

**DECISION AFFIRMING DISMISSAL**

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**LORENZO NAGEL**, Appellant,

v.

**DENVER SHERIFF DEPARTMENT**, and the City and County of Denver, a municipal corporation,  
Agency.

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**I. INTRODUCTION**

The Appellant, Lorenzo Nagel, appeals the termination of his employment by his employer, the Denver Sheriff Department (Agency) on April 1, 2020 for violations of specified Career Service Rules, and Agency regulations. A hearing<sup>1</sup> concerning these appeals was conducted by Bruce A. Plotkin, Hearing Officer, on June 23, 2020. The Agency was represented by Charles Mitchell and Margaret Tharp, Assistant City Attorneys. The Appellant was represented by Mallory Revel, Esq., and Lindsey Idelberg, Esq. of the law firm Foster Graham Milstein and Calisher. Agency exhibits 1-18 and Appellant's exhibits A-O were admitted by stipulation. Appellant testified on his own behalf and presented no other witness. Captain Ilya Telesin and Deputy Director Mary Dulacki testified for the Agency.

**II. ISSUES**

The issues presented for this appeal were whether Appellant established that:

- A. the Agency's finding he violated Career Service Rule (CSR) 16-28 R. as it pertains to Agency Rules and Regulations (RR) 300.22, 200.4.1, 200.4.2 and Agency Departmental Order (DO) 1.00.3013, was clearly erroneous;
- B. the Agency's assessment of the penalty of dismissal was clearly erroneous under CSR 20-56 A.; or
- C. the Agency's application of its disciplinary matrix in assessing discipline was clearly erroneous.

**III. FINDINGS**

On June 8, 2019, Appellant was on duty as a deputy sheriff in the Denver Downtown Detention Center. His was assigned to supervise one of the inmate residential pods. Inmate AV approached Appellant to insist on moving to a different cell. He became upset when Appellant declined to move him immediately. Appellant was about to supervise breakfast service and told AV he would ask his supervisor after breakfast. AV became disruptive with his repeated demand, so Appellant moved AV to the secure sally port adjoining the pod. In the meantime, a

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<sup>1</sup> The hearing was a modified remote hearing. Appellant and counsel appeared in person. Attorneys for the Agency and all witnesses appeared by remote transmission. Microsoft Teams was the platform and recording mechanism for this hearing.

cart containing breakfast trays had arrived in the sally port. Appellant told AV not to touch any of the trays. On cue, when Appellant left the sally port to tend to other duties, AV snagged one of the trays.

About an hour later, one of the tier porters asked Appellant to open the sally port door remotely in order to load trash onto the cart. As the tier clerk left the sally port, AV followed him, taking one step into the pod. [Exh. 15 at 5:22:45; Exh. 14 at 5:22:48-5:23:00]. Upon seeing AV out of the sally port, Appellant immediately reopened the sally port door and approached AV, pointing at least six times at AV to return into the sally port. [Exh. 14 at 5:23:05-5:23:29]. AV stood his ground with Appellant less than two feet away while they continued to argue over AV's bunk location. Eventually AV took two small steps backward into the sally port. As he did so, he leaned forward to look at Appellant's badge, [Exh. 14 at 5:23:25-28], then began to turn into the sally port. Although AV was already in the secured sally port, therefore in compliance with Appellant's order, while the two were walking toward the rear of the sally port Appellant attempted to grab AV's arms. AV did not comply, keeping his hands in front of him, [*Id.* at 5:23:33], but did not otherwise resist Appellant.

Then, as AV walked straight ahead in the sally port, Appellant, apparently unsatisfied with AV's compliance, raised his right hand to the back of AV's head/neck area and thrust AV's head to the left, causing it to strike a door to their left. [Exh. 15 at 5:23:34]. AV rebounded, limp, and fell to the floor. [*Id.* at 5:23:36]. AV was taken to the infirmary. He was placed on a 24-hour "neuro watch" and was given Tylenol for three days.

An investigation ensued. Following the Agency's investigation, it served Appellant with a contemplation of discipline letter on March 5, 2020, then convened a pre-disciplinary meeting on March 18, 2020. Appellant attended with his attorneys. On April 1, 2020, the Agency served Appellant with a notice of dismissal. This appeal followed timely on April 3, 2020.

## **IV. ANALYSIS**

### **A. Jurisdiction and Review**

The Career Service Hearing Office has jurisdiction over the appeal of a Career Service deputy sheriff dismissal pursuant to CSR 20-20 A.1. The Hearing Officer is required to affirm the discipline assessed by the Agency if the Appellant fails his burden of proof.

### **B. Burden and Standard of Proof**

The Appellant retains the burden of persuasion, throughout the case, to prove the Agency's finding that he violated CSR 16-28 R. was clearly erroneous or that the Agency's application of its disciplinary matrix in assessing the level of discipline was clearly erroneous. [CSR 20-56 A]. Discipline is clearly erroneous: (1) when the decision-maker's assessment, even while supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole; or (2) when the decision maker failed to follow its disciplinary matrix and, absent such failure, a lesser discipline or no discipline would have resulted; or (3) if the decision maker exceeded her authority. [CSR 20-56 B.1 c.i.-iii].

**C. Career Service Rule Violations**

**1. CSR 16-28 R. "Conduct which violates...written departmental or agency regulations, policies or rules..."**

The Agency alleged Appellant violated CSR 16-28 R. as it pertains to several Agency Rules and Departmental Orders. Appellant's violation of any specified Rule or Order necessarily violates CSR 16-28 R.

**a. RR 300.22 – Inappropriate Force on a Person**

**Deputy sheriffs and employees shall not use "inappropriate force" on a person, which is any use of force on a person that falls within the definition for "inappropriate force" established in the version of the DSD Use of force Policy that is effective when the force is used.**

**b. D.O. 1.00.30013 Use of Force**

**7.A. All uses of force on individuals must be "reasonable and necessary" as that term is defined in this Use of Force policy and must comply with all provisions of this policy applicable to the use of force on individuals.**

Together, this Rule and Order specify force is inappropriate in violation of RR 300.22 if it is not reasonable and necessary. The same DO defines that phrase as follows.

**20. Determination as to whether Deputy's use force was "reasonable and necessary."**

...

**A.3. Whether the deputy's use of force was reasonable when viewed in the light of what an objectively reasonable officer would have done under the same or similar circumstances.**

The pertinent circumstances are that AV complied with Appellant's order to return to the sally port, and the sally port is a fully-secured area, thus no force at all was necessary.<sup>2</sup> Even assuming Appellant was justified in attempting to control AV's arms, the violent thrust of AV's head was not objectively reasonable.

...

**B. A deputy will be found to have used "inappropriate force" in the following situations:**

...

**4. A deputy has used force in a particular way but, under this Use of Force Policy, the deputy was not justified in using force in that way.**

Appellant thrust AV's head from straight ahead to the left, causing AV's head to strike the door. For reasons stated immediately above, Appellant was not justified in using force that way. In addition, the manner in which Appellant used force on AV was egregious under the same DO 1.00.30013, stating:

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<sup>2</sup> AV initially did not comply with Appellant's directive to return to the sally port, as indicated from Appellant's testimony and the video recording showing Appellant point many times for AV to return to the sally port. Once AV began to turn on his own to re-enter the sally port, [Exh. 14 at 5:23:30], there was no longer any reason or justification for any force. Appellant's subsequent assertion, that AV used defensive resistance in avoiding Appellant's attempt to control his arms, was a red herring, since AV already complied with Appellant's order to return to the sally port, obviating the need for any force.

## 14.A. General Principles regarding Use of Lethal Force

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### 3. Examples of lethal force include:

...

#### **d. Deliberately or recklessly causing an individual's head to hit a hard, fixed object (e.g. concrete floor, wall, jail bars)**

The video evidence shows AV's head struck the door to his left, and that Appellant was the instrument of that movement. The evidence was insufficient to establish whether Appellant intended ["deliberately"] AV's head to strike the door. The distinction is immaterial, however, since it was clear in the video, irrespective of AV's waffling responses and Appellant's denial, that Appellant intentionally thrust AV's head to the left. Thus, even if not intentional, the contact AV's head made with the door was the direct result of Appellant's reckless action.

Appellant claimed AV's statement that he "went limp" exonerated him; however, AV first told the investigator Appellant "grabbed me and tried to shove my head against the wall." [Exh. 11-4 at 62-63]. That statement contradicted Appellant's claim that his right hand merely followed AV's head and did not direct it. [Appellant cross examination]. Asked directly if Appellant forced his head into the wall, AV did not give a direct answer.

Investigator: And you mentioned that he tried to hit your head on the wall. Did he at all make contact with your head on the wall?

AV: I -- I dropped down to the floor.

[Exh. 11-6 at 115-119].

Later, AV indicated his head did not hit the door.

AV: And a -- as we're going towards that door, I don't want my head to hit the door, and so that's when I drop down....

[Exh. 11-8 at 155-157].

That statement was tempered by AV's statement "I don't really want to -- for him to be in trouble or me to be in trouble." [Exh. 11-11 at 235-236].

The more credible video evidence shows AV did not drop until after his head hit the wall. [Exh. 15 at 5:23:34-35]. Also, when Appellant viewed the video during his Internal Affairs interview, he believed AV's head hit the wall. [Appellant cross-exam]. Appellant's claim, that AV hit his own head on the door and was not a result of his [Appellant's] action defies any credible viewing of the video recording. [Appellant cross-exam].

Appellant also claimed his conduct could not violate this subsection of DO 100.30013 because it is merely an example. Conduct that conforms with an example of a violation is a violation. For reasons stated here, Appellant's thrusting AV's head, causing it to strike the multi-purpose room door, was an unreasonable use of lethal force as defined by the DO. In sum, Appellant failed to establish that the Agency's findings were clearly erroneous.

**c. 200.4.1 Knowingly Making Misleading or Inaccurate Statements (D-F). Deputy sheriffs and employees shall not knowingly make a misleading or inaccurate statement relating to their official duties.**

The Agency assessed this violation for Appellant's misleading and inaccurate statements in his OIC report. [Exh. 1-13]. Appellant did not dispute that he was under a duty to write an OIC report following the incident with AV. The video evidence, as for the violations above, was determinative. Nagel forced AV's head toward the multi-purpose room door in the sally port, either intentionally or recklessly causing AV's head to strike the door. Consequently, his OIC statements, that he used "the least amount of force necessary," and "[a]s a result, he ended up hitting the door," were inaccurate and misleading, because the evident implication is Appellant did not cause AV's head to strike the door. Appellant's repeated claim that he writes poorly was insufficient to establish the Agency's findings were clearly erroneous. Capt. Telesin denied he told Appellant what to write in his OIC report, only that, after reviewing the video evidence, it lacked detail that would explain the video. [Telesin testimony].

**d. 200.4.2 Commission of a Deceptive Act**

**a. In connection with any investigation or any judicial or administrative proceeding, deputy sheriffs and employees shall not knowingly commit a materially deceptive act including, but not limited to, departing from the truth verbally, making a false report, or intentionally omitting information.**

A violation of 200.4.2 requires an intent to convey false information in connection with an investigation or official proceedings. [In re Kemp](#), CSB 19-13A, 2 (7/28/14). I adopt the Agency's conclusions in finding Appellant violated this rule.

Deputy Nagel's representation of the incident was so clearly inaccurate that it is reasonable to conclude that he was aware of his conduct and knowingly misrepresented it. This deceptive misrepresentation was material because it bore directly on whether Deputy Nagel's use of force upon AV was reasonable, necessary and within policy.

More specifically, the Agency found Appellant violated this rule by making materially deceptive statements during his IAB interview. The Agency referred specifically to these statements by Appellant: "we end up on the wall somehow" followed by his statement that he "tried to redirect him [AV] to go straight and not go this way [to the side], and that's how we end up on the wall."

Appellant had numerous opportunities to correct the record during the Agency's investigation after he viewed the video recording of the incident, when he submitted a supplemental report, during his pre-disciplinary meeting, and at hearing. Instead, Appellant seemed to double down on his plainly inaccurate statements that he did not direct AV's movement to the left, did not cause AV to hit his head, and even suggested that AV intentionally struck the wall, to wit:

[Question]: You said repeatedly, and absolutely clearly, that you were not in control of that, that it was the inmate who was pulling himself to the wall and your arm basically just went along for the ride?

[Answer]: Pretty much, yes.

[Appellant cross-exam].

Appellant repeatedly referred to AV's "going limp" as the reason he face-planted into the door with no assistance, despite AV's violent change in direction accompanied by Appellant's hand on the back of his neck. These alternate facts belie unambiguous video evidence and establish the requisite intent to establish a violation of RR 200.4.2. Appellant, therefore, failed to establish this violation was clearly erroneous.

## V. DEGREE OF DISCIPLINE

RR 300.22. Under the DSD disciplinary matrix, [Exhibit 18], a violation of RR 300.22, Inappropriate Force on a Person, is a Conduct Category E or F violation. The decision maker elected Category E, based on the matrix description of conduct in that category which "results in an actual adverse impact on the safety of a ... detainee", "involves unethical behavior or a serious misuse of authority", and "involves the misuse of authority by using inappropriate force against a person, where such force is determined not to fall within Conduct Category F". [Exh. 1-12]. The presumptive penalty for a Conduct Category E violation is a 30-day suspension, and the aggravated penalty is a 38 – 42-day suspension.

Appellant's inappropriate force resulted in an actual adverse impact to AV's safety, i.e. the risk of severe injury by having his head launched toward a steel door. The use of lethal force was a serious misuse of authority but did not rise to the level of a Conduct Category F violation because it did not result in death or serious bodily injury or meet any of the other specifications for that category.

The decision maker considered Appellant's lack of related discipline as the sole mitigating factor. The decision maker also considered endangerment to AV and Appellant's lack of candor and failure to fully disclose the incident while under investigation as "significant aggravating circumstances." Ultimately, the decision maker found the aggravating factors warranted imposing the lowest aggravated penalty against Appellant for this Rule violation, a 38 days suspension. The Appellant failed to demonstrate that decision was clearly erroneous.

RR 200.4.1. Violations in this category may be assessed in any category from D-F. [Exh. 18-120, 122, 124]. The decision maker elected to assess this violation as a Category D violation, which the matrix describes, in pertinent part, as:

Misconduct that... (iii) involves a demonstrable risk to the safety of a deputy sheriff, an employee, a detainee, or the public; (iv) involves the misuse of authority by using, or attempting to use, inappropriate force against an [individual], where such force or attempted force is determined not to fall within Conduct Category F; (v) involves the misuse of authority by attempting to use inappropriate force against a person, where such an attempt is determined not to fall within Conduct Category F....

Appellant's forceful thrust of AV's head toward the multi-purpose room door demonstrated a risk to detainee AV and involved the misuse of Appellant's authority by using inappropriate force against AV. Those actions fit squarely within the description of Category D violations. The decision maker found no significant mitigating or aggravating circumstances that were applicable to this specification. Consequently, the 10-day presumptive suspension chosen by the Agency for this violation was not clearly erroneous.

RR 200.4.2. The Agency places a special emphasis on honesty in reporting the use of force. Its DISCIPLINE HANDBOOK states "[d]ue to the paramount need for deputies to be truthful at all times in these types of proceedings, RR-200.4.2 is assigned to conduct category F and,

therefore, carries a presumptive penalty of dismissal. Consequently, a first-time offender of this rule should expect to be dismissed." [Exh 18-60]. Category F misconduct is, in pertinent part, misconduct that:

(iv) involves any abuse of authority, including an abuse of the authority to use or attempt to use force against a person... (viii) involves any serious or abusive conduct contrary to the standards of conduct reasonably expected of one whose sworn duties are to uphold the law and to provide for the care and custody of detainees....

[Exh. 18-124].

The mitigated penalty for this violation is a 90-day suspension. While Appellant does not have any prior, relevant discipline, the Agency has adopted and consistently enforced a policy of dismissal for deputies who commit a deceptive act, even in the absence of prior discipline. See [In re Gale](#), CSB 02-15A (7/21/16); see also [In re Applegate & Tomsick](#), CSB 46-17A & 47-17A (10/18/18); [In re Turner](#), CSB 01-17A (5/17/18). Appellant's defenses, including denial of wrongdoing, lack of prior discipline, and lack of harm to AV do not establish that the Agency's decision was clearly erroneous, because: (1) the video evidence clearly establishes Appellant's use of inappropriate force; (2) due to his proximity of being mere inches from AV, makes evident Appellant's knowledge of his inappropriate force so that his later omissions and denials were knowing; (3) the Agency's disciplinary matrix does not require a mitigated penalty in the absence of prior discipline [Exh. 18-32]; and (4) physical injury is not related to the type of misconduct covered under this rule, which focuses on the cover-up of the conduct, rather than on the underlying conduct. For these reasons, Appellant failed to establish the Agency's imposition of the presumptive penalty of dismissal was clearly erroneous.

## VI. ORDER

For reasons stated above, the Agency's dismissal of Appellant on April 1, 2020 is AFFIRMED.

DONE July 10, 2020.



Bruce A. Plotkin  
Career Service Hearing Officer