HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. A033-20

DECISION AFFIRMING FOUR-DAY SUSPENSION

SHAWN RHATIGAN, Appellant,

v.

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

I. INTRODUCTION

Appellant appeals his four-day suspension assessed on June 30, 2019, by his employer, the Department of Safety, Denver Sheriff Department (Agency), for alleged violations of specified Career Service Rules (CSR). A hearing was conducted on September 29, 2020 by Hearing Officer Bruce A. Plotkin. Agency Exhibits 1A-1Z, 1AA-1AZ, 1BA-1BF, 2 and 3 were admitted. Appellant offered one exhibit which was denied.[1] Yulia Nikolaevskaya, Esq., from Kissinger and Fellman P.C., represented the Appellant. Assistant City Attorney Natalia Ballinger represented the Agency. Appellant testified on his own behalf and called no other witness. The Agency called only the decision maker, Chief Deputy Director of Safety Mary Dulacki.

II. ISSUES

The issues presented for this appeal were whether Appellant established:

(1) the Agency's finding that Appellant violated Career Service Rule 16-28 R., as it pertains to DSD Rules and Regulation [RR] § 300.22 was clearly erroneous; or

(2) the application of the Agency's disciplinary matrix in assessing a four-day suspension was clearly erroneous.

III. FINDINGS

The Appellant, Shawn Rhatigan, has been a Denver Deputy Sheriff for the Agency since 2006. He is responsible for the safety and security of inmates in the Agency's custody including, pertinent to this appeal, the obligation to use only such force on inmates as is reasonable and necessary. Departmental Orders (DOs) define and authorize the use of choke holds only when deadly force is reasonable and necessary. Appellant has no prior discipline that would affect this appeal. The Executive Director of Safety authorized Chief Deputy Director of Safety Mary Dulacki to determine whether to assess discipline and, if so, to what degree.

On December 29, 2019, Appellant was on duty in the Intake/Fingerprint area of Agency's Downtown Detention Center. An uncooperative and belligerent inmate, DT, was unhappy with the book-in and fingerprint process. Appellant was aware DT was in custody following his arrest at Denver Health Medical Center where he assaulted an officer. DT cursed and verbally threatened

[1] Appellant offered Exhibit 4, a 2010 video clip from an Oklahoma television station, in which a local police department demonstrated a choke hold. The tendered exhibit was denied as irrelevant.

to assault deputies, including Appellant. Appellant unsuccessfully attempted to convince DT to cooperate using proper de-escalation training.

When DT continued his tantrum, Appellant warned if he made one more outburst, he would be placed in an isolation cell.[2] On cue, DT threatened Appellant. Appellant grabbed the back of DT's jacket with his right hand and reached around with his right forearm to hold DT below the chin, but not on his neck. [Exh. 1AP at 7:32:35].[3] Two other deputies at the fingerprint station accompanied Appellant while he shoved DT toward the isolation cells. Appellant switched arms, grabbing DT from behind with his left forearm. [Exh. 1AM 7:32:39-40].[4] DT resisted during the entire escort by pushing back on Appellant. Along the way, three other deputies joined to accompany Appellant and DT, but Appellant continued to control the much smaller DT alone. [Exh. 1AN at 7:32:58; 1AI at 7:32:58]. DT stumbled and his upper body fell forward and down. Appellant lifted him by leaning back with his left forearm still underneath DT's chin. [*Id.* at 7:32:55-57]. On the way to the isolation cell, DT yelled "are you trying to choke me out" to Appellant, [Exh. 1L-14, line 302], and continued to resist.

An investigation ensued which resulted in the issuance of a Contemplation of Discipline letter. A pre-disciplinary meeting was convened on June 10, 2020. Appellant attended without a representative.

The Agency issued a notice of discipline on June 30, 2020, imposing a four-day suspension. Appellant filed a timely appeal on July 13, 2020.

IV. ANALYSIS

A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction over the appeal of a Career Service deputy sheriff suspension pursuant to CSR 20-20 A.2. 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 the authority cited above - was clearly erroneous, or that the Agency's application of its disciplinary matrix in assessing the level of discipline was clearly erroneous. *See* 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.1c.i.-iii.].

C. Career Service Rule Violations

The Agency alleged Appellant violated CSR 16-28 R. "Conduct which violates…written departmental or agency regulations, policies or rules…" as it pertains to the following Denver Sheriff Department Rule:

[2] When Appellant raised his level of resistance from passive to threatening and physical, Department rules authorized Appellant to use the least amount of non-lethal force to prevent harm to DT and deputies while completing DT's detention.
[3] Freezing the video at 1AP 7:32:35 shows DT ducked his head when Appellant tried to grab him from behind, preventing Appellant's right forearm from sliding under DT's chin. Instead, Appellant's forearm is clearly shown against DT's cheek. This evidence becomes important, below, regarding one of Appellant's claims that the Agency's findings were clearly erroneous with respect to this portion of the incident.
[4] For the same reason n. 3 is important as to Appellant's defense regarding choking while at the fingerprint desk, this becomes important to the failure of Appellant to meet his burden regarding the portion of the incident during the escort.

300.22 Inappropriate Force on a Person (E-F) 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 of "inappropriate force" established in the version of the DSD Use of Force Policy that is effective when force is used.

The Agency cited the following DOs regarding the use of force.

DO 1.00.3013.

7. Requirements for All Uses of Force:

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.

11. Use of Force other than "Lethal Force":

A.1.a. To prevent physical harm to deputies, individuals, or third persons, when there are no de-escalation techniques, tactic options, or other non-force options reasonably available, practical, or effective:

B.1. Deputies are prohibited from using force:

…

c. After compliance or control of an individual has been obtained.[5]

D.2. A choke hold is a hold that involves the application of pressure to an individual's throat or windpipe potentially resulting in preventing or hindering an individual's ability to breathe or intake air. The use of a choke hold is authorized only when the use of lethal force is reasonable and necessary.

Given Appellant's claims at hearing, it is important to clarify what is and is not at issue. Under CSR 20, unlike other Career Service Appeals, the burden of persuasion begins and remains with Appellant. Thus, a hearing under CSR 20 is not a *de novo* review of the Agency's decision, [CSR 20-56 A.], i.e. it is not up to the Agency to prove its disciplinary findings were proper. Rather, Appellant must put forth evidence that demonstrates the Agency's finding(s) leading to discipline were clearly erroneous or that lesser or no discipline would have resulted but for the Agency failing to follow its own disciplinary matrix or other applicable authority.[6] [*Id*.]. If the Appellant fails to meet that burden, the hearing officer must affirm the Agency action.

The Agency found Appellant's grasp of DT with his forearm constituted a choke hold as defined by DO 1.00.3013. 11.D.2. Appellant first claimed he never placed his hands on DT's neck. [Exh. 1L-22]. However, the orders above and specifically the Agency's definition of "choke hold," require only that pressure be applied to the throat or windpipe without limiting such application of pressure to the use of hands.

[5] The decision maker found Appellant also violated this rule. "It was neither reasonable nor necessary for Deputy Rhatigan to have his left arm around DT's neck area and to leave it in that location after physical control of the inmate was obtained." Since, by all accounts and video evidence DT struggled and resisted control during the entire incident until inside the isolation cell, this finding was clearly erroneous; however, since her findings of inappropriate force during other portions of the escort were not clearly erroneous, this finding was harmless error.

[6] An appellant may also meet his burden by showing the decision maker exceeded her authority, [CSR 20-56 B.1.c.iii.], but that claim was not made in this appeal.

Moreover, when the investigator asked Appellant if he put pressure on DT's neck, he did not restrict his question to Appellant's use of hands. Appellant replied, "not that I recall at all." However, while reviewing the security camera recording of the incident Appellant acknowledged "it does look weird there," while reasserting that he never exerted pressure on DT's neck. [Exh. 1L-23 at ln. 531].

The Agency found Appellant violated RR 300.22 at two distinct times: at the fingerprint station when Appellant first grabbed the DT's upper back or neck with his right hand while pressing his right thumb into DT's neck; then while escorting DT with his left forearm under DT's chin and against his neck. Appellant denied ever putting pressure on DT's neck or windpipe. The security camera recording of the incident is the best evidence in resolving the parties' dispute.

Fingerprint Station. Security cameras recorded that, beginning at timestamp 7:32:33, Appellant was standing to the left of DT and used his right hand to grab DT by the back of his jacket at the neck level. [Exh. 1AP at 7:32:32-36]. It does not show Appellant's thumb pressed against DT's windpipe or throat as alleged by the decision maker [Dulacki testimony]; nor could a reasonable inference of such pressure be made from DT's reaction or from any other evidence. Because the Agency's only basis for finding a violation of RR 300.22 at the fingerprint station was that Appellant pressed his right thumb onto DT neck or windpipe, and that allegation was clearly erroneous, Appellant met his burden to prove the Agency's decision was clearly erroneous in finding Appellant violated RR 300.22 while at the fingerprint station.

Escort. During the portion of the incident when Appellant escorted DT toward the isolation cells, he switched his hold on DT from his right to his left forearm. [*See* Findings, above]. Most notably, when DT stumbled [Exh. 1AU at 7:32:55-7:33:02] causing him to slump down and forward, Appellant used his left forearm - which was still under DT's chin and against his neck - to lift DT upright. [Exh. 1 AU at 7:32:55-59; and especially 1AI at 7:32:55-59].

Appellant insisted he never applied pressure on DT's neck, even during this portion of the escort. [Appellant testimony]. It is unlikely Appellant could lift DT with his forearm under DT's chin while he struggled without applying any pressure whatsoever to DT's windpipe or throat. Again, the most compelling evidence was the video evidence and, to a lesser extent, Appellant's acknowledgment to the investigator after viewing the video recording "it does look weird there," as well as DT's yelling "are you trying to choke me out." Appellant's assertion that he applied no pressure to DT's neck or windpipe, therefore, failed to establish that the Agency's finding Appellant in violation of RR 300.22 - as it pertains to the escort portion of the incident - was clearly erroneous.

Moreover, Appellant could have enlisted the help of up to five deputies accompanying him to control DT without resorting to a potentially dangerous choke hold. Thus, Appellant's struggle to maintain control over DT by using his forearm against DT's neck was neither reasonable nor necessary in violation of RR 300.22, since other options for lesser non-lethal force were available.

V. DEGREE OF DISCIPLINE

The decision maker correctly determined a violation of RR 300.22 fell into conduct category E or F of the Agency's disciplinary matrix. She considered, however, that a forthcoming amendment to the matrix would expand the potential conduct categories for RR 300.22 to include category D.,[7] and assessed discipline accordingly. [Dulacki testimony].

[7] Dulacki testified the Agency expanded this rule downward to include Category D exactly for situations such as this, where the use of inappropriate force was unintentional.

Conduct falls under category D when it is (1) contrary to the Agency's guiding principles or interferes with its mission to provide care and custody to inmates, or (2) involves a demonstrable risk to the safety of a detainee or to law enforcement personnel. [Exh. 2-120]. The guiding principle cited by Dulacki was the obligation to protect detainees from harm. [Exh 2-49]. The potential danger of Appellant's pressure on DT's windpipe aptly described conduct in violation of Category D.

Next, the level of discipline, pursuant the matrix is "5" when, as here, there were no prior violations [*Id.*]. The range of penalties for level 5 is a suspension of 4-6 days if mitigated, a presumptive 10-day suspension, and 14-16 days if aggravated. [Exh. 2-127].

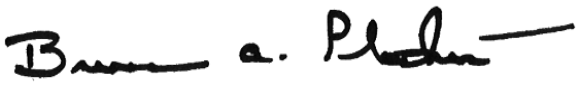
In balancing mitigating and aggravating factors, Dulacki determined a mitigated penalty was called for based on the following: some force was called for by DT's active resistance; Appellant had no prior violations counting against him, and his work reviews were favorable; Appellant's actions displayed no punitive behavior, ill intent or malice; DT sustained no discernable injury and refused to make any statement to IAU; Appellant's actions quickly ended DT's aggression with no injury to inmate or deputy; and there was little, if any, risk of an actual and demonstrable legal or financial risk to the Department or City by Appellant's actions. [Exh. 2-21,2-22 at §§ 19.6.2-19.6.9]. Based on the aforementioned substantial mitigating factors, and finding no aggravating circumstances, Dulacki elected to assess the minimum penalty in the mitigated range, a four-day suspension.

While it is conceivable that Appellant never applied pressure to DT's throat even when lifting him while his left arm was clearly under DT's chin, the decision maker's assessment of the video, testimonial, and documentary evidence in concluding Appellant applied pressure to DT's throat or windpipe was not contrary to what a reasonable person would conclude from the record as a whole. None of DT's actions called for a response of deadly force. Therefore, Appellant's use of a choke hold, as determined by the Agency, was not reasonable or necessary, and resulted in a violation of CSR 16-28 R., via RR 300.22. Moreover, the decision maker substantially followed the Agency's disciplinary matrix in assessing the degree of discipline and did not exceed her authority. [CSR 20-56 B.1c.i.-iii]. Because the Agency's basis for finding a violation of CSR 16-28 R., via RR 300.22 was not clearly erroneous;[8] its application of its disciplinary matrix was not clearly erroneous; and the decision maker did not exceed her authority, the Agency's discipline must be affirmed. [CSR 20-56 B.1.c.].

VI. ORDER

The Agency's assessment of a 4-day suspension against Appellant on June 30, 2020, is AFFIRMED.

DONE October 7, 2020.



Bruce A. Plotkin
Career Service Hearing Officer

[8] A different result may have obtained had the Agency borne the burden of persuasion to prove Appellant applied pressure on DT's throat rather than Appellant proving that finding was clearly erroneous.