some force was needed to achieve that purpose. Appellant used greater force than necessary and employed an unauthorized type of force, violating two of the five standards established by the Department for inappropriate force. [Exh. 3-65.] Appellant also failed to consider the size difference between himself and the inmate. As a result, MW was lifted off his feet and hit a table, whereas a larger inmate may have suffered only a fall to the ground as a result of the shoulder throw.

The videos and other evidence also did not prove Appellant disregarded the religious significance of the item in dispute. MW initiated the topic of religion, and sought to prolong it by asking religious questions without obvious embarrassment or hesitation. The encounter began when Appellant and MW walked down the hall so that Appellant could give him a “visual aid” by showing him that the item was a hard cover, not a complete Bible. Appellant answered one of MW’s religious questions in a serious manner. There is no indication that Appellant was attempting to humiliate MW over his belief that the cover was a Bible. I find that Appellant retrieved the item from MW because he believed it was contraband, and not based on any desire to provoke the inmate over a religious item. Hard book covers are prohibited as contraband within the special management housing units. [Elwell, 9:33 am.] The videos did not reveal any taunting behavior by Appellant during their discussion of the Bible cover or thereafter. The mere fact that the cover had religious significance to the inmate is an insufficient basis for assigning a higher conduct category or aggravating the penalty.

In addition, the evidence did not show that MW’s mental illness affected his ability to cooperate or communicate. MW simply disagreed that the hard cover was contraband, and chose to resist Appellant’s order to return to his cell. [Exh. 17-9 to -11; Exh. 25.] The Agency failed to prove that the inmate’s mental health vulnerability prevented him from understanding Appellant, or lessened his ability to resist a reasonable detention-related order.

Elwell expressed offense that Appellant used the phrase “excessive resistance”, describing it as “a gross exaggeration and extremely self serving.” [Exhs. 1-7; Exh. 9-3.] When asked about that phrase at hearing, Appellant explained,

In hindsight, that was probably a poor choice of words. At the time of my report, his resistance was psychological intimidating to the verbal resistance, leading up to the passive resistance, to the defensive resistance. That’s what I consider to be excessive resistance. It was me thinking it was his escalative resistance.

[Appellant, 10:38 am.]

Appellant’s testimony is credible on that point, as he also used the phrase “defensive resistance” when describing the incident in his Offense in Custody (OIC) report and during his Internal Affairs interview. [Exhs. 4-1; 9-65.] The Agency itself used “excessive force” until the 2011 Discipline Handbook replaced it with the phrase “inappropriate force”. The term is also used in the Colorado statute in relation to peace officers. CRS 18-8-803. The Agency presented no evidence that Appellant’s single misstatement during his interview illustrated his intention to deflect blame or ignore the risk of harm to the inmate. [Exh. 3-65.]

Ms. Elwell emphasized that Appellant had used excessive force “one second” after MW placed his hand on the door, without attempting lesser force options. However, when considering all of the facts surrounding this incident, it must be noted that Appellant had first used CIT techniques and what he called a “visual aid” by walking MW down the corridor and showing him the Bible cover. After that effort led to verbal escalation, Appellant tried command presence and verbal orders, which was met with passive resistance. When Appellant escorted him to his cell, MW engaged in

physical resistance. While Ms. Elwell concluded that the escort was reasonable, she did not look at the incident as a whole. Instead, she considered the seconds before the cell door in isolation from its beginning, and therefore failed to consider the totality of the circumstances, which showed that Appellant tried four lesser force techniques just before this incident in an effort to obtain the inmate's compliance.

The findings made by the CRA are significantly different in type and seriousness from those supported by the evidence at hearing. Dismissal is an ultimate finding because it requires the application of departmental and career service rules to the events found to have occurred, rendering it a mixed question of law and fact. Ritzert v. Board of Education of Academy School District No. 20, 361 P.3d 966, 973 (Colo. 2015). In the absence of the unsupported findings, the CRA's penalty decision must be reconsidered to determine if the Agency weighed the relevant factors or exceeded the bounds of reasonableness based on the proven facts. In order to do so, an analysis of the Discipline Handbook's penalty standards may clarify the "analytical grid [or] coordinates used in mapping agency discretion." Colorado Real Estate Commission v. Hanegan, 947 P.2d 933, 936 (Colo. en banc, 1997).

2. Conduct category

a. **Agency's selection of category F**

Category F was selected by the Civilian Review Administrator as most fitting the behavior at issue. Elwell found that the conduct was a "willful and wanton disregard of departmental guiding principles", demonstrated a serious lack of character necessary to hold his position, and was "egregious misconduct substantially contrary to the expected standards of conduct", thus falling into three of the four descriptions under category F.

The Agency proved that Appellant used inappropriate force and an unauthorized technique in relation to the threat faced, without considering MW's smaller size, and therefore risked both serious bodily injury to MW and civil liability to the City. The only actual injury caused were minor cuts and contusions to the inmate. The factual findings supporting category F were that MW was not resisting at all, Appellant's grossly disproportionate force was intended to punish the inmate, and that both serious injury and civil liability could have resulted.

At hearing, Ms. Elwell did not explain her decision to reject the recommendation of the Sheriff and the CRO, except to state that she disagreed as to the amount of inmate resistance, the need for a takedown, and the nature of the recommended penalty. [Elwell, 1:59, 2:54, 3:30 pm.] In its review of the same facts, the CRO found Appellant's decision to take MW to the ground was made in response to the inmate's "continued defensive resistant behavior ... after other lesser force options were ineffective". It agreed that the force used was disproportionate to the threat faced and that the technique used was not approved. As noted above, the report may be read to have assigned either a category D or E, without further explanation of the basis for the category assignment. It rejected mitigation and aggravation, and recommended a 30-day suspension. [Exh. BB-10 to 13].

The Discipline Handbook has as its objective a discipline system that is effective, fairly administered, reasonably consistent and based on known departmental standards of conduct. "In determining the conduct category, ... [i]t should be distinguished from the analysis of mitigating and aggravating factors which determines penalties within a given conduct category ... No attempt should be made to unjustifiably or unreasonably 'fit' a violation into a particular conduct category based upon the desire to reach or avoid a certain discipline level or a certain penalty." [Exh. 3-25, -26.] The decision-maker must document all findings, rationales, and the relative weights of mitigating or aggravating circumstances. [Exh. 3-20, § 10.7; 3-33 § 22.5.] The Handbook serves its constituencies by "presenting a clear methodology for consequences" when those standards are violated. [Exh. 3-8, § 1.4.] The matrix teaches that the penalty accorded use of force incidents should be analyzed based on the severity, intent and impact of the incident, and any other relevant factors.

In determining the conduct category, the Discipline Handbook sets forth eleven questions to be answered, including an analysis of the nature of the misconduct, its relation to departmental mission and principles, its impact on operations, and the kind of harm caused. In addition, the reviewer is to consider whether there has been a previous case decided that may provide guidance. [Exh. 3-25, § 15.1].

The first question asks the reviewer to identify the general nature of the misconduct. Here, that is unquestionably an inappropriate use of force against an inmate. The next question is how that misconduct relates to the department's mission, vision, and guiding principles. It is clear that the Sheriff's Department's use of force rules in the jail setting are an important part of its mission to provide for the safety and care of inmates. The third question asks how the misconduct impacted its operations and image. As found by Elwell, the incident had the potential to result in civil liability against the City. The fourth question is the actual harm or risk of harm. The actual harm here was that the inmate suffered minor cuts, and the risk of harm was the possibility of a serious head injury. There was no specific evidence supporting a "yes" answer to questions 15.1.5 through 15.1.9. As to 15.1.10, the relevant rule is RR-300.22, which may be assigned to categories D, E or F, depending on the nature and/or impact of the violation.

The last question is whether there are previous cases decided under the Discipline Handbook that may give direction to the choice of conduct category. [Exh. 3-26, § 15.1.11.] Ms. Elwell did not specifically consider any such cases, but testified that she was generally aware of them, having served as their decision-maker.

Appellant submitted six redacted disciplinary decisions imposed in 2016 in use of force matters, all made by the current Civilian Review Administrator, and all assigned to category D, the least serious of the conduct categories available in an inappropriate force case. [Exh. U.] The first four cases were based on physical assaults on inmates by deputies with no prior use of force violations, none of whom were found to have been deceptive during the investigation.² In Case One, a deputy pepper-sprayed the face of a seated, restrained inmate, netting a ten-day suspension. Case Two involved a deputy who pulled the hair of an inmate where no force was necessary, resulting in a

² Case Five is dissimilar because dishonesty was also found, and Case Six involved a previous inappropriate force offense. [Exh. U. Bates 743 – 771.]

like suspension of ten days. In Cases Three and Four, two deputies pushed a cuffed, kicking inmate into an elevator, slammed him into the floor, and picked him up by his handcuffs from behind his back. The deputy in Case Three was given an aggravated penalty of 16 days based on a fourth action: placing his knee and considerable body weight on the back of the prone, cuffed and non-resisting prisoner for over two minutes. The second deputy in this same incident, designated as Case Four, was suspended for ten days for inflicting inappropriate force by pushing and slamming the inmate, then picking him up by the cuffs. Elwell described the conduct of the deputy in Case Three as falling "egregiously short" of standards required by the rules, while the behavior of the Case Four deputy merely "fell short" of those standards. She also found the actions of both could have caused serious head injury and liability to the city. Elwell found that taking the prisoner to the floor was appropriate, and in fact ordered by their sergeant, but was administered with "violence." Both deputies were larger than the inmate, and were found to have used an unauthorized force method in picking up and carrying the inmate by his handcuffs.

The similarities in Cases One, Three and Four to Appellant's discipline are notable. All four deputies were free from previous discipline, and none were charged with dishonesty. Minor bodily harm was the only actual impact suffered in each of the four cases. In Case One, the deputy was found to have OC-sprayed a non-resistant inmate to punish him for previous resistance. Elwell found that this act exposed others to the risk of injury, and subjected the city to potential lawsuits. In the present appeal, the finding of punishment was not supported by the evidence. In Cases Three and Four, deputies brought about four and three separate physical attacks, respectively, two of which were to the head. In sharp contrast, the actions of this Appellant were assigned to category F based on a single use of inappropriate force which is like in degree to the force imposed in Cases Three and Four, and committed under similar circumstances.

Additional guidance is provided in the recent Ford decision, wherein the Career Service Board summarized the facts in other inappropriate force appeals. In re Ford, CSB 48-14 (12/17/15). In the first, a deputy received a 42-day suspension for swinging at an inmate, putting him in a headlock, pushing him to the wall, and then pulling him up by the handcuffs. In re Valerio, CSA 22-14. Next, a sergeant was given ten days for ordering a deputy to shoot an inmate with a Taser gun. In re St. Germain, CSA 24-14. Two deputies were each given 10-day suspensions for similar actions: shoving a prisoner into the wall three times (In re Jordan, CSA 30-14), and choking an inmate against a wall (In re Fuller, CSA 39-14). Conduct category D was assigned in the ten-day suspensions, and Valerio received an aggravated penalty under conduct category E. The Board noted that in Ford's case, the deputy's conduct was assigned to category F for punching an inmate. "We are concerned that given the ease of categorizing any act of inappropriate force into any Matrix category, the assignment of a category has the potential of appearing arbitrary". In re Ford, at 4-6. The Board concluded that the Agency's category assignment had not followed the Matrix's guiding principles. It accepted the Hearing Officer's findings rejecting the Agency's most serious allegations, re-classified the violation to category E, and imposed a 30-day suspension.

Ms. Elwell did not specifically document her rationale for characterizing this Appellant's conduct to the three descriptions under category F noted in the disciplinary letter. It is therefore necessary here to analyze the conduct category

selection in detail. The evidence proved that Appellant violated departmental rules by imposing force greater than necessary by means of an unauthorized method. The video demonstrated that Appellant instantaneously reacted to an unexpected increase in the prisoner's resistance, believing incorrectly that MW was bracing himself with two hands against the door frame of his cell. [Exh. 9-52.] MW was actually using only his right arm to brace himself. In taking this action, Appellant failed to consider lesser force options, and decided to throw MW backward without considering the obstacles behind them that the inmate might - and did - hit. While MW's injuries were fortunately minor, the inmate risked serious head trauma, and the city could have faced a civil lawsuit because of Appellant's actions.

Both the CRO and Ms. Elwell found that Appellant did not intentionally throw MW into the metal table behind them, but Elwell determined that his action was "deliberately indifferent" to the risk of injury, and taken to punish him. Elwell also found that Appellant's statements were "a gross exaggeration and extremely self-serving", and that he "allowed his frustrations to get the better of him" by using grossly disproportionate force on a much smaller, mentally ill inmate over an item of religious significance. The implication is that Appellant abused his size and powers as a deputy to take advantage of a vulnerable person in his care, and then failed to accept responsibility for his actions. Elwell testified to two additional bases for her category assignment: that MW was using his right arm to steady himself, and that Appellant was getting "increasingly agitated" with the inmate, showing his punitive intent. Elwell concluded that Appellant's conduct was a willful disregard of departmental principles. As found above, the evidence did not support these findings. As a result, Elwell's conclusion that Appellant's conduct was a "willful and wanton disregard of department guiding principles" was unsupported by the evidence.

The second description under category F is demonstration of a serious lack of integrity, ethics or character. The Agency did not support this finding with any specific allegations, and none appear in the record. The last description is egregious misconduct substantially contrary to the standards of conduct expected of deputies. This appears to be based only on the same unsubstantiated findings made in support of the first descriptive phrase, and therefore it too is not supported by the evidence.

In sum, the allegations made in support of the selection of category F were unproven. The Agency failed to prove that the inmate's mental health contributed to his resistive conduct, or that the force was inflicted to punish MW, exploit his mental illness, or goad him based on his religion. The ultimate penalty decision is therefore "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." Ross v. Fire and Police Pension Assn., 713 P.2d 1304, 1309 (Colo. en banc, 1986.) Where there are no competent evidentiary facts to support the agency's findings of ultimate fact, the decision must be reversed as arbitrary, capricious or contrary to rule or law. In re Owens-Manis et al., CSA 73-09, 11 (3/11/2010); Womack v. Industrial Commission, 451 P.2d 761, 764 (Colo. 1969); Ricci v. Davis, 627 P.2d 1111, 1118 (Colo. 1981).

b. Analysis of conduct category based on evidence at hearing

Laws must be phrased in language general enough to cover their intended target, yet clear enough to be applied to specific situations. The matrix attempts to slot

types of misconduct into six categories by using broad concepts related to the nature and impact of the behavior. However, concepts such as standards of conduct, abuse of authority, and impact on the agency can be applied to many different circumstances, depending on whether viewed through a wide or a narrow lens. As noted by the Career Service Board, similar use of force incidents can arguably be characterized as violations of categories D through F. In re Ford, at 8. That state of affairs could negatively affect the predictability and perceived fairness of a disciplinary system intended to be "fair, rational, efficient, reasonably consistent and transparent ... and foster respect, trust and confidence among all Department personnel" and the community. [Exh. 3-1.]

An organization's disciplinary rules are essentially normative, determining the boundaries of acceptable conduct in that specific environment based on the organization's mission and standards. Their fairness depends on whether the standards by which penalties are measured are reasonably predictable. Fortunately, an ancient principle of statutory interpretation can be adapted to clarify the intent of the matrix categories: *ejusdem generis*; literally, "of the same species". Where a general term is followed by particular examples, the general term is interpreted to be limited to things that "share the characteristics" of the examples. See People v. Beck, 187 P.3d 1125, 1128 (Colo.App. 2008).

The six conduct categories, A to F, describe misconduct in increasing levels of severity, culpability, willfulness and conflict with Agency core values. The nature of the general descriptions is illuminated by the rules listed as examples under each conduct category. While many rule violations can fall into a range of categories depending on their seriousness or harm caused, it is useful to isolate those falling into only one category so that the essential nature of that category can be revealed, and useful comparisons made.

The lowest category for a violation of the inappropriate force rule is D, which carries a presumptive penalty of a ten-day suspension for a first offense. It includes conduct that is either 1) "substantially contrary to the guiding principles" of the department, 2) "substantially interferes with its mission", operations or image, or 3) involves a substantial risk to employees or public safety. Rules falling only into category D include insubordination, feigning illness, immoral conduct, and being unfit for duty. Use of force violations in that category include cruel and unusual treatment or abuse of prisoners, neither of which require physical contact or injury. Other rules in category D relate to improper relationships or treatment of inmates, but those rules could also be placed in category E or F, depending on the severity or impact of the misconduct.

At the next level, category E is violated by three subsets of conduct: 1) serious abuse of authority, 2) unethical behavior, or 3) an act resulting in "actual serious and adverse impact" on others or the department. The listed rules punishable only as category E, or that top out at that level, include misleading statements, recommending bondsmen or attorneys for profit, release of confidential information, unauthorized use of equipment, and improper arrests. Rules in the first two subsets - abuse of authority or ethics - include disclosure of confidential information and misuse of city assets. A serious adverse impact may be found to arise from such violations as drinking on the job, abandoning post, discrimination, or failing to protect inmates from harm. While the

circumstances of misconduct must be analyzed to determine the level of abuse or impact, it is clear from these examples that a wide variety of conduct can be held to fall within the last subset. The presumptive penalty for a first-time violation of category E is a 30-day suspension, rendering it a powerful tool to motivate future compliance, which is the essential promise and advantage of progressive discipline.

Category F is the highest level of punishment, carrying dismissal as its presumptive penalty, even for a first offense. The benchmarks for a category F are 1) an act resulting in serious injury or death; 2) a wanton disregard of departmental principles; 3) a serious lack of ethics; 4) egregious misconduct substantially contrary to the standards of conduct; and 5) failure to adhere to a condition of employment. Rules that only fall into category F include violations of law, corruption, immoral or unethical behavior, and conduct that is described as egregious, aggravated, willful and wanton, intentional, or reckless. Examples are interference with prosecution, falsification of documents, soliciting preferential treatment, unlawful detention, and similar exploitation of law enforcement powers. Unethical behavior may include deceptive acts, theft, corruption, and sexual misconduct. Those offenses are arguably distinguishable on a moral level from the serious yet potentially correctible violations under category E.

After completing an objective analysis of the circumstances involved in the proven misconduct, a decision-maker must identify the broad concepts implicated by these facts. Under the Agency's Discipline Handbook, the CRA must decide the nature, seriousness and impact of the misconduct in order to determine the conduct category. That may involve, among other factors, determining the level of negative impact, the extent to which it transgressed moral and/or organizational standards, and whether it was negligent, reckless or intentional. Once that is done, mitigating and aggravating factors must be considered in order to tailor the punishment to the person.

Penalties for violations of the Career Service Rules are intended to meet similar purposes as those imposed under the matrix. Discipline must be reasonably related to the seriousness of the offense, must consider the employee's past record, and must be of the type and amount needed to correct the situation, if possible. CSR § 16-20. We review discipline imposed on deputies under the Career Service Rules, which require that a penalty fit both the misconduct and the purposes of discipline. A penalty entitled to deference will contain a reasoned explanation sufficient to demonstrate that the decision-maker considered the relevant factors and exercised judgment in accordance with these principles. See Skidmore v. Swift & Co., 323 US 134, 140 (1944); Davis v. Dept. of Justice, 368 Fed.Appx. 124, 127 (2010).

Stripped of the unproven facts, the Agency established that Appellant used inappropriate force, causing actual minor injuries and the risk of serious bodily harm and civil litigation. Thus, the answers to the first two of the questions under § 15.1 have not changed: the misconduct is inappropriate force, a matter of central importance to the Agency's mission and principles. While the degree of force used was proven to be inappropriate, some force was needed because MW increased his defensive resistance. In contrast, Elwell found that little or no force was necessary, a finding not supported by the video evidence. Likewise, the evidence did not prove Appellant used force with an intent to punish or taunt the inmate. It remains to determine what conduct category best fits the established facts.

Broadly stated, I have rejected category F based on the failure of the evidence to prove that Appellant's conduct was willful and wanton, unethical, egregious, or substantially contrary to standards of conduct. I must also reject category E because the evidence failed to reveal that the inappropriate force was also a serious abuse of authority or unethical, or that it resulted in an actual serious and adverse impact on public safety or departmental professionalism. By process of elimination and by virtue of its application in other highly similar use of force cases, the most appropriate category is D. This use of force incident was most like Discipline Cases One, Three and Four in Exhibit U, all of which were inappropriate force causing minor injuries, and all of which were assigned to category D by this same decision-maker.

The evidence established that Appellant's conduct was substantially contrary to the Agency's guiding principles, and that it was a serious risk of harm to public safety, both descriptors of category D offenses. Since Appellant has no prior violation, the penalty level is 5, a presumptive ten-day suspension.

c. Applicability of mitigation or aggravation

Ms. Elwell then considered Appellant's eleven years with good reviews and a single verbal reprimand, but determined that these factors were insufficiently weighty to mitigate the penalty. I find that this conclusion discounts without analysis significant evidence on the appropriateness of mitigation.

The purpose of discipline is to correct inappropriate behavior or performance, if possible. CSR 16-20. The Career Service Rules require that whenever practicable, discipline shall be progressive. CSR 16-50. Progressive discipline "governed by due process, personal accountability, reasonableness and sound business practice" is a critical part of the City's merit system, and should not be lightly dismissed. CSR Rule 16 Purpose statement; *In re Ford, supra*, at 8-9.

The evidence disclosed several reasons to indicate that mitigation may be appropriate. Elwell characterized Appellant as "a very good officer". [Elwell, 11:52 am.] During his eleven-year career at the Agency, forty percent of his evaluations placed him at the highest level of performance, and only two were at the successful level. [Exh. A.] His disciplinary history contains only a verbal reprimand for attendance issued nine years ago. [Exh. 1-4.] As noted above, Appellant's supervisor expressed appreciation in 2011 for his "valiant efforts and for placing himself in harm's way for the safety and well being of others!" during a thirty-minute struggle with a psychotic inmate who was threatening the medical staff. [Exh. A-66.] Here, after discovering that MW had hit his head, Appellant "felt bad" because he had not realized the table was behind them. He experienced tunnel vision, cutting off his awareness of all but a few people around him. Appellant told the investigator that if he had it to do again, he would just offer the inmate another Bible. [Exh. 9-36, -43.]

Based on the incident, Appellant was reassigned to the Vehicle Impound Facility for the 18 months of the investigation, instead of being placed on investigatory leave. His VIF supervisor testified in support of him at the hearing, and gave him a glowing evaluation for his "exceptional" work ethic and commitment to duty. [Zarnow, 4:06 pm; Exh. A-116.] Appellant testified that he worked hard and was a team player "even

though I had that [disciplinary investigation] going on. ... It was more important for me to keep my head in the game to be able to help my co-workers at VIF, instead of taking the negative approach to it." [Appellant, 11:00 am.]

In his testimony, Appellant stated that he generally avoids force by using his CIT training, and believes that "when [inmates] get injured, we're not doing our part." [Appellant, 1:33 pm.] His actions during the takedown demonstrated that attitude. "I could have muscled [MW's] right arm out [from under him]" but instead repositioned him to avoid injury, a process that took 30 seconds instead of five or ten. [Appellant, 10:45 am.] Appellant had no training on takedown tactics for inmates who resist going into a cell. [Exh. 9-57.] His self-reflection and candor on the stand demonstrated that this deputy accepts the guiding principles of the Department, and seeks to conform his conduct to them. I find that Appellant has demonstrated that he is capable of correcting his behavior in order to comply with departmental and City rules and standards.

When viewed in the light of both Career Service disciplinary principles and the reasonableness bounds set by the Department's Discipline Handbook, I conclude that the evidence justifies a mitigated penalty of a six-day suspension.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency decision imposed on June 27, 2016 is MODIFIED to a six-day suspension.

Dated this 21st day of November, 2016.



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. See Career Service Rules at www.denvergov.org/csa. **All petitions for review must be filed with the:**

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