

DECISION ON REMAND AFFIRMING SUSPENSIONS

CARLOS HERNANDEZ and BRET GAREGNANI, Appellants,

v.

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

I. BACKGROUND

A *de novo* hearing in this consolidated appeal was held on September 18 and 19, 2017, to determine the propriety of the Agency's findings that Appellants violated specified Career Service Rules and, if so, the propriety of the 10-day suspension assessed against Appellant Hernandez, and the 16-day suspension assessed against Appellant Garegnani. A decision issued November 3, 2017 which reversed the findings of wrongdoing and reversed both suspensions. At the next level of review, the Career Service Board (CSB) reversed the Hearing Officer on January 17, 2019 and remanded the case for reconsideration of the degree of discipline of both appellants, and to determine whether each Appellant violated Career Service Rule 16-60 A. Both Appellants appealed the CSB's decision to the Denver District Court on February 12, 2019 seeking to reverse the Board's decision. On June 5, 2019, the District Court found the case was not ripe for review under C.R.C.P. 106 (a)(4), dismissed Appellants' complaint, and remanded the case for a final administrative determination of the penalties to be assessed. The case is now ripe for a review of the Agency's determination of the degree of discipline.

II. ISSUES

The only issues to be decided are whether each Appellant violated Career Service Rule 16-60 A., (Neglect of Duty or Carelessness in the Performance of a Duty),¹ and the degree of discipline to be assessed against each Appellant in view of the CSB's Decision and Order January 17, 2019.

III. FINDINGS

The CSB found the evidence established the following facts in its January 17, 2019 Decision and Order.²

¹ In its Decision and Order, the CSB stated "the Hearing Officer erred in failing to consider the CSR 16-60 A. Charge." [CSB Decision and Order 25-17A., 26-17A, p.5]. That rule has since been revised and renumbered to CSR 16-28 A.

² I have cited only some of those findings. However, the entirety of the Decision and Order is binding on the Hearing Officer, and is incorporated by reference.

A. Hernandez.

1. Inmate Marshall was controlled by four other deputies and did not pose a threat when Hernandez applied his OPNs³ to Marshall.

2. Hernandez's application of OPNs to Marshall after he was already under control caused Marshall to actively resist which, in turn, caused deputies to re-engage with escalated force.

3. Hernandez's application of OPNs was unnecessary and a violation of the Agency's use of force policy. "When a suspect is under control... the degree of force shall be de-escalated accordingly." [Departmental Order (DO) 5011.1M].

B. Garegnani

1. Almost two minutes elapsed from the time a nurse asked Garegnani to release pressure on inmate Marshall until he did so.

2. The pressure applied by Garegnani was possibly harmful to Marshall.

3. Garegnani applied force to Marshall's head and neck area when other deputies already had him under control.

4. Garegnani's use of force on Marshall was unnecessary, possibly harmful, and therefore in violation of the Agency's use of force policy, DO 500.1M, Use of Force, and Rules/Regulations (RR) 300.22, Inappropriate Force.

C. Findings regarding CSR 16-60 A.,⁴ Neglect of Duty.

Neglect of duty is established if an employee fails to perform a duty he knows he is supposed to perform. [*In re Serna*, CSB 39-12, 3-4 (2/21/14)]. The Civilian Review Administrator, who was the decision-maker for assessing discipline, stated this rule violation was based upon Appellants' violations of the duties under DO 5011.1M and RRs 300.19.1 and 300.22. [Elwell testimony]. Both appellants used unreasonable and inappropriate force on inmate Marshall. Hernandez re-applied OPNs to Marshall's ankle when he was already under control. Garegnani applied pressure on Marshall's head and neck. [CSB Findings and Order]. Hernandez applied OPNs when Marshall was already under control. Since those actions constituted neglect of their duty to use only reasonable and appropriate force under the aforementioned Agency directives, they both violated CSR 16-60 A.

IV. DEGREE OF DISCIPLINE

The Career Service Rules require hearing officers to apply a deferential standard of review to the level of discipline in Sheriff's Department disciplinary decisions. In order to reduce or reverse the level of discipline assessed by the DSD decision maker, the election must be found to be "clearly erroneous." CSR 20-56 B.1. Discipline is clearly erroneous when: the decision, even if supported by the evidence, is contrary to what a reasonable person would conclude from the

³ "OPN stands for Orcutt Police Nunchaku. A nunchaku is a martial arts weapon consisting of two batons joined together at their tops by a short length of rope or chain. It is used as a pain compliance device." [CSB *Decision and Order*, 25-17A, 26-17A, n.1].

⁴ Since the date of the incident underlying these appeals, section 16-60 was amended and re-numbered as 16-29 on Feb. 12, 2016, and amended and renumbered as 16-28 on June 22, 2018. As both the original decision, and 1/16/19 CSB decision refer to 16-60, that rule will be used throughout.

record; if the decision maker failed to follow the DSD's disciplinary matrix; or if the decision maker exceeds his/her authority. CSR 20-56 B.1.c.

The Agency's disciplinary matrix prescribes a decision tree for the decision maker. I review the decision maker's assessments under the "clearly erroneous" standard.

The decision maker first determines the category of conduct ascribed to each violation. For a violation of RR 300.19.1 (disobedience of rule), the decision maker may select from category A to category F. A violation of RR 300.22 (inappropriate force) must be assigned a category between D and F. Here, the decision maker assessed category D for both violations. The Matrix defines Category D violations as:

Conduct that is substantially contrary to the guiding principles of the Department or that substantially interferes with its mission, operations or professional image, or that involves a demonstrable serious risk to deputy sheriff, employee or public safety.

[DSD HANDBOOK, Appendix E, p. 90].

The decision maker elected to proceed under Category D by determining Appellants' conduct was "substantially contrary to the guiding principles of the department or ... substantially interfere[d] with its mission, operations, or professional image, or ... involved a demonstrable serious risk to Deputy Sheriff, employee, or public safety." [Bates No. 904; Bates No. 921].⁵

Guiding Principles. The Agency's guiding principles are: honesty; respect; fairness; openness; teamwork; judgment; sensitivity; personal leadership; integrity; accountability; and professionalism. [Handbook, Appendix A]. The decision maker did not specify any connection between Appellants' wrongdoing and these principles, let alone conduct that was "substantially contrary" to them. The evidence provided no apparent link to any of them.

Mission. The Agency's mission is "to provide safety and security for the community by ensuring care, custody, transportation and reentry services for detainees by operating safe, secure, efficient and humane facilities that adhere to federal, state, and local laws. [Id]. Here too, the decision maker made no connection between the Appellants' conduct and the Agency's mission; nor was it apparent how any aspect of the mission - to provide safety and security for the community⁶ - was adversely affected by Appellants' actions.

Operations. The decision maker did not address what, if any negative effects the Appellants' actions had on the Agency's operations. Any evidentiary link to such effect would be highly speculative.

Professional image. Other than in conclusory fashion, by quoting Category D, the decision maker did not propose any connection between the Appellants' actions and the Agency's professional image.

⁵ Because the decision maker proceeded under the minimum category allowed by the Agency's disciplinary matrix, the conclusory analysis was harmless. Whether Category D, or something less, defined Appellants' conduct is beyond the scope of this decision, and likely beyond the authority of this venue when the decision maker elects the minimum category. Even if I found Appellants' conduct in violating RR 300.19.1 did not fall under Category D, the result here would not change since the remaining charge, RR 300.22 still must be assessed a minimum of Category D., and the penalties were assessed concurrently.

⁶ I read the mission as providing safety and security for the non-detainee community, in contrast to inmates. "Care, custody, transportation and reentry services are the means to accomplish that mission, as indicated via the conjunction "by." In turn, those means are to be accomplished in a specified manner: "by operating safe, secure, efficient and humane facilities that adhere to federal, state, and local laws."

Demonstrable serious risk to deputy, employee, or public⁷ safety. Neither the notice of discipline nor the evidence at hearing described a risk to any deputy, employee or public safety,⁸ let alone a risk that was demonstrable.

Notwithstanding these findings, because Appellants were found to have violated RRs 300.19 and 300.22, and the minimum category for RR 300.22 must be assessed as a D category violation, the penalties for which are concurrent, I am bound by the Agency's assessment of Category D. [See CSR 20-56 B.1.a.].

The next step required by the DSD Handbook in electing the degree of discipline is whether the underlying violation was a first violation. As neither Appellant had any prior violations, the matrix identifies the penalty level for a first Category D violation at level 5. [Matrix, Appendix D p. 90].

The range of penalties for a level 5 violation include: a mitigated penalty of a suspension between 4 and 6 days; a presumptive penalty of a 10-day suspension; and an aggravated penalty of a 14-16-day suspension. Consequently, the next step requires the decision maker to weigh mitigating and aggravating circumstances.

Handbook sections 19- 23 provide non-exclusive guidance in weighing mitigating and aggravating circumstances. Many of the same factors which determined the inappropriate use of force also apply in determining whether discipline should be mitigated or aggravated. [HANDBOOK, Appendix C]. As it pertains to the present appeal, the Handbook proposes the following examples in assessing mitigation and aggravation. For any circumstances that differ between the Appellants, I specified the distinctions.

1. Vulnerability. Marshall "was experiencing a medical emergency" and "a psychotic episode." [CSB Decision and Order p.1]. The CSB found Marshall was impervious to pain. [*Id.* at 2]. At the same time, the CSB determined Hernandez's "[a]pplying a pain control technique [OPNs] knowing that it will not be effective is nothing more than a gratuitous infliction of pain." [*Id.*]. This is an aggravating factor against Hernandez.

With respect to Garegnani, the decision maker determined "Marshall's death constituted injury or harm to a member of the public..." [Bates No. 904], however the same notice of discipline cited the Assistant Medical Examiner as stating "Dr. Frank, however, could not say with certainty when inmate Marshall aspirated... physical exertion alone could have triggered cardio-arrest before the aspiration occurred... she would not have expected inmate Marshall to have difficulty breathing simply because the prone position during the restraint. ... being restrained would not be a causative factor by itself in this case... it is a reasonable possibility that inmate Marshall's heart was not functioning properly during this time of agitation even before any physical contact by the deputies... it was a possibility that inmate Marshall would still have died if he deputies had ceased restraining him after he went unconscious the first time..." In short, the Medical Examiner did not conclude that any of Garegnani's actions contributed to Marshall's death, and therefore provided no basis to include Marshall's death as an aggravating factor in assessing discipline.

⁷ The DSD distinguishes inmates and the limitation on their rights from the general "public." See, e.g. the DSD INMATE HANDBOOK, [HTTPS://WWW.DENVERGOV.ORG/CONTENT/DAM/DENVERGOV/PORTALS/776/DOCUMENTS/INMATE_HANDBOOK.PDF](https://www.denvergov.org/content/dam/denvergov/portals/776/documents/inmate_handbook.pdf), p.14 at 4.1; p. 37.

⁸ The CSB found that Marshall was controlled by at least four other deputies and did not pose a threat to others when Appellants applied inappropriate force. [CSB Decision and Order p.2,5].

While the Agency's inclusion of Marshall's death was clearly erroneous as an aggravating factor, the CSB found Garegnani continued to apply pressure on Marshall's neck after Nurse Ajao told him to release pressure there. [Garegnani Notice of Discipline p. 15; CSB Decision and Order p.4]. This is an aggravating factor.

2. Credible threat. The CSB determined Marshall "did not pose a credible threat to others" at the time Appellants applied force. However, the CSB found Garegnani's use of force was "possibly harmful," an aggravating factor against him.

3. Motivation for use of force. No ill intent or determination to inflict maximum pain was ascribed to either Appellant. "[T]here was no evidence of a malicious culpable mental state in the commission of the violation." [Bates No. 904; Bates No. 922]. Nonetheless, the CSB determined Hernandez's use of OPNs was a "gratuitous infliction of pain." Both before and after Marshall became unconscious, Garegnani took measures that showed his concern for Marshall's well-being, including: talking to Marshall in the sally port to try to have him comply with verbal commands even after Marshall failed to comply; when using force initially, lowering Marshall to the sally port bench while holding the back of his head [Exh. 27 at 18:32:56]; lowering Marshall to the floor carefully [*Id.* at 18:32:58-18:33]; using little weight to control Marshall [Bates No. 420]; performing a sternum rub on Marshall when he first became unconscious; moving Marshall from underneath the bench to enable nurses easier access to him [Bates No. 419; Bates No. 436]; and, most significantly, performing chest compressions on Marshall almost continuously for sixteen minutes even after responding Emergency Medical Technicians argued for stopping. [Bates No. 437 at 287-305; Bates No. 444 at 590-611].

4. Choice of weapon/device. As stated immediately above, the CSB determined Hernandez's election to use OPNs was unnecessary and determined Marshall could have been controlled with hands only.

5. History of inappropriate force. Neither Appellant had any prior violations; thus, neither had any history of inappropriate force.

6. Other factors.

Both Appellants had been employed for nine years without prior disciplinary incident.

Both Appellants applied extraordinary resuscitative measures.

The record does not show either Appellant would be unlikely to reform his behavior to comport with the use of force policy.

The CSB concluded Hernandez's "unnecessary re-application of his OPN caused Marshall to endure a re-escalation of force from the deputies attempting to control him." [CSB Decision and Order p.3].

In short, there were both mitigating and aggravating factors surrounding the inappropriate force used by both Hernandez and Garegnani. Thus, the decision maker's election to assess the presumptive penalty of a 10-day suspension against Hernandez was squarely within the bounds of the Matrix Penalty Table. [Matrix Appendix E, p. 86]. The decision maker's election to assess an aggravated penalty of 16 days against Garegnani was within her discretion under the same Table.

Whether a different decision maker could assess a different penalty, or whether the decision maker should have weighed mitigation and aggravation differently is not sufficient reason to amend the Agency's election of penalties. The decision maker substantially complied with the standards required by the Agency's disciplinary matrix. [See In re Sparer, CSB 71-18A (7/18/19)]. The degree of discipline assessed to each Appellant was not clearly erroneous, where: (1) the penalties were not contrary to what would be assessed by a reasonable administrator reviewing the record; (2) the decision maker followed the applicable Agency guidelines; and (3) the decision maker did not otherwise exceed her authority. [CSR 20-56 B.]. As such, I am required to affirm the penalties assessed by the decision maker.

V. ORDER

The Agency's 10-day suspension of Deputy Hernandez is **AFFIRMED**.

The Agency's 16-day suspension of Deputy Garegnani is **AFFIRMED**.

DONE August 26, 2019.



Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this final order, in accordance with the requirements and limitations of CSR 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery, below. See Career Service Rules at www.denvergov.org/csa. All petitions for review must be filed with the:

Career Service Board

c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org.

Career Service Hearing Office

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Denver, CO 80202
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AND opposing parties or their representatives, if any.