

DECISION MODIFYING 16-DAY SUSPENSION TO 10 DAYS

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ISABELLE ROCHA, Appellant,

v.

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

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I. INTRODUCTION

The Appellant, Deputy Isabelle Rocha, appeals her sixteen-day suspension from the Denver Sheriff's Department (Agency) assessed on March 31, 2016, for alleged violations of specified Career Service Rules and Agency regulations. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on June 20 and August 4, 2016. The Agency was represented by Assistant City Attorneys Andrew Gomez and John Sauer, while the Appellant was represented by Lucas Lorenz Esq. and Don Sisson, Esq. of the law firm Elkus and Sisson, P.C. Agency's exhibits 1-7, 10, 14-22, and Appellant's exhibit O were admitted. The following witnesses testified for the Agency: Deputy Sylvia Luna; Sergeant Robert Petrie; and Civilian Review Administrator Shannon Elwell. The Appellant testified on her own behalf, and presented no other witness.

II. ISSUES

The following issues were presented for appeal:<sup>1</sup>

- A. whether the Appellant violated any of the following Career Service Rules: 16-60 A; or 16-60 L.<sup>2</sup>
- B. if the Appellant violated one or more of the aforementioned Career Service Rules, whether the Agency's decision to suspend her for 16 days conformed to the purposes of discipline under CSR 16-20.

III. FINDINGS

The Appellant, Isabelle Rocha, has been a deputy sheriff in the Agency since 2013. Her primary duties are the care and custody of inmates at the facility known as the Downtown Detention Center, or DDC.

On January 18, 2015, Rocha was in charge of inmate housing unit 5D at the DDC. For several days, inmate DH repeatedly asked for his court and release dates even after Rocha gave him the same answer and told him to write the information so he wouldn't forget. When

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<sup>1</sup> In addition to these listed issues, prior to hearing, Appellant claimed the decision maker, Civilian Review Administrator Shannon Elwell had no authority to determine rule violations or discipline. The Career Service Board has previously settled this same claim. *In re Gale*, 02-15A (CSB 7/21/16). Appellant was permitted to make an offer of proof regarding this claim prior to hearing, but was not permitted to provide evidence during hearing.

<sup>2</sup> Since this appeal was filed, the Career Service Rules have been revised. Because the previous version of the rules was in effect when discipline was assessed, that version applies here.

DH asked again on January 18, Rocha refused and told DH to stop asking. DH asked Rocha why she wouldn't provide him an answer. In response, Rocha ordered DH to sit in the 5D sally port "because of how disrespectful he was being towards me and because he was acting childish and is if it were a game." [Exhibit 2-6]. The Agency agreed this "timeout" was a proper response to a disruptive inmate. Rocha ordered DH to stop talking with inmates through the sally port sliding door and to remain seated.

Rocha's immediate supervisor, Sgt. Petrie, noticed DH sitting in the sally port and spoke with him about why he was there. Petrie then conferred with Rocha who told him DH was disruptive. [Exhibit 4-1]. Petrie returned to speak with DH, told DH his release date, told him it was not going to change, told DH to stop harassing Rocha, and told DH it was not funny when DH exhibited evident pleasure over his antics. Petrie left DH in the 5D sally port.

When DH continued to talk to other inmates on the outside of the 5D sally port through the sliding glass door, Rocha moved him to the 5G sally port, thinking DH knew fewer inmates there and would be less likely to talk with them. She warned DH she would handcuff him if he disobeyed. Despite Rocha's directive to remain seated and not talk to anyone, DH stood up, walked to the sliding door, and attempted to or did talk with inmates through the sally port door. At that point Rocha had enough. She entered the 5G sally port, and handcuffed DH's left wrist, attached the other end to the sally port bench, then "double-locked" the cuff on DH's left wrist to prevent the handcuff from over-tightening. [Rocha testimony]. She then left for her lunch break without telling anyone DH was handcuffed to the bench. She forgot about DH by the time she returned. [Exhibit 5-15, 5-16].

Thirteen minutes after Rocha handcuffed DH, Petrie was passing by and saw DH handcuffed to the 5G sally port bench. Petrie un-cuffed DH and, after hearing from DH what happened, contacted Captain Ortega regarding a possible inappropriate use of restraints.<sup>3</sup> Petrie and Ortega interviewed DH, and obtained DH's agreement to behave. Ortega instructed Petrie to write a report, [Exhibit 4], about the incident. Petrie sent DH to be seen by the nurse who reported no injury to DH following DH's complaint that his wrists hurt from overly-tightened handcuffs.

Petrie met with Rocha who told him she handcuffed DH to the sally port bench because he refused to comply with her order to stop talking to other inmates. She also explained DH resisted her. Asked why she did not report the handcuffing, Rocha said she forgot about DH when she went to lunch. Petrie ordered her to write a report about the incident. [Exhibit 4-3].

When Rocha was interviewed by Internal Affairs during the ensuing investigation, she stated DH was compliant with being handcuffed until she started to attach the other end to the 5G sally port bench at which point DH "had a clenched fist and started to resist by tugging and pulling his wrist away." [Exhibit 5-8].

A pre-disciplinary meeting was convened on March 10, 2016. Rocha attended with legal counsel. When asked why she handcuffed DH, Rocha repeated what she had told Petrie immediately after the incident - because he "didn't follow [a] direct order." [Exhibit. 5-30]. That order was "to not talk to the other inmates in the pod... standing up, walking to the doors, and walking back." [See also Exhibit 6-11]. Rocha also explained DH physically resisted by tensing when she double-locked his handcuffs.<sup>4</sup> She also explained the disruption caused by DH was "all verbal" because he continued to ask for his out date. She also stated he was causing other

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<sup>3</sup> Petrie described it at the time as a possible inappropriate use of force.

<sup>4</sup> Rocha clarified she had already handcuffed DH when he resisted her by tensing up. Double locking of handcuffs simply insures the cuffs will not tighten further, to avoid injuring an inmate's wrists. [Exh. 8]

inmates to be disruptive by talking to them. [Exhibit 6-7, 6-8, 6-9].

On March 31, 2016, the Agency delivered its notice of suspension to Rocha. This appeal followed timely on April 4, 2016.

Before hearing, the parties stipulated there was no Agency policy in effect concerning the use of restraints involving the 5D-5G sally port bench rings. Also, the Agency clarified that Rocha's ordering DH to the 5D-5G sally port as a "time-out" did not violate any rule, policy or law. The Agency's representative further stated the only basis for the alleged violations was Rocha's handcuffing DH to the sally port bench, without the requisite level of aggression under Agency rule to justify such restraint.

#### IV. ANALYSIS

##### A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-20, as a direct appeal of a suspension. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

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

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove the degree of discipline complied with CSR 16-20. The standard by which the Agency must prove each violation is by a preponderance of the evidence.

##### C. Career Service Rule Violations

###### 1. CSR 16-60 A. Neglect of duty.

To sustain a violation under CSR 16-60 A., the Agency must establish that Rocha failed to perform a known duty. In re Gomez, CSA 02-12 (5/14/12) citing In re Abbey, CSA 99-09, 6 (8/9/10).

At hearing, Elwell claimed Rocha violated this rule by failing to treat inmate DH with dignity and respect under the guiding principles of the Agency. [Elwell testimony]. That claim was not alleged in the notice of discipline, and is, therefore, dismissed and not considered here. A pre-hearing notice of each violation, and the basis for it, is required in order to provide the accused employee an opportunity to prepare a defense to it. In re Mounjim, 87-07, 8 (CSB 1/8/09).

Petrie testified it was protocol at the time of this incident for deputies to notify a supervisor after using restraints on an inmate. [Petrie testimony, cross-exam]. To the extent the Agency claimed Rocha failed to meet this duty, it was not alleged in the notice of discipline and is dismissed for the same reasons cited immediately above.

While the Agency alleged Rocha violated 16-60 A. in its notice of discipline, it did not specify a basis for it other than as a wrongful use of restraints, below. [Sheriff's Department Rules and Regulation 5013.1E]. No other basis for the Agency's claim under CSR 16-60 A. is apparent in its notice of discipline. It is well-established that a claimed neglect of a duty under a separate rule violation may not serve to double each such separate violation. In re Wright, 40-14, 7 (11/17/14). Consequently, the Agency failed to establish a violation under CSR 16-60 A.

2. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

The Agency claimed the Appellant violated the following written policies.

Sheriff's Dept. Rules and Regulations

300.19.1 Disobedience of Rule

Deputy Sheriffs and employees shall not violate any lawful Departmental rule (including CSA rules), duty, procedure, policy, directive, instruction, order (including Mayor's Executive Orders), or Operations Manual section.

Department Order 5013.1E – Use of Restraints

1. Purpose: the purpose of this order is to describe the Denver Sheriff Department (DSD) policy regarding restraint devices. The use of restraint equipment is intended to prevent escapes, assaults, or the commission of some other offense by violent or disruptive offenders. The use of restraints will safely and humanely secure prisoners during transport, escort and/or other appropriate situations.

2. Policy: It is Denver Sheriff Department policy to maintain control of inmates' actions through the use of restrains during transportation or other appropriate situations. Restraints will be applied and maintained in a safe, secure, humane and least restrictive manner. The use of restrains for offenders in general population units will be used only when all other reasonable methods have failed.

4. General guidelines:

The following three subsections implement the policy statement, above, by describing the conditions under which restraints may be used (subsection A); who may use them, along with a limitation (subsection B); and prohibited uses of restraints (subsection C).

A. Use of Restraint Equipment: The use of restraint equipment is designed to prevent the commission of an offense by violent or unruly inmates and as a precautionary measure against escape of inmates under escort. The purpose is to prevent injury to self, others or property and will be used as specified by procedures, and at the discretion of the officers.

Rocha acknowledged she is familiar with the Use of Restraints policy. This subsection A. restricts the use of restraints in order to prevent injury to an inmate, to an officer, to others, and in order to prevent damage to property, in situations posing a significant risk of an offense by a violent inmate or when there is a significant risk of an offense by an unruly inmate. It does not apply, as claimed by Rocha, merely to subdue an unruly inmate in the absence of a significant risk of an offense which is likely to result in injury. Rocha's theorizing potential wrongdoing by inmates who were blocking her view while they talked with DH, or unproven resistance by DH after being handcuffed, do not rise to the level of risk of injury justifying the use of restraints. Rocha did not claim DH was violent and, while DH may have been obnoxious, his disobedience to Rocha's directive under the circumstances – a nonviolent inmate was confined, alone, in a sally port – presented virtually no risk of injury. Consequently, Rocha was unjustified in her use of restraints on DH under this subsection.

This subsection A. also permits the use of restraints to prevent an offense by an unruly inmate; however, as found above, in the absence of a significant risk of injury, Rocha's use of restraints was unjustified. Finally, the phrase "at the discretion of the officers" does not apply independently of the restrictions stated before it, but in concert with them. Thus, the rule did not permit Rocha, as she claimed, total discretion whether to apply restraints to DH in the absence of a significant risk of injury or other defined circumstances.

This is not an overly-technical rule. Deputies may be guided by a reasonable concern that restraints will prevent injury. Inmate twitches, clenching which is detectable only by one person, and other subjective assessments appearing after-the-fact, do not, alone, constitute such reasonable concern of injury as would justify the use of restraints.

- B. Instruments of restraints (i.e.: handcuffs, leg irons, belly chains, black box security devices for handcuffs, soft restraints, restraint chairs, straight [sic.] jackets, electronic restraints, etc.) must be used by trained personnel and only when necessary.

The first restriction in this subsection was not at issue. The Agency did not allege Rocha was untrained in the use of restraints. However, the Agency alleged there was no necessity to handcuff DH. The circumstances defining "necessity" were defined above, and need no repetition here. For reasons found immediately above, there was no necessity for Rocha to handcuff DH under this rule, thus her use of handcuffs on DH was a violation of this subsection.

- C. Restraints as Punishment: restraints will not be used as a punishment under any circumstances, or to effect compliance with verbal commands where there is no physical threat.

This subsection, the core of the Agency's case, prohibits the use of restraints for two purposes: to punish an inmate, or to force compliance with a command when the inmate poses no physical threat. The Agency agreed that handcuffing an inmate to a sally port bench is an appropriate use of restraints when valid safety concerns arise, such as an inmate fights. The parties disagreed whether the situation Rocha faced with inmate DH rose to that level of justification.

Elwell found Rocha was in violation of both parts of this subsection C in that she used restraints on DH as punishment for his obnoxious behavior, and in response to his failure to follow her command when he posed no physical threat. [Elwell testimony; Exhibit 2-9]. Rocha claimed she handcuffed DH not to punish him, but out of safety concerns, as DH was disrupting the 5G housing pod.

The Agency found Rocha handcuffed DH to punish him because she was frustrated with DH's repeatedly asking for his release date, frustrated that he continued to talk with other inmates after being told not to, and based on her telling a colleague DH would be placed in sally port 5G "until he listened and stopped acting up." The Agency found further evidence of Rocha handcuffing DH to punish him because she said DH was acting "disrespectfully" toward her and "acting childish." [Exhibit 2- 9].

Rocha undoubtedly became frustrated with DH's antics as indicated from her comments, above. However, it does not necessarily follow that her motive for handcuffing him was punishment. Punishment as motive for use of force was evident in cases where deputies slammed an inmate into a wall or door, [see, e.g., In re Kemp, 19-13A (CSB 7/28/14); In re Lovingier, 48-13 (4/7/14); In re Norman-Curry, 28-07 & 50-08 (2/27/09)]. The degree of force Rocha exercised in this case makes a similar conclusion less evident. Rocha took care to double-lock DH's handcuff to insure it would not over-tighten. That action tends to negate a

motive to punish. Nothing in the video recording of the incident indicates Rocha handled DH in a hostile or aggressive manner. The absence of such actions also provide some indication Rocha did not intend to punish him. The Agency's allegations are no more persuasive than Rocha's denial nor more persuasive than the objective evidence. Consequently, it remains unproven, by a preponderance standard, that Rocha handcuffed DH to punish him.

The next question under this subsection C is whether Rocha handcuffed DH to force compliance with her directives when DH posed no physical threat. At times, Rocha acknowledged that handcuffing DH was improper under this standard [Exhibit 5-31], or DH's resistance was "all verbal." [Id]. At other times, she claimed she was justified in handcuffing DH because he physically resisted her. [Rocha testimony; Exhibit 4-4; Exhibit 8-3].

The preponderant evidence supports the Agency position and does not support Rocha's sometimes-claim that DH posed a physical threat. Rocha testified she was familiar with this Use of Restraints policy during her IA interview on January 18, 2015. Rocha first told the IA interviewer she handcuffed DH only for refusing her order as indicated in the following exchange.

IA: And so you had told him -- you informed him that he would be handcuffed to the bench if he did not follow your order?

ROCHA: After, yeah, after he wasn't listening before in 5D and in 5G. So, yes, I did inform him that if he didn't sit down, if he didn't follow my direct order then that's what would happen.

IA: And your direct order was?

ROCHA: To not talk to the inmates in the other pod and to have a seat, not to pace around.

[Exhibit 5-11].

Tellingly, in the video recording, DH offered his hand passively to Rocha to be handcuffed, [Exhibit 15; *see also* Exhibit 5-8] and, as Rocha handcuffed DH's hand to the bench where he was seated, DH sipped from a cup. [Exhibit 15 @ 18:02:35-18:02:44]. These passive actions are incompatible with a physical threat. Other indicia that DH posed no threat included that Rocha did not visibly react in a way that suggested she was alarmed, and she did not call for backup.

No other threat existed at that time, and Rocha acknowledged DH's left hand was already handcuffed to the bench when she claimed DH pulled, tugged, and made a fist with the handcuffed hand. [Exhibit 5-28, 5-29]. In the absence of any physical threat, Rocha's admission that she handcuffed DH to effect compliance with her order - for DH to remain seated and not talk with other inmates - was a violation of D.O.5013.1E. 4. C., and therefore violated CSR 16-60 L.

Rocha's other claims, that she handcuffed DH for being disruptive and out of safety concerns, were variations of the same physical threat claim, above, and were equally unpersuasive. For example, Rocha claimed, and I find, the video recording does not show DH's handcuffed hand at the time Rocha alleged he clenched and tugged his handcuffed hand. Nonetheless, the video is consistent with the Agency's claim, and more credible than Rocha's claim, that DH showed no other indication of resistance at that time, i.e. DH remained seated, appeared otherwise compliant, and was not attempting to stand, did not swing his other arm or otherwise threaten Rocha, sipped from a cup, and offered his unrestrained hand to be handcuffed.

K. Emergency/Special Situations: Combative prisoners (within a facility) will be restrained in accordance with divisional procedures. Inmates will not be left in restraints any longer than is necessary to gain control of the inmate and to ensure that

the inmate is not a threat to him/herself or others. This includes the use of restraint chairs. Appropriate reports will be written.

Rocha left DH handcuffed to the 5G sally port bench when she took her lunch break. She did not tell anyone to look in on him when she left. Even if Rocha had shown that DH was threat when she handcuffed him (and she did not make such a showing), when Rocha left DH handcuffed while she went to lunch without telling anyone, she could not be aware if he continued to pose a threat or risk of a threat, and, more likely, didn't care, as she left him unattended. She therefore left DH in restraints longer than necessary to gain control of him and left him handcuffed longer than necessary to ensure he was not a threat to himself or others, in violation of this rule.

## V. APPELLANT CLAIMS

### A. Authority of decision maker

The Appellant was not permitted to present evidence regarding Elwell's authority to issue discipline in this case.<sup>5</sup> An offer of proof was permitted to preserve the claim for appeal. The Career Service Board has determined Elwell's authority, as Civilian Review Administrator, or more precisely, as the person to whom the Manager of Safety has delegated such authority, has authority to issue discipline on behalf of the Manager of Safety. In re Gale, 02-15A, 2-3 (CSB 7/21/16).

### B. Violation of Agency Rules/Procedures.

Rocha claimed discipline should be overturned because the pre-disciplinary process was defective. Elwell acknowledged that, at the time of the pre-disciplinary hearing in this case, the Agency's Complaint and Procedure Policy<sup>6</sup> required two division chiefs to be present at the meeting, but were not. [Elwell cross-exam]. First, an agency's failure to comply strictly with its own procedures is not fatal to discipline under the Career Service Rules. Gale, at 3-4. Second, the due process hearing conducted on June 20 and August 4, 2015 in this appeal was a *de novo* consideration of the underlying facts and was free of any Agency defects in the application of its own policy.

Rocha also claimed Agency policy did not specify that the Civilian Review Administrator could be present for the pre-disciplinary meeting. Elwell acknowledged that was the case. Rocha's attorney asked "why is it OK for you to violate departmental orders, but not Denver Deputy Sheriffs? Don't you think that's a little hypocritical?" [Elwell cross-examination]. The same comments immediately above apply equally here. Any internal policy violation was not a fatal flaw, and any such internal violation was rendered moot by this *de novo* review.

At the time of the incident in this case, the Agency had no restraint policy specific to sally port bench rings. Rocha claimed the subsequent remedial policy proves she did not violate the then-existing restraint policy. The argument fails because the portion of the policy for which violations were found, above, were not directly related to the fact that Rocha used sally port bench rings, but that she used restraints at all under the then-existing policy, the language of which has not changed.

Rocha also claimed she was untrained in the use of restraints as it pertained to the sally port benches [opening statement]. While there was no order with respect to handcuffing

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<sup>5</sup> See also, Appellant's Amended Pre-hearing Statement, p.2.

<sup>6</sup> That document was shown to the witness but not offered into evidence.

inmates to sally port benches, the testimony of Luna and Petrie, as well as Rocha, made it clear the restraint policy in effect at the time, and stated immediately above, was both in effect and known to deputies, including Rocha on January 8, 2015.

## VI. DEGREE OF DISCIPLINE

The purpose of discipline under the Career Service Rules is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense(s), the employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20. The measure of these considerations is whether the penalty assessed is within the range of penalties that could be imposed by a reasonable and prudent administrator, or is clearly excessive. In re Ford, 48-14A, 8 (CSB 9/17/15).

### A. Seriousness of the proven offenses

Elwell determined the degree of discipline was mandated by the Agency's so-called disciplinary matrix. Exhibit 21-85 through 21-92. She determined the violations fell under Category D because Rocha's handcuffing DH for the purpose of punishment and in the absence of a physical threat, was conduct substantially contrary to the guiding principles of the Agency, including respect, accountability, integrity, and fairness. [Elwell testimony]. The next step Elwell took was to refer to Exhibit 21-90, which states that, for a first Category D violation in the past seven years, the level of discipline was five. From there, the penalty table at Exhibit 21-86 states the presumptive penalty for level five is 10 days; mitigated penalty 4-6 days, and aggravated penalty 14-16 days.

Elwell chose the highest aggravated penalty under the matrix due to Rocha's "lack of candor."<sup>7</sup> [Exh. 21-31 at 19.9.10]. Elwell believed Rocha lacked candor because she:

(1) gave multiple and inconsistent reasons how, when, and why she handcuffed DH. Specifically, Elwell stated Rocha told IA at first that DH resisted as she attached the handcuff to the bench, but, after watching the video, she told IA he resisted while she double-cuffed him. These statements are not inherently inconsistent, and are readily attributable to honest differences in Rocha's recollection before and after reviewing the video evidence. Moreover, Elwell apparently found insufficient indicia to charge Rocha with dishonesty. The preponderance of the evidence did not support a finding of lack of candor in this regard.

(2) told Petrie she handcuffed DH for making a disturbance in 5D, [Elwell testimony], while, in her OIC report, and at her pre-disciplinary meeting, Rocha stated she handcuffed DH for making a disturbance in 5G where, according to Elwell there was no disturbance. [Elwell testimony; Elwell cross-exam]. Here too, the preponderance of the evidence does not support a finding of lack of candor. It appears the Agency agreed with Rocha's assessment that DH was causing a "disruption" in 5D, [Exhibit 10-6; Petrie testimony]. Rocha's assessment that DH was causing a disruption or disturbance in 5G, while misguided, fails to rise to the level of lack of candor. Elwell found those inconsistent statements showed a lack of candor. As above, Elwell apparently found insufficient indicia of dishonesty to charge Rocha with it. Also, inconsistent statements, alone, are insufficient to determine either dishonesty or lack of candor. Some element of deception either by commission or omission is required. [See In re Lewis, 51-14A, 5-6 (CSB 11/9/15)]. Elwell's description of Rocha's disparate recollections was no more than inconsistency and lacked indicia of intent to deceive. Rocha's statements - that DH caused disruption or disturbance in both 5D and 5G - are not inconsistent, and do not prove lack of

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<sup>7</sup>Also, Elwell described a lack of candor as a "lesser included offense" to a deceptive act under agency rule. She further described lack of candor as "not forthcoming" which she further specified as the multiple reasons she supplied at various times and to various people for when, where, and why she handcuffed HD. [Elwell cross-exam].

candor.

Elwell also found aggravation of the presumptive penalty was justified by “an actual and demonstrable legal or financial risk to the Department or City” under the Agency’s disciplinary matrix. [Exhibit 21-30 @ 19.9.3; Elwell testimony; Elwell cross-exam]. Elwell explained the actual and demonstrable risk as “cities and law enforcement departments are sued all the time for handcuffing as an excessive force measure.” She further explained such risk as “Deputy Rocha was prohibited from handcuffing the inmate under the circumstances that she did; this would open the door for the inmate to then to sue under section 1983 of 42 U.S.C. for excessive force as it pertains to tightly handcuffing.” Elwell’s determination of the actual and demonstrable risk to the Agency or City was too speculative to justify that aggravating factor under the matrix. That an inmate could possibly sue does not amount to actual and demonstrable legal or financial risk to the Agency or to the City. [See Exh. 21-30 at 19.9.3]. Moreover, the nurse who checked DH for injury due to the allegedly overly-tightened handcuffs found none.

Elwell also found aggravating circumstances in the potential for DH to sue the City for being wrongfully handcuffed to the 5G sally port bench. [Elwell testimony]. Even if a lawsuit were more than a remote possibility, the damages for an inmate wrongfully handcuffed for 13 minutes would be minimal. In short, there was insufficient justification, by the objective evidence, to justify an aggravated penalty in this case.

Finally, the Career Service Board has recently evaluated several use of force decisions, finding that the degree of discipline imposed by the Agency for the improper use of force has been inconsistent. In re Ford, 48-14A, 5-6 (CSB 9/17/15). The Board pointed out that a Sergeant received a 10-day suspension for wrongfully instructing subordinates to fire Tazers at an inmate. In re St. Germain, 24-14A (CSB 9/3/15). Another deputy inappropriately used force when he shoved an inmate causing him to fall. In re Jordan, 30-14A (CSB 2/19/15). In another case, a deputy who forced an inmate into a wall and choked him, received a 10-day suspension. In re Fuller, 39-14A (CSB 8/7/15).

An aggravated, 16-day suspension, under the Agency’s matrix, for wrongfully handcuffing an inmate for 13 minutes, where no injury and no distress resulted to the inmate, is an inconsistent application of the matrix. In other cases involving similarly clean records and likelihood of reform, more egregious uses of force, resulted in only 10-day suspensions. Such inconsistencies continue to point out the subjective nature, and internally inconsistent application, of the Agency’s disciplinary matrix, in contradiction to its purpose to provide consistent discipline.

More directly to the point, under the Career Service Rules, the penalty assessed here was not within the range of alternatives available to a reasonable and prudent administrator, and was clearly excessive under the circumstances. In re Ford, 48-14A, 8 (CSB 9/17/15); *see also* DSD Handbook Policy Statement.

## **B. Prior Record**

Elwell determined Rocha had no prior discipline that counted for purposes of discipline in this case. The Career Service Rules require discipline to be progressive, when possible. CSR 16-20; *see also* In re Ford, 48-14A, 8-9 (CSB 9/17/15).

## **C. Likelihood of Reform**

Rocha’s failure to acknowledge any wrongdoing makes it unknown to what extent she will reform.

**D. Additional Factors.**

It was apparent at hearing that Rocha is a well-regarded officer. Her supervisors spoke highly of her dedication and the performance of her duties. Rocha appeared to misapprehend the use of restraints policy when she violated it, rather than applying restraints out of an enraged desire to punish an inmate, as was the case in other use of force cases, above, resulting in lesser discipline.

In view of the purpose of discipline, severity of the proven violations, and dearth of aggravating factors - while also weighing Rocha's failure to acknowledge wrongdoing - no more than the presumptive penalty under the Agency's matrix was justified under the principles espoused under CSR 16-20.

**VII. ORDER**

The Agency's 16-day suspension of Deputy Rocha's employment, beginning April 17, 2016, is MODIFIED to 10 days.

DONE September 14, 2016.



Bruce A. Plotkin  
Hearing Officer  
Career Service Board

**NOTICE OF RIGHT TO FILE PETITION FOR REVIEW**

A party 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 certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board  
c/o Employee Relations  
201 W. Colfax Avenue, Dept. 412  
Denver CO 80202

BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.

CERTIFICATE OF DELIVERY

I certify that, on September 14, 2016, I emailed a correct copy of this Decision to the following:

Deputy Isabelle Rocha, [isabelle\\_rocha@yahoo.com](mailto:isabelle_rocha@yahoo.com)

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