HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 22-14

DECISION AFFIRMING DISMISSAL

IN THE MATTER OF THE APPEAL OF:

STEVEN VALERIO, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Steven Valerio, appeals the termination of his employment on April 17, 2014, 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 July 31, 2014. The Agency was represented by John-Paul C. Sauer, Assistant City Attorney, while the Appellant was represented by Reid J. Elkus, Esq. of the firm Elkus, Sisson & Rosenstein, P.C. Agency exhibits 1-5, 1 and 11 were admitted. Appellant offered no additional exhibits. The Agency called the following witnesses: Appellant; Sgt. Michael Jordan; and Deputy Manager of Safety Jess Vigil. Appellant presented no additional witnesses.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant violated Career Service Rule (CSR) 16-60-L;

B. if the Appellant violated CSR 16-60L., whether the Agency's decision to terminate his employment conformed to the purposes of discipline under CSR 16-10;

1 In Exhibit 3, only the top paragraph is admitted into evidence.
III. FINDINGS

The Appellant, Steven Valerio was a deputy sheriff for the Agency from 2001 until his termination in April this year. His primary duties were the care, custody and control of inmates.

The Agency disciplined Valerio for using excessive force on an inmate December 26, 2012, and for lying about the incident during a subsequent investigation into the incident. Valerio denied using excessive force, while admitting he inappropriately lifted the inmate by his handcuffs. He denied lying about the incident during the subsequent investigation, attributing discrepancies to lapses in memory. The most convincing evidence, regarding use of force, was Exhibit 5, the silent video recording of housing pod 4B in the Denver downtown detention center on the morning of December 26, 2012. The video revealed the following sequence of events.

On December 26, 2012, Valerio was sitting at the duty desk in an open-style inmate housing pod. He was speaking on the desk phone when an inmate, Martinez, approached. Martinez placed his hands on top of the 40" cinderblock half-wall which surrounds the desk on three sides and waited there for Valerio to finish. 14 seconds later, Valerio remained on the phone, ignoring Martinez, who backed away, began pacing, ruffling his hair, and otherwise appeared agitated.

When Valerio finished his call, Martinez, approached the desk again, and engaged in a conversation with Valerio. Valerio remained seated while Martinez placed his arms on top of the wall and leaned his head over the wall toward Valerio. They remained like that, in conversation for 34 seconds, until Martinez placed his hand on top of the desk phone and began to slide it toward Valerio.

In the same instant, Valerio stood up, and made a full swing with his right arm toward Martinez’s face. Martinez recoiled from the swing.

Valerio came around the desk. Martinez brought his arms up protectively around his face. Valerio grabbed Martinez in a head-lock, slammed him into the half-wall and threw him to the floor. Martinez did not resist. Valerio was on top of Martinez, and handcuffed his hands behind his back. Valerio stood up, and, in violation of Agency policy due to the high risk of injury, lifted Martinez to his feet by the handcuffs while Martinez’s hands were still behind him.

Four other deputies assisted and took Martinez from Valerio. Before that incident, Valerio had no prior interaction with Martinez, and was unaware of any issues with Martinez and any other officer. [Exhibit 2-6].
In keeping with an Agency requirement to submit a report whenever an officer has physical contact with an inmate, Valerio wrote an incident report after the incident. He began the report within 10 minutes and finished it about 45 minutes later. His report explained that, when Martinez spoke to him, Valerio told him to take a seat because “there were other inmates at my desk at the time.” None of the recordings from five cameras at the scene showed any inmates near the desk. He also wrote Martinez “picked up my [desk] telephone and threw it at me.” Martinez neither picked up the phone nor threw it. Valerio also wrote that, after initially controlling Martinez, Martinez continued to resist. [Exhibit 3-1]. No resistance was recorded by video. [Exhibit 5]. Valerio’s report did not mention that he took a swing at Martinez, threw him against the half-wall, threw him to the floor, and did not mention that he picked up Martinez by the handcuffs.

Based on Valerio’s statement that Martinez threw the desk phone and struck him in the shoulder, the Denver Police Department (DPD) investigated the incident as a possible assault on an officer by an inmate. Valerio provided a written statement to DPD two hours after his statement to IAB. Much of the language in the two reports was identical but, in his IAB statement, Valerio wrote Martinez “picked up my telephone and threw it at me.” [Exhibit 3-1]. In the DPD statement he added “Martinez picked up my telephone and threw it at me hitting my left shoulder.”

A pre-disciplinary meeting was held on April 3, 2014. Appellant attended with legal counsel. Both Valerio and his attorney gave statements. On April 17, 2014, the Agency delivered its notice of termination, effective the same day. This appeal followed timely.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A.1.a., as a direct appeal of a dismissal. 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 claim is by a preponderance of the evidence. The Agency cited one Career Service Rule (CSR) violation.
C. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules. When citing this subsection, a department or agency must cite the specific regulation, policy or rule the employee has violated.

The Agency claimed Valerio violated the following written rules and regulations.

**Department Rules and Regulations**

**RR 200.3 – Accurate Reporting**

Deputy Sheriffs and employees shall submit an accurate and complete written or oral report where one is required or when ordered to do so.

Valerio was aware that a complete and accurate report is required after every inmate contact. [Valerio testimony]. Vigil determined Valerio violated this rule by omitting certain use of force details and exaggerating others in two official reports [Exhibit 3; Exhibit 4], and in his statements to IAB. [Vigil testimony].

Valerio left out of his reports that he swung at Martinez with a closed fist, grabbed him around the neck, threw him against the half wall and to the floor, and lifted him by the handcuffs. He also inaccurately accused Martinez of assaulting him, resisting, and continuing to resist even after he threw Martinez to the floor and after Martinez was handcuffed with his hands behind his back, where, at most, Martinez was trying to protect himself. [see Exhibit 5-1; 5-2; 5-3]. Those inaccuracies each establish a violation of RR 200.3.

**RR 200.4.2 – Commission of a Deceptive Act**

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

During his IAB interview, Valerio was shown the video recordings of the December 26 incident. He explained he omitted striking or pushing Martinez from his report because the “incident happened quickly” while acknowledging he misstated some facts. [Exhibit 2-4]. He explained he did not want to amend his report after remembering striking at Martinez because it would look funny for him to do so. [Id at 17:34-17:40].
The first 81 words of Valerio's reports to IAB to DPD were identical, including punctuation. Then, notable inconsistencies appeared. In Valerio's IAB report, after noting Martinez stated he was going to stab someone, Valerio wrote other inmates were "at the desk," which added an inherent, imminent danger. In his DPD report, however, Valerio wrote that he simply told Martinez to take a seat, and made no mention of inmates nearby. In his IAB report, Valerio wrote Martinez threw a phone at him while, in the DPD report, he added very specific information that the phone struck him in left shoulder. All other language in both reports was identical.

In addition, Valerio's claim, that the passage of time improved his memory, defies common sense. If such were the case, then his statement to DPD, two hours after his statement to the Agency's IAB, should have been more, not less accurate; however, two hours after stating Martinez threw a desk phone at him, he remembered the phone struck him in the left shoulder, a significant detail he disavowed when shown the video recording of the incident. Valerio acknowledged Martinez did not even pick up the phone. [Exhibit 2-10].

In another example of Valerio's inconsistencies, he wrote, soon after the incident in his IAB report, that other inmates were at the desk, then two hours later did not mention that circumstance in his DPD report.

Together, these inconsistencies raise doubt about Valerio's credibility. Where video evidence unambiguously establishes that an inmate presented no imminent threat, a deputy's claim to the contrary, during the course of an investigation, establishes a violation of RR 200.4.2.

**RR 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.

This rule applies only the in absence of the application of a more specific obligation. Since other, more specific, rules applied, this rule is surplus.

**Departmental Order 5011.1J - USE OF FORCE**

2. Policy: It is the policy of the Denver Sheriff Department (DSD) that officers use physical force only as prescribed by the Colorado Revised Statues (CRS) and Internal Departmental standards to perform any legitimate law enforcement or detention related function. The amount of force used will be reasonable and appropriate in relation to the threat
faced. In all cases, force will be de-escalated once the legitimate function is achieved or the resistance has ceased.

The Agency interprets this rule as obliging its officers to use only the minimum degree of force necessary to accomplish their duties under the circumstances. [Vigil testimony]. The Agency claimed Martinez posed no threat to Valerio at the time Valerio took a swing at, then manhandled Martinez, and endangered him further by lifting him by the cuffs behind his back, both in violation of this use of force rule. [Id]. Valerio claimed Martinez' reaching for the phone and sliding it toward him was threatening and he (Valerio) responded accordingly. Valerio explained inmates are not allowed to reach over the desk because there are objects on the desk which can be used as weapons, such as a stapler, pens, and the telephone. [Valerio cross-exam].

While Valerio's concerns about desk objects being used as weapons may be true in theory, he testified he never felt threatened by Martinez; he allowed Martinez to lean over the desk without issue; and the first time Valerio mentioned objects on the desk could be used as weapons was at hearing. In addition, his credibility is questionable based on his written statements that Martinez threw the desk phone at him (in the IAB report) or struck him with it (in the DPD report). Valerio's explanation that he gained clarity with time undermines his own argument, since the police report he filed later should, according to Valerio's logic, have been more accurate. Yet he stated, even less accurately than his first report, that Martinez struck him in the left shoulder with the phone.

After viewing the recording of the incident during his IAB interview, Valerio agreed Martinez never threw the phone or hit him with it. Valerio explained Martinez moved the phone toward him and he inaccurately thought it struck him. [Exhibit 2-10]. The explanation is improbable. The video is clear and unambiguous: the phone was not thrown toward Valerio, it did not strike him and Martinez moved it very little, and unthreateningly. The manner in which Martinez moved the phone is consistent with the Agency's conclusion from its investigation, that Martinez' gesture was benign. [see below under Physical Force...].

Valerio responded that Martinez' moving the phone toward him was "aggressive and hostile, and possibly he was going to proceed to hurt somebody like he previously stated." [Exhibit 2-10]. In light of unambiguous video evidence, this justification for use of force is not credible. Where Martinez was not threatening to Valerio, and merely pushed a desk phone toward him, Valerio's response - taking a full, closed-fist swing at Martinez, throwing him into a cinderblock wall, and throwing him to the floor - was not a legitimate
detention function; and the amount of force was unreasonable and inappropriate under the circumstances. Thus, Valerio’s excessive force violated the Agency’s use of force policy 5011.1 J.

Where Martinez was compliant and not threatening, Valerio’s lifting him by the handcuffs behind his back was also a violation of 5011.1 J.

Physical Force will not be used as a punishment, under any circumstances.

Vigil testified Valerio used excessive force on Martinez in retaliation and as punishment for Martinez pushing the desk phone toward him. [Vigil testimony]. Valerio claimed his use of force was in response to a substantial threat of harm.

The proof for a violation of this rule will necessarily almost always be indirect. The evidence, above, established Martinez posed no threat to Valerio, yet Valerio reacted violently to Martinez’ benign action of pushing the phone toward him. Martinez’ action is consistent with the Agency’s conclusion that, immediately prior to pushing the phone, Martinez had asked Valerio to make a call for psychological counseling which Valerio either ignored or refused. Martinez then pushed the phone toward Valerio as a misguided, but unthreatening statement to Valerio to “do your job.” [Vigil testimony]. In the absence of an actual threat to Valerio, the most logical conclusion is Valerio erupted in response to being insulted, not threatened, in violation of this subsection of 5011.1J.

Officers should rely on departmentally approved use of force techniques that are taught in training.

Valerio admitted that his lifting Martinez by the handcuffs was improper under department-approved technique. [Valerio testimony; see also Jordan testimony; Vigil testimony]. This violation is established by admission.

Officers are responsible for justifying their actions and must report use of force incidents in accordance with departmental rules and CRS 18-8-111 and CRS 18—802.

Valerio complied with the requirement to report his use of force with inmate Martinez. For reasons stated above, his only justification for using force on Martinez was because Martinez presented an imminent threat. It was already established that Martinez presented no credible threat. Accordingly, Valerio failed to justify his use of force in violation of the first clause of this subsection.
4. Explanation... with these values in mind, an officer shall use only that degree of force which is necessary and objectively reasonable under the circumstances...

The same conclusions stated above apply here. Valerio used force against Martinez that was objectively unreasonable, inappropriate, and excessive under the circumstances. Those actions violated this subsection.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee’s past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

A. Seriousness of the proven offenses

The Agency has made it clear it will not tolerate abuse of inmates. [Vigil testimony; In re Lovingier, CSA 48-13 (9/30/13); In re Carothers, CSB 13-11 (7/16/14); In re Webster, CSB 03-11A (4/18/12); In re Norman-Curry, CSB 28-07, 50-08 (9/3/09); In re Kemp, CSB 19-13A (7/28/14). As is evident from recent events in Denver,² inmate abuse by a deputy exposes the Agency and the City to enormous financial liability. [Vigil testimony]. Thus, not surprisingly, the Agency’s disciplinary matrix calls presumptively for dismissal for lying during the course of an official investigation. [Vigil testimony; Exhibit 10-93; 10-87]. Also, Valerio’s false claim that Martinez assaulted him led to an unjustified criminal investigation against Martinez, [see Exhibit 12].

B. Prior Record

Valerio noted he received an “excellent” work review even after this incident. Vigil countered that the investigation into this case did not culminate until after the work review. [Vigil cross-examination].

Vigil acknowledged Valerio had excellent past work evaluations, but those evaluations did not diminish the seriousness of inmate abuse and commission of a deceptive act, or the Agency’s right to assess dismissal as a justified penalty.³ Moreover, progressive discipline is not required under the

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³ To be more precise, the Agency assessed a 42-day suspension for Valerio’s abuse of Martinez under its disciplinary matrix, concurrent with the penalty of dismissal for commission of a deceptive act under RR 200.4.2.
Career Service Rules. [CSR 16-50 3.]. Finally, the Denver Sheriff’s Department, in which officers are specifically charged with upholding the public trust, may treat deceptive acts more harshly than civilian agencies. [see Vigil testimony].

C. Likelihood of Reform

Valerio had numerous opportunities to correct the record but failed to do so. Vigil was, therefore, justified in concluding Valerio’s deception was not correctable.

VI. ORDER

The Agency’s termination of the Appellant’s employment on April 17, 2014, is AFFIRMED.

DONE September 2, 2014.

[Bruce A. Plotkin
Career Service Board Hearing Officer

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 http://www.denvergov.org/EmployeeResources/RulesandPolicies/tabid/432517/Default.aspx.

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
or
BY FAX at: (720) 913-5720.
Fax transmissions of more than ten pages will not be accepted.