An inmate in the care and custody of the Denver Sheriff’s Department (“Agency”) was in his cell. He was suicidal. He was banging his head repeatedly against the cell wall, inflicting injury upon himself. A deputy implored him to stop, but he would not. Appellant, Denver Deputy Sheriff Sgt. Ned St. Germain assembled a team of six deputies to deal with the prisoner. Appellant had two of those deputies arm themselves with tasers. Before entering the cell with his team, Appellant asked the inmate to back away from the cell door and extend his hands so that he could be handcuffed. The prisoner refused. Appellant and his team eventually entered the prisoner’s cell and found him sitting on the cell bench. Appellant ordered the inmate to turn around, kneel, and place his hands behind his head. The prisoner emphatically refused, though not physically resisting any deputy. Appellant then told the prisoner that if he did not cooperate, he would be tased. Another deputy in the room implored the prisoner to cooperate, but to no avail. Appellant then ordered his deputies to tase the inmate.
The incident was investigated. Ultimately, the Safety Department determined that the order given by Appellant to deploy the tasers violated Departmental policy and issued Appellant a ten-day suspension.

Appellant appealed his suspension to a hearing officer. The Hearing Officer, after conducting an evidentiary hearing, upheld the suspension, finding that Appellant had violated the Departmental rule which requires all uses of force to be reasonable and appropriate\(^1\). The Hearing Officer further determined that Appellant had violated the Departmental rule which prohibits Electronic Control Devices (such as a Taser) from being used to effect compliance with verbal commands where there is no physical threat (Departmental Order 5014.11).

Appellant filed a timely appeal of the Hearing Officer’s decision. After a thorough review of the Hearing Officer’s decision, the briefs of the parties\(^2\), and the record below, we affirm the Hearing Officer’s decision.

The Agency has a specific policy concerning the use of tasers. That policy (Departmental Order 5014.11) provides, in part:

... situations that justify the use of less lethal force ... include but are not limited to, quelling disturbances, preventing escape, protecting the welfare of inmates, staff and the public, and preventing extensive damage to

\(^1\) Departmental Order (D.O.) 5011.1L.

\(^2\) We note that Appellant provided this Board with a 53 page brief. The brief was well written and, for the most part, well reasoned and might have been persuasive had it been a brief to the hearing officer. But the bulk of the brief asked us to re-weigh evidence, re-weigh credibility, and resolve issues of conflicting facts, that is, almost the entire argument in the brief dealt with trying to convince us that the Hearing Officer should have come to a different conclusion. But that, of course, is not our standard for review. As we have noted on numerous occasions, we do not make credibility determinations. We do not re-weigh evidence. We do not resolve disputes of fact. We do not overturn factual findings made by the hearing officer unless they are clearly erroneous. So while it may have been that had the Board been the entity to hear this case in the first instance as the trier of fact it might have found differently than did our hearing officer (and we are not saying or even implying that this would have occurred), practically all of Appellant’s argument, which basically amounts to a claim that the Hearing Officer “got it wrong” and should have ruled differently, asks us to essentially re-try the case and is, therefore, unavailing.
property by inmates. The authorized TASER-type control devices ... can be used when self-defense is justifiable or when an inmate in our custody physically resists a lawful order. Electronic Control Devices\(^3\) will not be used ... to effect compliance with verbal commands where there is no physical threat.

The Agency, in imposing discipline, believed that the prisoner presented no physical threat and that none of the other conditions for legitimate use of the taser were present when he refused to obey the verbal commands to get on his knees and put his hands behind his head.

The Hearing Officer, after reviewing the video of the incident and after hearing testimony from Appellant and his witnesses, found that Appellant lacked sufficient objective justification for his ordering the use of the taser. For example, Appellant claimed that he needed to tase the inmate to prevent him from further injuring himself because he had been banging his head on the cell wall for thirty minutes. Appellant, however, also testified that at the time he ordered the tasing of the inmate, he was unaware of the fact that the inmate had been banging his head against the cell wall. Since the Hearing Officer's decision in this respect is supported by evidence in the record, we will not disturb his finding.

The Hearing Officer also analyzed Appellant's other stated reasons for ordering use of the taser, such as his feeling that the inmate might choose to fight his deputies, his belief that the inmate was building anger, his belief that the inmate was "balled up inside" or that he had sensed the inmate had a tense torso.\(^4\) The Hearing Officer found

\(^3\) A taser is a type of electronic control device.
\(^4\) The Hearing Officer quite reasonably expressed doubt as to Appellant's ability to make some of these observations, since the inmate, at the time, was wrapped in a suicide (prevention) vest.
these alleged justifications for ordering the use of the taser to be too subjective, and not sufficient to justify the use of force which must be objectively reasonable\(^5\) under the circumstances. We believe the Hearing Officer's rationale for finding that Appellant violated the policy concerning the use of the taser to be well reasoned and totally justified under the specific language of the policy. We further find there is ample evidence in the record supporting all factual findings and conclusions made by the Hearing Officer underpinning his ultimate conclusion concerning the violation of Agency policy. In sum, the record supports the Hearing Officer's ultimate finding that Appellant violated the Agency's policy regarding the use of the taser when he ordered it to be used on a non-threatening, physically non-resisting inmate.

Appellant appears to argue at page 32 of his brief that this Board should, essentially, strike the aforementioned taser policy from the Agency's books because, he claims, it is inconsistent with the Agency's more general use of force policy, referring to it as a "discordant, ad hoc 'supplement'" to the use of force policy,\(^6\) resulting in a "vague mish-mash."\(^7\)

First, we will not strike the policy. We are not even convinced that we have the authority to do so had we been so inclined. We would not strike the policy because we do not believe it is unreasonable and we do not believe it is in any way inconsistent with the Agency's more general use of force policy. We actually see the taser policy as amplifying and defining the contours of the Use of Force Policy. While the Use of Force policy speaks primarily in generalities, the taser policy at issue speaks in specifics. It

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\(^5\) When viewed from the standpoint of an objectively reasonable officer.

\(^6\) This is not an argument that factual findings made by the hearing officer were clearly erroneous, nor is it truly an argument that the hearing officer misinterpreted the taser policy. We decide this issue, therefore, assuming it is raised under CSR 19-61(C), which allows us to decide matters of policy-setting precedent.

\(^7\) We presume from the tenor of the argument that this is somehow worse than a specific mish-mash (the legal definition of which, in any event, manages to elude us).
outlines in more detail than the general policy when it might or might not be appropriate to use the taser as a force option. It helps deputies determine when the use of the taser is objectively reasonable, per Agency policy. Rather than creating confusion, as alleged by Appellant, we believe the policy helps eliminate uncertainty regarding appropriate circumstances for the use of the taser. We see no unfairness in the Agency laying out in a specific, written policy, the circumstances under which it would find deployment of the taser to be objectively reasonable.  

Appellant further urges us to overturn the Hearing Officer's decision on the grounds that the Hearing Officer erroneously interpreted the Agency's Use of Force Policy when he agreed with the Deputy Director of Safety's interpretation of the policy as calling for a "minimum" use of force or resort to the "least" amount of force reasonable under the circumstances. But we do not believe that the Hearing Officer (or the Deputy Director of Safety) committed any error when adopting this interpretation of the policy. While it is true, as Appellant alleges, that no specific language of the policy calls for only the "minimum" or "least" amount of force available, we believe such an interpretation is a reasonable synthesis of the policy when taken as a whole, that this interpretation is evident and that knowledge of such is chargeable to the Agency employees.

Indeed, Appellant's argument appears to us to be a claim that the Agency's Use of

8 We should be mindful that we are not necessarily determining whether a deputy, in employing the taser, has violated the constitutional rights of an individual on whom the taser was deployed. Rather, we are deciding whether the deputy's use of the taser complied with the Agency's internal policy specifically applicable to the use of the taser.

9 Alternatively, Appellant argued that his ordering the use of the taser was consistent with and not violative of the Agency's policy. But the Hearing Officer made specific findings as to why this was not the case. Those findings are supported by record evidence and the conclusions made by the Hearing Officer employing those findings are well reasoned and supported by the evidence and the terms of the Agency policy at issue.

10 Let alone any "profound error" as alleged on page 11 of Appellant's brief.
Force Policy amounts to nothing more than following the dictates of *Graham v. Connor*, 490 U.S. 386 (1989). And while *Graham v. Connor* is unquestionably an important part of the Agency's Use of Force policy, it is not the end-all and be-all of that policy. The policy may use *Graham v. Connor* as a baseline or a starting point, but the entire policy builds on *Graham v. Connor* and informs an officer not merely on what the law on use of force and excessive force is, but what the Agency expects from its officers when using force. The Deputy Director of Safety determined that Appellant's ordering the use of the taser, under the specific circumstances presented, violated *Agency policy*. That policy requires, *inter alia*, that an officer's use of force must be "reasonable and appropriate in relation to the threat faced" (D.O. 5011.1L(2)), that an officer "use only that degree of force which is necessary and reasonable under the circumstances" (D.O. 5011.1L(4)), and that officers employ "only the force necessary to perform their duties" (Id).

If the Agency had intended its Use of Force Policy to be nothing but *Graham v. Connor*, it would simply say, "follow *Graham v. Connor.*" But the Agency policy is more than that, and it is plain, as noted above, that there is significant limiting language in the actual policy; language that defines in greater detail than a supreme court decision when the Agency itself will consider a use of force reasonable under the circumstances.

The Hearing Officer found that Appellant's ordering the use of the taser was not reasonable given the entire policy and given the specific circumstances. The findings are supported by record evidence. We believe the Hearing Officer's interpretation of the Agency's Use of Force Policy to be not only reasonable, but correct. We see no grounds for vacating his decision.

Finally, Appellant argues that it was error for the Hearing Officer to fail to
consider the fact that several individuals within the chain of command believed Appellant did nothing wrong. Appellant argues that it is improper or at least unfair for the Executive Director of Safety (or his or her designee) to have resurrected a dead issue of discipline. But while we all may be adherents to the proposition that "it ain't over til it's over," in this case, it was not over when Acting Chief Gale or Major Horner thought it should be. It was not over, that is, the issue of discipline was not dead or closed until the Executive Director of Safety determined it to be so. Frank Gale can make a recommendation and do nothing more. The same holds true for Major Horner and even for Director Wilson. The decision to issue discipline, or not issue discipline, is one that is ultimately made by the Appointing Authority and no one else. That fact that people lower in the chain of command may have believed that Appellant did not violate policy did not prove that Appellant did not, in fact, violate policy. Those opinions in no way render the Deputy Director's opinion to the contrary improper, and certainly provide us with no grounds for vacating the Hearing Officer's decision.

For all of these reasons, the Hearing Officer's decision is AFFIRMED

11 Acting Division Chief Frank Gale evidently believed Appellant had not violated the Use of Force Policy. Major Mike Horner at one time believed the same and wrote a letter exonerating Appellant, but later rescinded that letter. The Hearing Officer noted that Horner, when writing the letter, was focused on the general Use of Force Policy and was not considering the specific taser policy at issue in this appeal.


13 The Civil Service Commission case of Kilroy v. Sparks and Murr, 11 CSC 03A-04A, cited by Appellant on page 51 of his brief is inapposite to our case. In Kilroy, the Commission outlined criteria for when the Executive Director of Safety could rescind discipline he had already imposed. It in no way limited the Executive Director's authority to issue discipline in the first instance. In fact, we note that under current Commission Rules, specifically, Rule 12, Section 8(D)(5)(c), Gale's and Horner's recommendations would not even be admissible at hearing, undoubtedly because, as is the case here, those lower recommendations or opinions have no legal affect on the Executive Director's exercise of his authority and are, therefore, irrelevant to any disciplinary appeal.

14 We had originally voted to reduce the ten-day suspension to a five-day suspension based on the Hearing Officer's comment that the original discipline was issued at five-days, but was aggravated to ten days. We discovered this comment to have been made in error. The record reflects that the ten-day penalty imposed was not an aggravated penalty but was, in fact, the recommended standard matrix penalty for this misconduct. Because we determined that our initial decision was based on a misconception, and that a ten-day suspension was within the range of alternatives available to a reasonable manager, we re-voted to uphold the imposition of the ten-day suspension.
SO ORDERED by the Board on July 16, 2015, and documented this 3rd day of September, 2015.

BY THE BOARD:

Colleen M. Rea
Chair (or Co-Chair)

Board Members Concurring:

Colleen M. Rea
Derrick Fuller
Neil Peck