Wayne Jocchem, 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 November 18 and 19, 2015 before Hearing Officer Valerie McNaughton. Appellant was present and was represented by Douglas Jewell, Esq. Assistant City Attorney Jessica Allen represented the Agency in the appeal. The Agency called Michael Jordan, Shannon Elwell, Connie Coyle, Rhonda Gunnerson, and Anthony Gettler. Appellant testified on his own behalf, and presented the testimony of Bryan Moore, William Mitko, Joshua Frank and Michael Nester.

I. STATEMENT OF THE APPEAL

Appellant Wayne Jocchem appealed his disciplinary demotion from the rank of Captain to that of Sergeant imposed on April 30, 2015 based on Appellant’s part in providing an unlit cigarette to an agitated inmate on Sept. 4, 2014. The Agency withdrew Exhibits 3, 6 and 18, and the parties stipulated to the remaining Agency Exhibits from 1 - 17. Agency Exhibits 19 and 20 were admitted at hearing. The parties stipulated to Appellant Exhibits P, R, Z, GG - II, and LL - BBB. Exhibits E, EE, and FF were admitted during the hearing. The issues in this appeal are whether the Agency established that Appellant violated the rules alleged in the disciplinary letter, and whether demotion is within the range that a reasonable administrator may impose for the proven violations.

II. FINDINGS OF FACT

Appellant has been a Deputy Sheriff with the Denver Sheriff’s Department for the past twenty-seven years. He held the rank of Captain for seven years until his disciplinary demotion to Sergeant in April, 2015.

1 Exhibits LL, NN and OO contain Internal Affairs interviews with Major Gettler. The audio versions are labeled as LLa, NNa, and O0a, and the transcriptions are LLb, NNb, and O0b.
A. September 4, 2014 Inmate Incident

The incident leading to the demotion began when Appellant, Sgt. Michael Jordan and Deputy William Mitko responded to the cell of a belligerent inmate (RD) who had been reclassified to Mental Health Extreme Alert, and as a result needed to be moved to a camera cell. RD had scattered papers and belongings inside and outside his cell, and seemed unaware of his surroundings. To every attempt at conversation, he responded only with the words, "[g]ive me a cigarette." Appellant refused, stating that cigarettes and lighters are contraband. [Mitko, 1:30 pm.] Appellant assembled a cell extraction team and contacted Major Anthony Gettler to obtain permission to begin the prisoner move, as required by procedure. In response to Appellant’s call, Major Gettler came up to the fourth floor and met with the officers at the scene, which included Appellant, Jordan, Mitko, and Sgt. Joshua Frank. Gettler too tried to communicate with the inmate, but received the same response to all of his questions: “Give me a cigarette.” [Exh. NNB-15.] In the meantime, Jordan called the psychiatric unit to confirm the classification and determine how to handle the inmate’s failure to take his morning medications.

The officers held a staffing discussion to decide on a plan of action. Gettler remarked that if they could avoid using force by giving him a cigarette, they should get him a cigarette. He asked the group, "[w]ho’s got a cigarette?", and added, "[l]et’s try to stay out of the [news]papers." [Gettler, 11/19/15, 11:01 am.] Sgt. Jordan heard Gettler say, "'Let's get this guy a cigarette' and [Gettler] got a cigarette, and he came back and showed it." [Jordan, 11/18/15, 12:08 am.] Sgt. Frank testified that Major Gettler asked, "'[l]et’s just get a cigarette. Is there anybody that can give him a cigarette? Who’s got a cigarette?'" Frank was shocked because he considered Gettler a “by-the-book” commander. [Frank, 11/19/15, 2:21.] Mitko recalled thinking that Gettler wanted to get a cigarette to move the inmate, because "the guy wants a cigarette." [Mitko, 11/19/15, 1:37 pm.] No one asked any questions or made any comments about the plan. [Gettler, 10:46 am.]

When it became clear that no one at the staffing had a cigarette, Gettler announced he would get one from Deputy Gunnerson, who smokes. [Gettler, 11:12 am.] He went to the third floor and asked her for a cigarette. When she asked why, "I said, 'I got a guy upstairs'. I said, 'all I'm trying to do is get this guy to move. And he keeps asking for a cigarette.'" [Exh. NNB-10.] When he returned to Pod 4D with the cigarette in hand, Frank said, "[o]h, you found a cigarette." [Frank, 2:28 pm.] Appellant told him the move had been delayed so medical staff could try to give RD the medications he had refused that morning. Gettler went back to his first floor office and put the cigarette in a desk drawer. [Gettler, 11/19/15, 11:00 am.]

Less than an hour later, Appellant came to Gettler’s office and told him they were ready to start the move. Gettler gave him the cigarette, and Appellant headed back to RD’s cell. By that time, the inmate cooperated by taking his medicine and permitting himself to be handcuffed. He was then escorted to the camera cell by ten officers without any use of force, and the cigarette was not used to induce his
cooperation. However, after he was placed in the new cell, RD pushed against the officers and twice managed to get nearly out of the cell. He was re-handcuffed after each attempt, but continued to resist and remained extremely wide-eyed, anxious and confused. Jochem directed them to remove the handcuffs and get out of the cell, fearing that RD could use the cuffs to damage himself or the cell. [Exh. 13-4.] Finally, the last deputy managed to leave and close the door behind him.

Deputy Michael Nester is certified and experienced in crisis intervention skills. He had taken control of RD during the cell transfer, and now attempted to calm the inmate from behind the closed cell door. While he maintained eye contact with RD, Nester heard Appellant say, "If you cooperate with the deputy, I'll give you a cigarette." RD then followed the nurses' directions during the required post-force medical check, and asked Appellant, "[w]here's my cigarette?" Appellant said, "[w]ell, you did what we told you to do", and rolled the cigarette under the cell door. [Nester, 11/19/15, 3:13 pm; Exh. 5-17.] RD kicked it out again, and Appellant picked it up. Appellant gave the cigarette to Nester and instructed him to push it back into the cell. Nester showed the cigarette to RD, then rolled it back under the door. This time RD picked it up, looked at it and held it. Nestor told him he would get him a lighter, then left. [Exh. 5-30.] RD sat on his bunk calmly fingering the cigarette for the next ten minutes. [Jordan, 11/18/15, 11:28 am; Mitko, 11/19/15, 1:43 pm.]

A little while later, Sgt. Jordan passed by RD's cell and saw that he had a cigarette. Jordan told Mitko to retrieve it from him. Mitko went to the cell, knocked on the door and told the inmate he would get him a lighter if he would return the cigarette. The inmate rolled the cigarette under the door. Mitko picked it up and turned it over to Appellant. Thereafter, the inmate was transferred by ambulance to the Denver Health medical facility. [Gettler, 9:58 am.]

B. Incident Aftermath

Mitko is a lifelong non-smoker who was greatly upset by this incident. He described the post-incident atmosphere at the jail as tense. "Everyone was trying to scurry in their own direction ... it felt like everyone was on an island." Thereafter, inmates in Pod 4D jokingly asked Mitko for a cigarette. Others asked Jordan, "[i]f I act like that, will you give me a 40 [a 40-ounce beer]?" [Jordan, 9:58 am.] In his first report, Mitko did not mention anything about either the cigarette or Gettler's part in the plan. He testified that he left it out because he had forgotten it, but also said he tries "to stay out of politics." [Mitko, 11/19/15, 1:26 pm.] Between his first and second report, Mitko told his supervisor Sgt. Frank that he was afraid to report the use of a cigarette during the incident. Frank suggested he could mention it in his shift log instead. Frank said he could then reference the log in his own report, which would show that Mitko had reported it. [Frank, 11/19/15, 2:30 pm.]

Afterwards, Jordan discussed the matter with Sgt. Joshua Frank. They both agreed that they should speak to Appellant about why a cigarette was used to handle the inmate. They went to Appellant's office and expressed their objections. Appellant
reminded them of the situation that had led to its use, and added, “[r]ank has its privileges. Sometimes you have to bend the rules a little bit to achieve the desired results.” [Exh. 1-21.] Jordan assumed Appellant was referring to his own rank as Captain, although Jordan was also upset with Major Gettler because “essentially the idea was his in the first place.” [Jordan, 11/18/15, 9:58 am.]

The incident was investigated by Internal Affairs (IA), and led to discipline for everyone involved. Mitko was given a two-day suspension for writing an inaccurate report based on his failure to mention the cigarette in his initial report. [Mitko, 2:10 pm.] His supervisor Sgt. Frank himself omitted any reference to the cigarette in his first report. During his IA interview, Frank explained that omission by saying he had been unsure how to report an allegation of misconduct by a supervisor. [Exh. ZZ.] At hearing, Frank stated he left it out because he didn’t see it as part of the use of force. He anticipated there would be an investigation of this incident, and believed he could report it then. [Frank, 11/19/15, 2:44 pm.] Frank too was given a written reprimand for writing an inaccurate report. [Frank, 2:20 pm.] Jordan was given a written reprimand for his failure to include in his report that a cigarette was used as a coaxing tool. Nestor was given a two-day suspension for an inaccurate report. A week after this incident, Appellant was placed on investigatory leave which lasted for nine months, ultimately ending in this demotion. For his part in the incident, Gettler was given a two-day suspension for failure to supervise the incident because he did not return to the pod and direct Appellant’s implementation of his plan. A week after this incident, Gettler was removed from his Acting Major position by Manager of Safety Stephanie O’Malley, and returned to the rank of Captain.

C. Context of the Gettler Order

For some time before this incident, the Denver Sheriff’s Department had been receiving negative publicity for excessive use of force. Just before this incident, Sheriff Diggins issued an order requiring that cell extractions must be authorized by an officer with the rank of Major or above. A cell extraction is a force technique used to remove an uncooperative inmate from a cell. At the same time, Sheriff Diggins appointed then-Captain Anthony Gettler to the position of Acting Major, and instructed him to do everything he could to minimize force and work to change the jail culture at the Downtown Detention Center (DDC) regarding use of force. Since his appointment, Gettler has not authorized a single cell extraction, instead using his crisis intervention skills and creativity to assess every situation for alternatives to force.

D. Internal Affairs Interviews and Testimony at Hearing

When questioned by IA about the incident, Gettler said his plan had been to get a cigarette to coax the inmate into moving, and that he said something like, “[i]f I can get this guy to move with a cigarette, maybe that’s all it’s going to take”. He gave no specific instructions about how the cigarette was to be used to accomplish that goal, and failed to tell Appellant not to give the inmate the cigarette. [Exh. NNb, pp. 9, 13, 14, 35.] He did not intend that the inmate be given the cigarette, but testified he may
have said, "[l]et's get this guy a cigarette," or "[i]s there anyone who can give this guy a cigarette?" [Gettler, 11/19/15, 10:58 am.] Gettler did not accompany Appellant to the pod to supervise his plan because he considered Appellant fully capable of carrying it out. [Gettler, 11:22 am.] Thereafter, Gettler accepted a two-day suspension for failing to supervise his plan.

Gettler has been with the DSD for eighteen years, and testified without contradiction by the Agency that there is no policy forbidding him from showing an inmate a cigarette. Even if the policy prohibits cigarettes in a prisoner living area, Gettler believes policy should not be a substitute for common sense. In Gettler’s judgment, avoiding force was of greater value than any technical violation of the tobacco policy under these circumstances. He was sensitive to the orders from above to avoid force and negative media attention based on recent jail incidents causing injury or death. He was convinced that Agency leaders want to reverse a tendency to get “badge-heavy” for minor infractions that do not affect operations. [Gettler, 10:48 am.] Gettler believes that his order was in keeping with the DSD mission to provide safety to the community by operating safe, secure, efficient and humane facilities that treat inmates with respect and dignity, as well as Sheriff Diggins’ personal instruction to him to reduce use of force incidents. [Gettler, 12:55 pm.] Gettler had the authority to order use of a cigarette as an alternative to force, and continues to believe his order did not violate policy because he did not anticipate that Appellant would give the cigarette to the inmate.

Both Jordan and Frank told IA they believed Gettler intended to have them give a cigarette to the inmate to avoid using force. [Exhs. BBB, AAA.] Both repeated that testimony at hearing. Jordan was so shocked at the suggestion that he thinks he told Gettler, “I don’t agree with this, but whatever,” and later walked away in disgust when Appellant pulled out the cigarette. Jordan believes there is no policy against using a cigarette or even a beer to coax an inmate, “but you just don’t do it.” He also believes that a cigarette within the jail is contraband, and is therefore a felony.

Appellant testified that the Agency’s “current culture ... is unclear to everybody, to the point where captains and sergeants don’t have the ability to make decisions to take care of business.” [Appellant, 11/19/15, 4:05 pm.] The opinions expressed by the witnesses about use of force, policy enforcement and lying to inmates varied. Jordan stated “I’d much rather fight the guy or use force than give him a cigarette.” [Jordan, 11/18/15, 9:58 am.] Mitko admired Appellant’s and Nestor’s ability to calm the inmate by talking to him, but was shocked by his superiors’ willingness to use a cigarette for the same purpose.

Deputy Nestor agrees that command staff has the power to order a deputy to disobey a rule. “Under this environment that we’ve been working under for the past year or so, [they are] being a little more creative on how we’re dealing with inmates, [and] I can understand them attempting to circumvent a little bit of the policies.” [Nestor, 11/19/15, 3:29 pm.] He told IA that the smoking policies “are fluid”. [Exh. 5-39.] Mitko and Sgt. Jordan were both frustrated that their superiors involved them in the
plan, and both left it out of their initial reports. Sgt. Frank at first thought Gettler's plan was a joke, but then realized he was serious when the Major came back with a cigarette. He understood why Mitko was reluctant to mention the cigarette or the Major in his report, and came up with a plan to have him report it in a less visible place: his shift log, which Frank would then reference in his own report to prove Mitko had not omitted it. Despite these efforts, both were disciplined for filing inaccurate reports.

Major Bryan Moore believes that Agency policy is to do anything possible to avoid using force. He believes supervisors have plenty of options at their disposal, but those do not include violating policy. He conceded that exceptions to some policies are permitted for practical reasons. One example is housing a suicidal inmate in a non-suicide cell if there are none available. Moore testified that violation of the cigarette rule is different because "we have time on our side."

Shannon Elwell, the Civilian Review Administrator who decided this case, believes use of a cigarette to coax an inmate is not prohibited by rule unless it is used in a taunting or harassing manner. "Everything is on a case-by-case basis."[Elwell, 3:37 pm.] Elwell also believes deputies may bring their own cigarettes into inmate living space without violating D.O. 7710.11. [Elwell, 2:34 pm.] Division Chief Connie Coyle is the highest ranking official in the County Jail Division. She agrees that jail policies sometimes conflict, but states it is the deputies' job to make sense of them. She testified that using a cigarette to lure an inmate is inappropriate, but does not know if it amounts to a violation of policy. [Coyle, 11/19/15, 9:03 am.] Gettler believes his order did not violate policy unless the inmate was allowed to touch the cigarette. [Gettler, 10:44 am.] Appellant believes even permitting an inmate to hold an unlit cigarette does not violate the rules, as long as a supervisor has given permission. The greater danger, in Appellant’s view, is presented by lying to an inmate.

Mitko reluctantly lied to RD to obtain the cigarette, but felt justified in doing so because it allowed him to retrieve what he considered contraband. Nestor had earlier told the same lie in order to leave the inmate in a relatively calm state of mind, despite his Academy training urging honesty with inmates. [Exh. 5-33.] Gettler believes there is no policy that says you can’t lie to an inmate, but admitted that such an act might negatively affect the reputation of the Sheriff’s Department. [Gettler, 11:07.] Jordan testified that while lying is not encouraged, it can be done. [Jordan, 12:39 am.] Appellant firmly believes "[i]t’s not okay to lie." Appellant would have disagreed with Gettler if he thought he was ordering him to promise the inmate a cigarette and then withhold it. He testified that experience has taught him an officer’s credibility can help prevent injury by inmates during critical incidents. Appellant has earned five commendations for exemplary conduct during potentially violent incidents with inmates. [Exhs. EE, FF.]

E. **Disciplinary Decision**

Civilian Review Administrator Shannon Elwell made the disciplinary decision. The disciplinary letter set forth two specifications. The first was based on the allegation that
furnishing an inmate with a cigarette violated several rules. The second specification alleges Appellant failed to supervise Nestor by ordering him to give RD the cigarette.

The Agency determined that Appellant violated DO 7710.11 policy by failing to ensure that cigarettes are kept in places inaccessible to inmates. Elwell also found a violation of RR-400.12 because Appellant was not given express permission to use the cigarette after RD was locked in his new cell. By exceeding the limits of Gettler’s permission, she found Appellant misused his authority and committed conduct prejudicial to the Agency.

The following facts related to this specification are undisputed. Gettler communicated a plan to use a cigarette instead of force to obtain compliance from prisoner RD. Gettler got the cigarette and gave it to Appellant so he could use it for that purpose. RD was escorted to his new cell without force, but became agitated and tried to escape once in the new cell. Appellant told RD he could have the cigarette if he complied with orders. RD cooperated with the medical examination. Appellant then slid the cigarette under the door. When RD kicked it out, Appellant gave the cigarette to Nestor, who showed it to RD and slid it under the door. This time, the prisoner took the cigarette and held it calmly for about ten minutes. Later, Jordan noticed it in the cell and ordered Mitko to retrieve it. Mitko told RD that he would get him a lighter if he would give him the cigarette. RD handed it over to Mitko, who delivered it to Appellant’s office.

There were also disputed fact related to this specification. After Elwell reviewed the IA investigation, she found that the inmate did not ask for a cigarette. [Exh. 1-15.] The investigative file included Gettler’s statement, during which he said eight times that the inmate repeatedly asked for a cigarette. [Exh. NNb.] The uncontradicted testimony of Gettler, Jordan, Frank, and Mitko proved conclusively that RD asked both Appellant and Gettler for a cigarette, in the presence of the other deputies.

Elwell also found that Gettler did not give Appellant permission to give a cigarette to RD. Gettler could not recall the exact words he used, but stated his intent had been to use a cigarette to get the inmate to move. Jordan told IA that Gettler said, “[l]et’s go find this guy a cigarette. Someone find this guy a cigarette.” [Exh. BBB.] Frank told IA he recalled Gettler saying, “[i]s there anybody that can give him a cigarette? Who’s got a cigarette?” [Exh. ZZ.] They repeated that testimony during the hearing, over a year after the event.

Elwell testified that when Gettler said “this guy” or “him”, he may have meant, “[l]et’s get me a cigarette, and “[i]s there anyone that can give me a cigarette?” [Elwell, 3:53 pm.] That explanation requires Gettler to have referred to himself in the third person, an awkward use of pronouns that would have stood out to the officers at the staffing. It is contradicted by the consistent statements and testimony of those four officers as well as by Gettler himself. Gettler was not referring to himself when he ordered them to get “the guy” or “him” a cigarette. Once he got the cigarette, he gave it to Appellant, obviously intending that it would be used in his plan. Elwell also
testified that even if Gettler did say, “let’s get this guy a cigarette”, he was simply intending to motivate everyone to find a cigarette. She found that when Jordan heard Gettler say, “Someone find this guy a cigarette”, it should be read in context to mean, “[s]omeone find a cigarette.” [Elwell, 3:50 pm.]

The Agency’s interpretation of Gettler’s order is inconsistent with credible eyewitness testimony, and requires the fact-finder to ignore words or change their meaning. In addition, all of the witnesses had the same understanding: Gettler wanted to gain compliance by giving the inmate a cigarette. When Gettler reinforced his plan by delivering a cigarette to the pod, it was obvious to all present that he wanted them to use the cigarette as an alternative to force. Although Gettler later stated he meant only to have them show the cigarette to RD, he had an obligation to communicate clear orders. Elwell conceded that Gettler’s order was not “crystal clear”.

There is no evidence that Gettler said or implied that the cigarette should just be shown to RD, or implied that Appellant should lie to RD. In Gettler’s IA statement, he admitted he cannot recall exactly what he said. He gave four possible versions of what he may have said: “If I can get this guy to move with a cigarette, maybe that’s all it’s going to take.” [Exh. NNb-9.] “You know what? If I can get this – if I can use a cigarette to move this guy, if I can coax him with a cigarette, then I’m going to get a cigarette.” [Exh. NNb-11, 12.] “If it takes a cigarette to move him, I’m going to get a cigarette.” [Exh. NNb-14.] “If it takes a cigarette to move this guy, that’s what I’m going to do is get a cigarette.” [Exh. NNb-15.] All four versions have these things in common: none express that Appellant should lie, and none of them make it clear what action is to be taken if the inmate complies. Most persuasively, all four persons who heard the statement believed Gettler wanted to give RD the cigarette that he supplied.

In Elwell’s view, deputies are not barred from using cigarettes as a coaxing tool, or misrepresenting something to coax an inmate to do something. “Everything is on a case by case basis.” However, she stated that if the cigarette is used in a taunting, threatening, or harassing manner, the behavior would violate another rule. [Elwell, 2:33 pm.] That rule, RR-400.5, is a Conduct Category D – F, which carries higher presumptive penalties than those with which Appellant was charged.

Elwell concluded that Appellant failed to supervise under RR-1100.8 because he demonstrated poor judgment, failed to lead by example, and exposed his subordinates to the risk of discipline by directing them to violate policy. She viewed Appellant’s statements that Gettler developed the plan and obtained the cigarette as a failure to accept his own responsibility for exceeding Gettler’s intent or express authority.

F. Level of penalty

Under the Matrix, RR-300.11.6, 300.19.1, and 400.12 may be assigned any conduct category from A to F, depending on the nature of the misconduct and level of impact or harm caused by it. Category E was assigned to the violations based on Elwell’s conclusion that there was actual serious harm to the department by virtue of
the fact that inmates and deputies "were surprised and upset to observe and/or learn of the cigarette being used as both a coaxing mechanism [and] "security blanket" for an uncooperative inmate. Elwell determined that Appellant's failure to use sanctioned methods to achieve his objective negatively impacted the professional image of the department. Finally, Elwell considered Appellant's statement to his subordinate sergeants that "rank has its privileges" to be a serious misuse of authority which showed he is unfit to hold the rank of Captain. [Exh. 1-20, -25, -26].

Although the presumptive penalty for a first violation of a Category E offense is a thirty-day suspension, Elwell determined that special circumstances justified imposition of a demotion to the rank of Sergeant. Those circumstances include his 2013 suspension for releasing information about a traffic accident to hospital security services, which together with this incident "constitute a course of conduct that demonstrates [his] inability or unwillingness to conform to standards of conduct expected of high level command staff." Elwell found mitigating circumstances, including that there was minimal harm, Appellant lacked a culpable mental state and had "good reasons to do what he did," but concluded that they were of insufficient weight to avoid imposition of the enhanced penalty. [Elwell, 11/18/15, 1:54 pm.] The evidence showed that Appellant has earned 86 commendations, three exemplary service pins, and has been rated as either exceeds expectations or outstanding during his twenty-seven year career with the Sheriff's Department. [Exhs. EE, FF.]

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 the demotion was within the range of discipline that can be imposed under the circumstances. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

A. First Specification: Violation of tobacco and related policies

The Agency claims that Appellant violated its rules related to the possession of tobacco by inmates. RR-400.12 prohibits any employee from giving a prisoner "any unauthorized item ... without express permission from a supervisor." A cigarette is an unauthorized item pursuant to DO 7710.11 § 6, which states:

It is the responsibility of all employees to ensure that all tobacco products and smoking paraphernalia are kept in places not available to inmates, and to be familiar with and adhere to the meaning and intent of this order. Failure to comply with this order shall be grounds for disciplinary and legal actions.

The Agency contends that Appellant disobeyed these rules by giving the inmate a cigarette under circumstances not contemplated by his supervisor’s permission. "It is more likely than not that Major Gettler proposed only that the inmate be coaxed with a cigarette, for a specific purpose - to avoid using force - and at a specific time - to get the inmate to move voluntarily to a camera cell." [Exh. 1-18.]
Appellant counters that he was ordered by his supervisor to give the unauthorized item to the inmate as an alternative to using force. He supports that by evidence that he had earlier refused RD's request for a cigarette on the ground that it is contraband, and only agreed to grant it when Major Gettler convinced him they could use it "as a compliance tool." [Exh. 13-4.]

No other deputies present reported that Gettler said or implied that the cigarette could only be used during the current move to the new cell, or that he ordered them not to allow RD to touch or have the cigarette. Both Jordan and Frank told IA and testified at hearing that they believed Gettler wanted them to give the inmate a cigarette. Mitko conceded as much during the hearing. Frank thought the order was a joke until Gettler came back with a cigarette. None of them heard Gettler limit his order to using the cigarette during the move. Elwell testified that based on her knowledge of Gettler, "I could see him saying that, [i.e., 'give the guy a cigarette']." [Elwell, 4:12 pm.] As noted in the previous section, Elwell’s interpretation of the investigatory testimony is not persuasive.

While the Agency found it was "simply incredible" for Appellant to believe Gettler would order him to give an inmate a cigarette, the tobacco rules have recognized exceptions, unlike those regarding alcohol. Appellant testified that inmates have not been charged with a rule violation if they are found to possess cigarettes, but are if found with alcohol. Major Moore testified that inmates were allowed to have cigarettes until the issuance of Executive Order (E.O.) 99 in 1993, which states that smoking in detention centers shall be regulated by the Department of Safety. The policies passed under E.O. 99 are interpreted to permit deputies to carry their own cigarettes into inmate living areas for reasons of practicality. [Gettler, 12:45 pm; Elwell, 2:30 pm.] In addition, deputies may use cigarettes as a coaxing tool, or misrepresent cigarettes or anything to coax an inmate to do something. "Everything is on a case by case basis." [Elwell, 2:40 pm.]

The Agency distinguishes between coaxing and taunting, and argues the former is allowable while the latter is not. It contends that Appellant should have known he was being asked to use the cigarette as a ruse or ploy to persuade the inmate to cooperate. The issue then is whether Appellant’s interpretation of Gettler’s order was reasonable.

The word coax or its equivalent does not appear in the Agency policies. The dictionary definition of "coax" includes influence or persuasion by careful effort. Taunting includes baiting or aggravating the listener. The act of promising and then denying a mentally ill inmate a cigarette may well be interpreted as taunting and harassing in violation of RR-400.5. Appellant’s conclusion that the order did not require him to lie to the inmate was not unreasonable, in light of his training to be honest with inmates as well as the foreseeable risk that the unbalanced inmate could react with violence. It could also lead to a charge of taunting the prisoner, in violation of RR-400.5. If on the other hand Appellant refused to implement the plan, he could have been
charged with disobeying a lawful order under RR-200.13, a Conduct Category C - F
offense. Appellant's action was a reasonable choice among many undesirable ones.

In any event, use of a cigarette to coax an inmate is not inconsistent with
rewarding compliance with possession of the cigarette. Appellant's interpretation that
he was meant to give it to RD if the inmate obeyed was consistent with Gettler's order
as it was understood by all present. And just as the Sheriff did not instruct Gettler on
how to accomplish his direction to minimize use of force incidents, Gettler did not
personally supervise this incident. Instead, he delegated it to Appellant in keeping with
the level of judgment, responsibility and discretion entrusted to senior management. In
the absence of any more specific direction from Gettler, Appellant applied his own
judgment and experience in implementing the plan, reasonably interpreting it as
supervisory permission to give an unlit cigarette to an inmate under RR 400.12.

The Agency also argues that even if Gettler gave that permission, it was limited
to the time and place of RD's move from one cell to the other, and ended once the
door closed on the inmate at the new cell. Inferring such a limitation would be
inconsistent with the most specific evidence as well as the reason for the plan. No one
other than Gettler testified that he may have used the word "move." Gettler testified
he did not re-enter the pod because he trusted Appellant to implement his plan in a
way that would avoid force. That required Appellant to respond appropriately to the
event as it unfolded. Moreover, Appellant testified without contradiction that the move
was not over until the medical unit completed its post-force examination of the
prisoner.

I find that Appellant reasonably interpreted Gettler's order as instructions to give
the inmate a cigarette in order to avoid a use of force. The reasonableness of that
interpretation was demonstrated thereafter by its results. After being promised a
cigarette, RD stopped struggling and submitted to the required medical examination.
When given the cigarette, RD held it calmly for several minutes. After it was taken
away, RD was transported to Denver Health Medical Center by ambulance. [Gettler,
9:57 am.]

The second rule violated alleged under Specification One is Departmental Order
7710.11, which bans smoking in the Downtown Detention Center and states that anyone
providing tobacco to an inmate "will be in violation of C.R.S. 18-8-203 (Introducing
Contraband in the First Degree)." 7710.11 §§ B.1, B.8. That criminal statute identifies as
contraband only weapons, alcohol and marijuana. The District Attorney refused to
prosecute Appellant under 18-8-204, which does identify tobacco as contraband within
a jail setting. [Exh. P.]

The Agency interprets DO 7710.11 §§ 5.8(8) and 6 as forbidding employees from
making tobacco available to inmates. The first section prohibits only actual smoking
within the DDC. There was no evidence that the inmate smoked the cigarette. Section
6 states that employees have the responsibility to ensure that tobacco is "kept in places
not available to inmates." That rule was not interpreted to require deputies to remove
cigarettes from their person before entering an inmate area. It was believed to mean that cigarettes should not be stored in areas where inmates may get them. Elwell testified that she believed bringing a cigarette into the pod and using it as a ploy to avoid force does not violate any policy. [Elwell, 2:35 pm.]

The language of RR-400.12 and DO 7710.11 appear to be inconsistent if they both regulate the same conduct. The former allows a deputy to give an unauthorized item to a prisoner if a supervisor gives express permission for that act. The latter does not mention that exception. In order to read both rules as useful parts of a coherent regulatory scheme, they should be read with a view to placing each in its proper context within that regulatory scheme, if possible. “When a court construes a statute, it should read and consider the statute as a whole and interpret it in a manner giving consistent, harmonious, and sensible effect to all of its parts.” Soicher v. State Farm Mut. Auto. Ins. Co., 351 P.3d 559, 568 (Colo.App. 2015).

It would lead to an absurd result to find that an act that is in keeping with the order of a supervisor under RR-400.12 would be a felony under DO 7710.11. To avoid that result, the words and context of the latter rule must be considered. The verbs in the latter rule direct the reader’s attention to the acts of ensuring and keeping tobacco in places away from inmates. With that in mind, its meaning becomes clear. The first rule prohibits giving tobacco to inmates without permission, and the second controls where tobacco may be stored within the jail. This interpretation is consistent with the fact that the second (storage) rule is not listed in the Matrix, while RR-400.12 is included as a Category A – F violation. Violation of the DO may subject an employee to discipline, but it would be proven by a failure to store tobacco away from inmates. RR-400.12 anticipates that there may be circumstances where a supervisor may order or permit the giving of an otherwise unauthorized item to an inmate. Not unreasonably, the language of DO 7710.11 does not expect a supervisor to permit storage of tobacco where inmates may access it. The two rules are therefore consistent in that they regulate different conduct in appropriate ways.

In any event, the charge under DO 7710.11 is defeated by the Agency decisionmaker’s admission that it was not a violation of policy to bring the cigarette into the pod, as intended by Gettler. [Elwell, 3:37 pm.]

Appellant did not interpret the Major’s plan as requiring him to lie to the inmate by promising him a cigarette he did not intend to deliver. If he had believed that’s what Gettler meant, he would have disagreed with him because “it’s not okay to lie.” If the order remained in force despite the disagreement, Appellant testified he would have followed that order. Failure to obey a lawful order would have subjected Appellant to a charge under RR-200.13, a Conduct Category C – F, carrying more serious penalties than violation of the smoking policies.

The jail’s two rules on tobacco do not contain the clarity and consistency needed for their strict enforcement in volatile and changing jail conditions. The testimony throughout these proceedings displayed that deputies differ in what is
allowed when balancing the tobacco-free policy and the rules governing use of force. One sergeant believes bringing tobacco into a pod is a felony, while the decision-maker believes it only violates policy if the tobacco is used to taunt a prisoner. Others disagree about whether it violates policy for deputies to carry their own cigarettes while on duty in a prisoner area.

The rule interpretations of five separate deputies under exigent circumstances is difficult enough without superimposing an order by a superior officer which may violate policy. Deputies at all ranks are then not only asked to interpret policies as they may later be interpreted by supervisors, Internal Affairs and the Conduct Review Administrator. Deputies are also required to decide immediately whether a direct order overrides their interpretation, and if so, whether to question or disregard that order. If they decide wrong, they risk discipline, injury, or worse. If deputies are encouraged to question or refuse orders with which they disagree, the Agency risks losing the benefits of certainty and experience inherent in the proper operation of its chain of command.

Based on the foregoing, I find that Appellant did not violate RR-300.19.1, RR-400.12, or DO 7710.11. It follows that Appellant did not neglect his duties or commit conduct prejudicial to the Department or City under RR-300.19.1 or CSR 16-60 A or Z, as alleged in the Agency’s first specification.

B. Second Specification: Failure to Supervise

The Agency alleges that Appellant failed to accept responsibility for giving RD a cigarette, by his statements that Gettler developed the plan and obtained the cigarette. It is also claimed that Appellant failed in his duty to supervise because he directed Nester to give RD the cigarette, in violation of the tobacco policies. Elwell accepted as true Appellant’s statement that it was Gettler’s idea to use the cigarette, and the evidence showed that Gettler delivered the cigarette to Appellant in aid of the plan.

The first allegation contains two procedural errors. An employee’s exercise of his right to respond to disciplinary charges cannot be used as separate justification for discipline. Appellant provided these statements to Internal Affairs and at his pre-disciplinary meeting in order to permit a fair investigation into the allegations. The Agency does not challenge the accuracy of his statements. The Agency may not use an employee’s factual statement or denial of culpability during the investigation to charge him with an additional offense, unless it claims the statement is dishonest. Appellant was not accused of either an inaccurate report or dishonesty during the investigation or in the disciplinary letter.

Next, the allegation confuses the essential difference between an employee’s opportunity to be heard during the pre-disciplinary phase and the Agency’s own later obligation to determine the appropriate penalty if it finds a rule violation. An employee is fully entitled to present his side of the story during the first phase of pre-disciplinary proceedings. His challenge to the charges or statements in mitigation cannot then be used to enhance a penalty by an automatic finding that by virtue of his denial or claims
of mitigation he is not accepting responsibility for his behavior. In other words, an employee's defense cannot be treated as a waiver of his right to an appropriate penalty. An employee is entitled to discipline in accordance with the Career Service Rules, and a penalty after consideration of the factors in CSR § 16-20.

Here, Appellant's statements were found to be true by the Agency decision-maker. Gettler admitted that the plan was his, and that he located the cigarette to be used in the plan. Thus, the Agency did not demonstrate that making these statements constituted a violation of any responsibility of Appellant's rank or position under RR-1100.8, or that he failed to accept responsibility for his actions.

As to the charge that Appellant failed to supervise when he ordered Nestor to give RD the cigarette, the Agency did not prove that Appellant exceeded his authority to issue that order. No particular phrase or word is necessary to have a supervisor's statement considered an order. [Elwell, 2:53 pm.] The Agency determined that Appellant's direction to Nestor to give the inmate a cigarette was an order. For the same reason, Gettler's statement to Appellant, together with delivery of the cigarette, was an order to use that cigarette to avoid force. Appellant reasonably interpreted that order as permission to give RD the cigarette if it would assist in handling the inmate. Pursuant to that order, Appellant tried to give the cigarette to RD, who kicked it back. Appellant then gave the cigarette to Nestor, who had established rapport with the inmate during the cell transfer by using his critical incident skills. In his turn, Nestor reasonably interpreted Appellant's words and actions as permission to give the cigarette to RD. The inmate accepted the cigarette from Nestor, and held it without further incident for several minutes. In fact, Gettler's plan, and Appellant's implementation of that plan, worked.

The internal inconsistency in the Agency's actions against the six people involved in this incident is notable. Gettler was not disciplined for issuing the original order. Appellant was demoted for obeying that order. Nestor was not disciplined for obeying Appellant's order, which was the same as Gettler's original order. Gettler was disciplined only for failing to supervise his plan. Jordan, Frank, Mitko and Nestor were given reprimands or two-day suspensions for inaccurate or misleading reports.

In this uncertain atmosphere, Appellant at first sought to move the mentally ill prisoner by cell extraction, but admired Gettler's plan as a creative and effective method to avoid force. Appellant testified that the plan comported with his experience that giving an inmate an item to focus on can result in calmer behavior. After he was ordered to use a cigarette and shown the cigarette to be used, Appellant reasonably believed he was obeying the order of a superior, an order that was consistent with Agency policy, unlikely to cause actual harm, and justified by exigent circumstances.

Because the Agency failed to prove any rule violations by a preponderance of the evidence, the penalty determination is moot.

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IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency’s disciplinary action dated April 30, 2015 is REVERSED.

Dated this 31st day of December, 2015.

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:

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, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.