

**BEFORE THE CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY  
OF DENVER**

*Case No. 04 CSC 02*

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*In the Matter of:*

*JAMES TURNEY (98056),  
Police Officer in the Classified Service of the Denver Police Department  
Petitioner*

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**FINDINGS, CONCLUSIONS, AND DECISION**

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The hearing in the above case was held before the undersigned hearing officer on October 19 through 22 and October 25 through 29, 2004. Representing the Petitioner (Officer Turney) was Douglas Jewell, Esq., of the firm Bruno, Bruno & Colin, P.C., and appearing on behalf of the Manager of Safety were Karla J. Pierce, Esq. and Jack M. Wesoky, Esq., Assistant City Attorneys. During that hearing, the parties presented the testimony of some 26 witnesses, at least nine of whom were considered experts, and referred to numerous documents and other tangible items, including several audio tapes and videotapes.<sup>1</sup> Counsel for both parties also presented

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<sup>1</sup> The documents marked as exhibits filled several large notebooks. In many instances, several documents were collated and marked as a single exhibit; in other instances, the exhibit consisted of only a single document, but it had multiple pages. In several instances, only a portion of the documents bearing a single exhibit designation was considered relevant and admissible. Each document, however, bears a "Bates" number, and all were marked sequentially. At the end of the evidence, therefore, to assure that all documents that were relevant and otherwise proper to be considered by the hearing office, whether or not they were formally admitted at the time of the hearing, were considered by him, the parties were directed to prepare a list of exhibits that had been admitted or which the parties mutually agreed should be considered. That list is attached as an appendix to this decision. In addition, the parties have designated another exhibit, Exhibit 61, which is not included on this list. Of course, neither party, by agreeing to compile such

written post-hearing briefs, the last of which was received on December 17, 2004 at which time the hearing was considered closed.

Based on all of the evidence presented, the reasonable inferences to be drawn therefrom, and counsel's legal arguments, the hearing office hereby adopts the following findings and conclusions and enters his decision in this cause.

## I. THE CHARGES

Officer Turney received a ten-month suspension, based upon four separate specifications, as follows:

- i – Violation of Rules and Regulations (RR) 115, requiring officers to “obey the Charter of the City and County of Denver, all City Ordinances, and all State or Federal Statutes,” insofar as it pertains to C.R.S. 18-9-111 (e), which provides that a person commits the criminal offense of “harassment if, with the intent to harass, annoy, or alarm another person, he or she initiates communication with a person, anonymously or otherwise, by telephone ... in a manner intended to harass or threaten bodily injury.”
- ii – Violation of RR-105 which requires that “officers shall not engage in conduct prejudicial to the good order and police discipline of the department or conduct unbecoming an officer, which may not be set forth in department rules.”
- iii – Violation of RR -102, which requires that: “Officers shall obey all departmental rules, duties, procedures, instructions, or orders, and the provisions of the Operations Manual,” insofar as it pertains to *Operations Manual 17.02*, which provides that officers “shall be held strictly accountable for the good order of the post and beat to which they have been assigned for duty. They shall give their whole attention to their duties at all times.”
- iv – Violation of RR-102 as it pertains to *Operations Manual 3.13*, which states that: “In carrying out the functions of the department, all members thereof shall direct and coordinate their efforts in such a manner as will establish and maintain the highest standard of efficiency and safety.”

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a list, has waived any objection or other claim or error based upon the hearing officer's acceptance or rejection of any evidence.

## II. PRELIMINARY CONSIDERATIONS

The first two charges (i and ii above) are based upon a telephone call that Officer Turney admittedly placed to his former mother-in-law while on duty on July 4, 2003 (the “Telephone Incident”). The substance of the statements made by him in this call is the subject of substantial conflict.

The third charge (iii above) is based upon the admitted fact that, on this date, Officer Turney spent nearly two and half-hours engaged in making personal telephone calls while on duty. He concedes this underlying fact, and he concedes the impropriety of his actions. He argues, however, that a reasonable disciplinary measure be imposed for this infraction.

The final charge (iv above) has resulted from Officer Turney’s use of deadly force against a 15-year old developmentally disabled youth (the “Childs’ Incident”) on July 5, 2004.

The first three charges, all involving a series of telephone calls made by Officer Turney on the same day, were the subject of a separate investigation, and the Chief of Police imposed separate disciplinary sanctions for each of these three specifications.

The single charge in the Childs’ Incident was also the subject of a separate and independent investigation, and the Chief imposed a separate and additional sanction for this violation.

When these two matters reached the Manager, however, he consolidated them and imposed a single ten-month suspension for all four violations. As this hearing officer has observed in a previous order, while he is unaware of any other case in which disparate charges have been consolidated by the Manager, there is no Charter or Commission rule prohibiting such

consolidation. In addition, I have ruled that no prejudice has occurred by the presentation of evidence relating to all four charges before a single hearing officer, and I have denied Officer Turney's request for separate hearings.

During the course of these proceedings, however, counsel for the Manager has seemed to argue that, because both the Telephone Incident and the Childs' Incident reflect that Officer Turney did not use "good judgment," I can consider his actions in one incident as corroborative of his improper actions in the other incident. If counsel is really asserting such a proposition, I must reject it.

It has been universally accepted that whether a person has committed a particular act must be judged based on the evidence relevant to that act. That a person has a "bad character" is no evidence that he or she perpetrated the particular act in question. *See, People v. Spoto*, 795 P2d 1314 (Colo. 1990); *Kostal v. People*, 144 Colo. 505, 357 P2d 70 (1960), cert. denied 365 U.S. 804 (1961).

To codify this concept of due process, the Colorado Supreme Court has adopted a rule (C.R.E. 404) that prohibits the use of evidence of other "wrongs or acts" to prove the "character" of a person to show that he or she "acted in conformity therewith on a particular occasion." This fundamental rule is as applicable in administrative hearings as it is to criminal or civil trials. *See, Knowles v. Board of Education*, 857 P2d 553 (Colo. App. 1993).

While evidence of other acts may be admissible for certain specific purposes, such as to prove motive, identity or lack of accident (C.R.E. 404 (b)), neither incident here is in any manner connected with the other, so that evidence of Officer Turney's actions in either incident could provide no proof of any fact relevant to the other incident.

Further, the argument that both incidents demonstrate Officer Turney's lack of "good judgment" is fundamentally specious. I can conceive of no improper act, whether it be an act of simple negligence or one of malicious intent, that would not reflect a failure to exercise "good judgment." Every violation of any of the Department's rules or regulations would result from a failure of good judgment.

Moreover, here, even under the Manager's theory, the Telephone Incident resulted from Officers Turney's intentional act, while the death resulting from the Childs' Incident was not one based upon an improper intent; it was allegedly a negligent, or a reckless, failure to follow proper procedures. Officer Turney's actions in the one case, therefore, is no evidence of his impropriety in the other; they are completely discrete and disparate incidents. Of course, if one or more violations are found to have been committed, the fact that multiple violations occurred may be considered in adopting an appropriate degree of sanctions.

Given these considerations, therefore, I shall consider the Telephone Incident and the other July 4 telephone calls separately from the Childs' Incident. And, I shall adopt separate findings and conclusions as to each.

### III. THE TELEPHONE INCIDENT

#### a. Findings of Fact

Officer Turney met his former wife, Teresa, when both lived in Omaha, Nebraska. They entered into a long-term (9-10 years) relationship, moved to Denver, and were married about the same time (1998 or 1999) that Officer Turney graduated from the Police Academy. They had a son, Trenton, who was nine years old at the time of the hearing.

The marriage was short-lived, however, and Officer Turney and Teresa were divorced about three years before the hearing in this case. Their separation was apparently very emotional, especially for Teresa, who, according to her mother, Mrs. Orme, was devastated by the marriage breakup. Teresa moved back to Nebraska, taking Trenton with her, where she obtained employment in a hospital in Omaha.

Teresa's parents live in Shanendoah, Iowa, and they take care of Trenton during the three days a week when Teresa is employed in Omaha. The testimony of Mrs. Orme makes clear that she is devoted to her grandchild.

Contrary to Mrs. Orme's testimony, that she and Officer Turney enjoyed a very good relationship before his separation from Teresa, however, I find, as Officer Tuney testified, that the relationship was, at best, "up and down;" it was "not close, but not distant." The evidence makes clear that neither Teresa's mother nor her father fully approved of Officer Turney, and Mr. Orme was particularly skeptical of Officer Turney's desire to become a police officer. Both Mr. and Mrs. Orme have described Officer Turney in the past as either a "sociopath" or as "psychotic."

At the same time, however, everyone fully agrees that at no time prior to July 4, 2003 did Officer Turney ever commit any physical assaults or other violence against Teresa, nor did he ever make any threats of any kind against her or any member of her family.

Mrs. Orme looked upon Officer Turney's separation from Teresa and his later marriage to a fellow Denver police officer, his present wife, as an abandonment by him of both Teresa and Trenton. And, his failure to call or visit with Trenton as often as Mrs. Orme feels he should, has caused her considerable anguish. Further, she had expressed this anguish to Officer Turney in the form of a number of accusatory letters to him during the two years or so before July 4, 2003.

Then, on the Monday before this holiday, she posted a 20-page letter to him (Ex. 6, pp. 831-838) that asserted that he wanted Teresa to leave Denver, because he “wanted an excuse that its to [sic, too] hard to be a dad so far away;” that Teresa had given up all her social life to nurture Trenton, because she saw how it affected him when Officer Turney “thought more of [his] own life and left [Trenton] for another woman;” and having a child with his present wife “will just destroy [Trenton] even more.”

In this letter, Mrs. Orme also prophesied that, because of Officer Turney’s actions, his son will “be doing drugs because that takes him to another place that he won’t feel the hurt.” She compared Trenton in this respect to Officer Turney’s brother, who apparently has some drug dependence problem. She also asserted that, because Officer Turney was not able to take Trenton to hockey practices every week, Trenton plays hockey “with kids that are 3 & 4 years old that do a better job” than he does.

Officer Turney received this letter on July 3, but he testified credibly that he did not open its envelope when he received it, because he was sure that it would be similar to others that he had received, and he simply did not want to deal with it at that time. He opened it and read it after he reported for duty on July 4. He testified that Mrs. Orme had been making similar remarks about him ever since Trenton had been born, and this letter hurt him and made him angry. He decided to call Mrs. Orme, which he did a few minutes after reading the letter. This would have been a few minutes after eight o’clock Denver time, and a few minutes past nine in Iowa.

He testified that he knew that Mrs. Orme worked nights, and he anticipated that he would reach her before she went to bed. When she answered his call, however, she sounded as if he had awakened her. When she said, “Hello,” he testified that he said that she must stop sending

him letters, and that “if you continue putting garbage in his [Trenton’s] head, I’ll take your fucking fat ass to court.” He then hung up.

Mrs. Orme has been a psychiatric nurse for 10 years. She is employed as such by the Iowa Department of Human Services and works a night shift, from 10:30 p.m. to 6:00 a.m. When she received Officer Turney’s call on July 4, Mrs. Orme had just gone to bed. She testified that she had finished working seven nights in a row, that she was scheduled to work another shift the night of July 4, that she was exhausted, and that she fell immediately to sleep; she can’t even remember her head hitting the pillow. She said she was awakened by the telephone ringing. When she answered it and said, “Hello,” she recognized Officer Turney’s voice, and he sounded angry. She testified that he started by saying, “If,” but that she could not understand the next few words. She heard him say, however, “I’ll put a bullet in the middle of your head.” She said that, immediately upon hearing this, she hung up.

According to Mrs. Orme, this call frightened her. She was aware that Officer Turney had shot and killed someone<sup>2</sup> and that he always had a gun with him. She did not know that his call to her was made while he was on duty. On the contrary, the call upset her considerably because she was aware that he had planned to come to Omaha to see his parents and visit with Trenton, and she was fearful that he might be in the area.

Mrs. Orme testified that, after this call, she immediately went downstairs and into her yard where her husband and Trenton were working. She said that she reported the conversation to him at that time and indicated that she was frightened. At the hearing, Mr. Orme confirmed Mrs. Orme’s testimony. However, in a telephone conversation with the commander of the Department’s Internal Affairs Bureau (IAB), just a few days after July 4, Mr. Orme said he was



not at home when the call was received. (See audiotape #1 marked as Ex. 6). In a later telephone conference with an IAB investigator, Mr. Orme said that he was in the kitchen making breakfast when Mrs. Orme told him about the call, and they had an exchange about the letter she'd written.<sup>3</sup>

In any event, both Mr. and Mrs. Orme testified that she was concerned that Officer Turney might be on his way to shoot her, and they made arrangements to protect Trenton. Mr. Orme and Trenton went to their farm for the afternoon, while Mrs. Orme tried to sleep. Upon their return, it was agreed that all the outside doors and windows would be kept locked and that Mr. Orme would stay in Trenton's presence while Mrs. Orme was at work. If anything unusual was heard, they were to go to the cellar and lock the door.

In the late afternoon or early evening, Mrs. Orme reported Officer Turney's call to Teresa, her daughter. Teresa advised her to contact the Shenandoah police, which she did later that day. Unfortunately, the verbatim record of that report has been lost. In a later written report (Ex. 6, p. 779), however, the Shenandoah officer who took Mrs. Orme's complaint said that she had reported that Officer Turney had threatened to "put a gun to her head." (Ex. 6, p. 779) This officer reported that Mrs. Orme had said that she did not feel in any immediate danger, because Officer Turney was in Colorado. She also reported that she had told Officer Turney that she was recording the conversation, a statement that Mrs. Orme denies making. Later, Mrs. Orme was called back and advised to report the incident to the Denver police, which she did.

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<sup>2</sup> The call to Mrs. Orme occurred before the Childs' Incident. Mrs. Orme's reference, therefore, was to an earlier incident in which Officer Turney shot and killed a knife-wielding suspect for which he received a medal of valor. A further description of this incident is set forth below.

<sup>3</sup> Mr. Orme's conversation with the commander occurred on July 9, 2003. One would suppose that, if Mr. Orme considered Officer Turney's call to be a threat upon his wife's life, he would have remembered just five days later where he was when he first heard about it.

The summary of the report in the Shenandoah police records says that Mrs. Orme reported that Officer Turney said that “if she interfered [sic] that he would put a gun to her head and shoot her.” (Ex. 6, p. 818) In a later letter to the Denver IAB investigator, Shenandoah’s Chief of Police reported that Mrs. Orme had stated that Officer Turney “made several threats to put a bullet into the back of her head.” (Ex. 6, p. 829)

After finishing his call to Mrs. Orme, which was made on his private cell phone, Officer Turney made a number of other calls, several of which were made in an attempt to reach Teresa and several of which were made to his home. He also used his cell phone to speak with his brother and other relatives in Nebraska. Altogether, he spent 147 minutes making personal calls that day, while he was on duty, and indeed, even while he was engaged in active police work. (Ex. 6, p. 801)

Mrs. Orme’s report to the Shenandoah Police Department ultimately led to the filing of misdemeanor charges against Officer Turney in Iowa under an Iowa harassment statute similar to C.R.S 18-9-111 (e). (Ex. 6, p. 827) Mrs. Orme testified that she was reluctant to file these charges because she did not want Officer Turney to lose his job. Likewise, she testified that she was reluctant to testify in these proceedings until satisfied that Officer Turney’s job was not at stake.

Officer Turney testified that Chief Whitman had advised him to have the Iowa charge disposed of. Ultimately, that charge was dismissed pursuant to an agreement that deferred his prosecution for one year and prohibited any contact by him with Mrs. Orme for five years.<sup>4</sup> (Ex. 6, pp. 690-691) This agreement was negotiated by counsel who represents Officer Turney in

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<sup>4</sup> There was, apparently, some relationship between the prosecuting attorney and Mrs. Orme; he or a partner may also have been her personal attorney. I do not consider this to be significant. Likewise, the fact that the agreement contains a finding by the court that there was “probable cause” to believe Officer Turney

these proceedings, and during the course of those negotiations, he contacted Mrs. Orme. She testified that she almost filed charges of harassment against him, because he contacted her several times, and he was “forceful.”

Based upon the foregoing evidence, it is obvious that there is a substantial conflict as to what Officer Turney said in his telephone call to Mrs. Orme on July 4, 2003. And, the nature of any discipline to be imposed may differ significantly depending on whose version of the conversation is to be credited. It is a far different thing to say, “I’m going to sue you,” than it is to say, “I’m going to put a bullet in the middle of your head.”

In assessing much of the same information that was received during the hearing, the initial investigating officer concluded that the evidence was not “convincing” that Officer Turney had violated the law. His division chief concurred (Ex. 6, pp. 674- 680), but concluded that Officer Turney’s conduct was prejudicial to the good order and discipline of the Department. Likewise, the Disciplinary Review Board (DRB), composed of two commanding officers, two peer officers, and two citizens, concluded that Officer Turney’s excessive use of his cell phone on that day was more serious than was what he had said to Mrs. Orme. Chief Whitman also accepted Officer Turney’s version of his conversation with Mrs. Orme as being supported by a preponderance of the evidence, but he testified that, in his view, Officer Turney’s version of his statement nevertheless constituted a threat and harassment under the Colorado statute.

It was only the Manager who credited Mrs. Orme’s version of the conversation. However, he made this determination based only on his review of the “record” presented to him. He did not speak with either Mr. or Mrs. Orme or with Officer Turney and, therefore, had less

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violated the Iowa statute is of little significance. Mrs. Orme’s statement, alone and on its face, would provide sufficient evidence of probable cause.

opportunity to assess their credibility than did either the investigating officer or the undersigned hearing officer.

Based upon my assessment of the evidence and the credibility of the principals, I find that the Manager has not proven by a preponderance of the evidence that Officer Turney told Mrs. Orme that he would put a gun to her head. Because I am not convinced of this, I need not be convinced by a preponderance that Officer Turney's version of the conversation is accurate. But, were I required to make such a choice, I would have to credit Officer Turney, rather than Mrs. Orme.

My reasons for this finding are several. I do not accept counsel's allegation that Mrs. Orme's testimony was simply fabricated. On the contrary, I am convinced that she honestly believes that Officer Turney said what she accuses him of saying. I am not convinced, however, that she is not mistaken.

First, Mrs. Orme impressed me as being a very emotional person and one who sincerely felt that Officer Turney's actions with respect to his son were going to result in Trenton's lifelong emotional problems. She was, at this point, not kindly disposed to Officer Turney, and she was in a frame of mind in which she could accept that he was capable of inappropriate, if not violent, behavior.

Second, nothing in the 15 years or so during which Mrs. Orme had known Officer Turney had there ever been any act, or even a threat, of violence committed by him. However, she had recently become aware that he had killed someone in Denver.

Third, on the morning in question, Mrs. Orme was exhausted from working seven nights in a row. She was asleep when Officer Turney called, and she says he initially said something that she did not understand. Both Mrs. Orme's testimony and Officer Turney's testimony are

consistent that he used the work, “head.” He says that he told her not to put “garbage in Trenton’s head;” she says he threatened to “put a gun in the middle of [her] head.” Whatever was said, both agree that the call lasted only a few seconds before one or the other hung up. Given Mrs. Orme’s mental and emotional state (as evidenced by her recent letter to Officer Turney), I am persuaded that she might well have misunderstood or misinterpreted what was being said.

Fourth, there is evidence that Mrs. Orme’s reports of the conversation have not always been consistent, as noted above. She explains this as the result of others misunderstanding her. This may well be true, but neither party presented any evidence from these other persons, so I cannot really assess her assertion in this respect. I do not consider these fairly minor inconsistencies to reflect on intentional mis-statement; they may, however, be indicative of some confusion about what was actually said.

Fifth, Officer Turney has consistently said that he told Mrs. Orme not to put garbage in his son’s head, and if she did so, he would “take [her] fat fucking ass to court.” If he didn’t say this, it is inconceivable to me why he would report that he used such vulgar language. If he were to deny making any threat about a gun, what possible motive could he have for describing his statement in this manner, unless that was what he actually said?

Given all of these considerations therefore, I simply cannot find by a preponderance of evidence that Officer Turney threatened to place a gun to Mrs. Orme’s head. Consequently, I must accept his version of this conversation.

#### b. Conclusions of Law

(1) As I have noted, Officer Turney has been charged with a violation of RR-102, as it pertains to Operations Manual 17.02, which requires all officers to “give their whole attention

to their duties at all times.” Based on the evidence of his excessive use of his cell phone on July 4, 2003 and his concession that such use violated the pertinent provision, I conclude that the evidence supports this specification.

(2) The other two charges, which assert that his telephone call to Mrs. Orme violated the Colorado harassment statute and otherwise constituted conduct prejudicial to the good order and discipline of the department or was conduct unbecoming a Denver police officer, must be considered under his version of the conversation.

I first conclude that this conversation did not violate 18-9-111 (1) (e). That statute prohibits a person, “with the intent to harass, annoy, or alarm another person” from telephoning another person “in a manner intended” to:

- “harass”
- “threaten bodily injury or property damage;” or to make
- “any comment, request, suggestion or proposal ... that is obscene.”

For purposes of the last restriction, “obscene means a patently offensive description of ultimate sexual acts or solicitation to commit ultimate sexual acts ...” C.R.S.18-9-111 (1.5)

Clearly, Officer Turney’s comments to Mrs. Orme about suing her did not constitute a threat to commit bodily injury or property damage under this statute.

Likewise, while his description of her was vulgar, it was not obscene within the meaning of this statute.

I also conclude that his statement that he would take her to court did not constitute harassment. Leaving aside his vulgarity, the description of his intent was to initiate a perfectly legal act. And, he called only once.

The fact that someone being told this might be upset does not, by that fact alone, make such statement unlawful under this statute. *See, People v. Bolles* 189 Colo. 394, 541 P2d 80

(1975) (statute cannot make mailing of descriptive literature respecting abortion illegal simply because it might upset the recipients).

This is not a case where repeated calls were made or where the intention was simply to annoy the other person. It was a single statement made in response to Officer Turney's receipt of Mrs. Orme's serious accusatory letter - - a letter that invited a response. His call in response was not harassment.

(3) Finally, there is the question whether Officer Turney's use of vulgar language violated RR-105. This regulation prohibits conduct that is

- "prejudicial to the good order or discipline of the department;" or is
- "unbecoming an officer."

Counsel for both parties have failed to provide the hearing office with any considered analysis of Officer Turney's conduct with reference to this regulation. Rather, each has emphasized his or her views as to whether his conduct was criminal under the harassment statute.

I seriously doubt that Officer Turney's use of vulgar language was prejudicial to good order or discipline. He testified, however, that he recognized that his conduct was "inappropriate". And, while it is a close question, I conclude that, because this call was made while he was on duty, his conduct was unbecoming a Denver police officer. Hence, I conclude that his use of language violated *RR-105*.

In summary, then, I conclude that, based on the evidence presented and my credibility resolutions:

- (1) Officer Turney did not violate *RR-115*.
- (2) He did violate *RR-102*, as it pertains to Operations Manual 17.02; and
- (3) He did violate *RR-105*.

Given the Manager's imposition of a single disciplinary sanction for all four violations found by him, I will consider the issue of appropriate discipline after I consider the Childs' Incident.

#### IV THE CHILDS' INCIDENT

##### (a) Findings of Fact

As will be noted in greater detail below, the Manager did not discipline Officer Turney for using unnecessary or excessive force in firing his weapon at Paul Childs. On the contrary, the Denver District Attorney, Police Chief Gerald Whitman, and the Manager all agreed that, given the immediate circumstances facing him at the time he fired his weapon, Officer Turney was justified in shooting. Rather, the Manager disciplined Officer Turney for his alleged improper use of tactics, which resulted in his being placed in a position where the use of deadly force was necessary. Given this thesis, therefore, any review of the evidence must keep this important distinction in mind, and evidence that might have been relevant in considering the propriety of the use of deadly force becomes substantially irrelevant in considering the choice of options made by Officer Turney prior to the shooting.

##### The Incident Itself

The shooting of Paul Childs was a highly tragic and emotional event for everyone who participated or witnessed it. And, experience teaches that persons under emotional stress are not the best witnesses to an event; the adrenaline rush obstructs both the visual and the auditory senses. Hence, it is not unusual to have witnesses to the same highly



emotional event reporting substantially divergent histories of that event. Nevertheless, except in a few instances, the evidence of the circumstances surrounding the shooting of Paul Childs is relatively straightforward and not disputed.

Paul Childs was a 15-year old youth with a developmental disability. According to the testimony, he began having *gran mal* seizures at the age of nine, which required him to take medication on a daily basis. He also suffered from an attention deficit disorder and was losing his eyesight. Nevertheless, he stood 5 feet 8 inches tall, weighed nearly 150 pounds, and he was physically active. He skated, he rode a bicycle, and he skate-boarded among other activities. At the age of 15, he had completed his first year of high school. It is important to note that none of the officers present at the time of the shooting was aware of Paul's disability.

Paul lived with his mother, Mrs. Childs, and an older sister, Ashley. The family had moved into 5550 East Thrill Place in Denver in April 2004. This is a house with a front living room, a kitchen and dining area, two bedrooms, and a bath. Its wooden front door and a metal, screened security door open directly into the living room. (Ex. 4, p. 53).

Starting about two years before July 5, 2003, Paul had begun running away from home. Sometimes he would return by himself, but on numerous occasions, Mrs. Childs would place a 911 call and enlist the aid of the Denver Police to find Paul and return him. On at least two occasions, Paul went to Boulder to try to see a girl friend.

Before the family was living at 5550 East Thrill Place, Paul was struck by, or ran into, a car while he was on his bicycle. Police brought him home, and Mrs. Childs claims that Officer Turney was one of those officers. Officer Turney denies this, and the records show that he was not then assigned as a patrol officer; he was assigned to traffic

operations. (Ex. 9, p. 968). I am convinced that Mrs. Childs is mistaken as to the officer's identity.

After the family's move to the East Thrill Place home, Paul was involved in an attempted theft of a bicycle. He was picked up by another officer, and Officer Turney assisted in bringing him home. Because of this prior contact, Officer Turney testified that, when he first saw Paul on July 5, 2003, he knew he had seen him before, but he said that it was not until later that day that he recalled the prior circumstances. Chief Whitman testified, and I find, that Officer Turney cannot be faulted for failing immediately to recognize Paul at the time of the shooting.

In late June, Paul ran away from home and was found on a bus in southern Arapahoe County, where he suffered a seizure. Apparently as a result of this episode, Paul was placed in the Children's Hospital psychiatric unit from June 28 to July 1. Upon his return from the hospital, Paul was to take medicine, both to prevent seizures and to "calm him down". He continued to attempt to leave home, however. On at least one occasion, Mrs. Childs had to physically restrain him by grabbing his shirt and forcing him to the ground. In addition, in her later 911 call, Paul's sister, Ashley, reported that Paul had physically attacked his mother on previous occasions.

Mrs. Childs and Paul attended some festivity on July 4, 2004. When they returned home, Paul wanted to leave again. When Mrs. Childs locked both the front and back doors, Paul became violent and "trashed" his room, which included breaking furniture. (See Ex. W, X, Y, Z, and DD). Mrs. Childs decided that she would not try to deal with Paul until the next morning.

On the following day, Mrs. Childs, two of her friends, Ashley, and two children were in the home. Paul didn't get up until almost noon. He hadn't taken his medicine the night before, and he failed to take any medicine after he arose on July 5. According to all those who were in the home that day and who testified at the hearing, Paul was acting strange. He refused to speak with anyone, and he refused to eat. All those present had never seen him act as he was then acting. He made clear, however, that he wanted to leave, so Mrs. Childs locked both the security and the back doors..

As Mrs. Childs sat on the couch, Paul approached her, put his left arm around her shoulders, and covered her mouth and nose with his right hand. Mrs. Childs asked him, "Are you trying to kill me?" In response, Paul removed himself from the couch and went into the kitchen from which sounds of utensils being handled were heard. The people in the living room thought that Paul was fixing something to eat. Instead, however, Paul reappeared from the kitchen with a large knife; the knife was in excess of one foot long, and it had a blade that measured 8 ½ inches. (See Ex. 4, p. 44).

At first, the other persons present tried to joke with Paul about the knife. They soon realized, however, that Paul was not in a joking mood. It is not exactly clear what actions Paul took with the knife, but when Mrs. Childs got up from the couch, he followed her with the knife in his hands. She then went into her room and shut the door.

In the meantime, several of the other persons present asked Paul to drop the knife, but he refused to do so. One person told him that, if he put the knife down, she'd take him out. But, while he began to put on his shoes, presumably to go out, he continued to hold the knife in his hand.

Paul's actions were of sufficient concern to his sister, Ashley, that she placed a 911 call and spoke with the agent for several minutes. In this call, she described Paul's actions as follows:

"my brother has a knife an' he's trying to stab my mother with it."

"It's like a long knife, like a cutting knife, like a butcher knife."

"He has it in both hands ... He's following her [Mrs. Childs] around the house with it."

"my mom's tellin' 'im to put the knife down, but he won't."

"he's tryin' to run away an; you know, we have dead bolts on our door, so my mom's like locked 'im in the house, so he won't try to run away."

"he can't get out. An' that's why he has the knife in his hand because he wants to leave an' my mom's not lettin' him leave."

"he's hit my mom before, but never pulled out a knife."

"he's coming towards my mom with the knife now."

He's angry.

"He's like followin' her around an' when she turns her back, he'll try to stab her an' she'll hurry up and turn around." (Ex. 5, pp. 237-243)

While this conversation was going on, the Denver Police Dispatcher spoke with several police units and told them of this report. The dispatcher reported that a 15-year old was chasing his mother around the house with a knife and was also threatening his sister. Based on Ashley's report, the dispatcher said that the suspect had beaten his mother, but had never used a knife before, and that the premises had an "extensive, uh, domestic violence an' also family disturbance history here." He noted that he was getting information that the suspect was "very angry" and that he was trying to stab both his mother and the complainant (Ashley). (Ex. 5, pp. 332-324).

Four officers, including Officer Turney answered this dispatch and went to the Childs' home. Officer Turney was the first to arrive, followed shortly by Officers Geddes, Krause, and Naysmith.

There is a small concrete porch across a portion of the front of the house at 5550 East Thrill Place, with a walk leading up to this porch directly in the front of the door. Across this porch on either side of the entry onto the porch is a low, brick wall, perhaps two feet in height. Where the walkway meets the porch, there is a small step up onto the porch of perhaps six inches in height. (Ex. 5, pp. 50; 55; 638; Ex. 42, pp. 6258-6270).

Mrs. Childs had just emerged from her bedroom or the bathroom when Officer Turney arrived on the scene. He went directly to the front door; the wooden door was open, but the metal security door was closed and locked. Mrs. Childs unlocked the security door, Officer Turney opened it and continued to hold it open with either his leg or toes, while he asked if "he" still had a knife. When told that he did, he ordered everyone out.<sup>5</sup>

Within seconds of Officer Turney's arrival, Office Geddes also came upon the scene. As Officer Turney stood on the porch, Geddes initially took up a position on the porch to Turney's right in front of the brick wall. He shortly moved off the porch and in back of the wall, but still to Turney's right. He said he made this move so that he could get a better view of the door and to provide himself with more space in the event of an emergency. Soon thereafter, Officers Krause and Naysmith arrived and took up positions just on or off the walkway behind Officer Turney. (See Ex. 4, p. 50)

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<sup>5</sup> Officer Turney had parked his vehicle several doors away from this house, and he drew and held his weapon as he approached the door. He continued to hold his weapon in both hands throughout the incident.

The evidence is that, as the other persons were leaving, Officer Turney was told that Paul still had the knife and that he was behind the door. And, almost immediately after the last person left, Officer Geddes was able to peek through the doorsill of the open wooden door and glanced someone standing there with a knife in his hand. He immediately informed Officer Turney of this and told the dispatcher to “hold the air, we got a party with a knife,” i.e. keep a clear channel so that the dispatcher and the officer on the scene could communicate. (Ex. 5, p. 324). As a consequence, the dispatch tape recorded many of the events as they occurred. (Ex. FF).

Officer Geddes had been trained to use a taser, and he had it out and ready to use, until he saw the person with a knife behind the door. Upon seeing this, he put his taser away and drew his weapon.

Officer Turney ordered Paul to come out from behind the door with his hands up. Paul came out by making an arc around the edge of the open wooden door. He still held the knife in both hands, however. The most persuasive testimony is that he was holding the knife in both hands at about waist height with the blade pointing up. (See upper right photo at Ex. 4, p. 45).

Officer Turney, and perhaps one or more of the other officers as well, shouted to Paul to drop the knife. The best evidence is that this command was given two or three times. Paul failed to obey any of these commands. Instead, he continued to hold the knife and to slowly approach the threshold of the front door. When he was within about three or four feet of him, Officer Turney, who was then in fear for his life, fired his weapon several times, hitting Paul in the chest and mortally wounding him.

All four officers on the scene testified that only a few seconds elapsed between the time that Officer Geddes saw Paul behind the door and the time that Officer Turney fired his weapon. Chief Whitman, on the other hand, testified that his review of the dispatch tape revealed that about 30 seconds passed between the time that Officer Geddes asked dispatch to “hold the air” until dispatch was asked to call an ambulance. To resolve this controversy, I have reviewed and re-reviewed the copy of the dispatch tape placed in evidence. (Ex. FF) That tape shows that only about eight seconds elapsed between the call to “hold the air” and the call for an ambulance. About 23 seconds elapsed between the hold the air call and the report that “suspect is down. Officers are okay.” Assuming, therefore, that the copy of the tape placed in evidence is a true copy of the original dispatch record, and I have no reason to find that it is not, the testimony of the officers at the scene, that only a few seconds elapsed from the time Paul was seen behind the door until he approached them with a knife and Officer Turney fired, is accurate. In addition, even without this objective evidence, I would find that it is highly unlikely that it took Paul about one-half minute to move from behind the door and almost to the threshold, a distance of not more than about twelve feet.

Finally, given the Manager’s position that Officer Turney should have closed the security door at some point, and at the very latest when Paul appeared from behind the wooden door still armed with the knife, the lack of evidence upon what could be an important factor should be noted. Everyone agrees that the security door at the Childs’ residence had a hydraulic device connected to it. Its presence appears in the photos of that door (Ex. 42, pp. 6263-6265; 6267; 6270; 6272) I may properly note that the purpose of such a device is not to hold the door open, but it is designed to retard the

speed with which the door closes so as to prevent its slamming. I may also properly note that, in many instances, a door equipped with such a device may take several seconds to fully close after it is released. Yet, this record contains no evidence of the time it takes for the Childs' security door to close when it is released. There is, therefore, no way to estimate, based on this record, the amount of time that the security door would have remained at least partially open had Officer Turney released it.

#### Officer Turney's Training and Experience

Officer Turney attended the Denver Police Department Academy from October 1, 1998 until February 26, 1999, when he graduated and assumed an active police officer position in the Department. The record (Ex. 10, pp. 1829) reflects that he received more than 850 hours of training while in the Academy and more than 200 hours of training since graduation. (See Ex. 10, pp. 1830 – 1834).

Placed into evidence were the curricula and course outlines for the instruction he received at the Academy. (Ex. 10, pp. 1418 1440; 1895- 2741). I have, of course, reviewed all of these materials, but it is difficult for a layman, such as this hearing officer, to gain more than an introduction to some basic principles without having the advantage of participation in the courses themselves. I have, however, paid particular attention to certain course outlines, especially those dealing with "in progress calls."

From these materials, I have determined that certain general principles are emphasized

First, in answering such an in progress call, there are three goals: protection of life, protection of property, and apprehension of the suspect. (Ex. 10, pp. 2024-2025)



Second, the unit closest to the call answers it first and becomes the primary unit. The primary duty of the first officer on the scene is to “contain” the incident, and it is this officer who is to issue any necessary command. Other officers who arrive become “cover” officers.

Third, it may be necessary for the primary officer to “retreat” to “cover” while waiting for the arrival of cover officers. (Ex. 10, p. 205).

Fourth, in the case of an in progress call at a residence, officers should listen to what is going on inside; it may be necessary to make a forced entry. (Ex. 10, pp. 2064-2066).

Fifth, it appears that officers are instructed to order the suspect to come to them and to get the suspect out of the house. A suspect should not be taken through an unsecured area. (Ex. 10, pp. 2056; 2064-2066).

Officers are instructed as to a number of actions by a suspect (“danger cues”) that might indicate that the suspect may be planning an attack, among which is his or her “conscious ignoring” of commands and “physically crowding” the officer. (Ex. 10, pp. 2108-2139).

The officers are instructed that “a CLEAR and PRESENT THREAT that must be immediately CONTROLLED to protect you or another innocent party” must be the “officer’s FOCUS POINT.” (Ex. 10, p. 2123).

The materials emphasize that, in the case of an assault, an officer must be “mobile, active, and aggressive.” It is emphasized that “distance” increases safety and that “cover” is important, although these materials describe “cover” as “something that will stop a [bullet].” (Ex. 10, p. 2468-2474). At the same time, however, they are told

that officers who have lost battles are those who have taken cover and remained there. (Ex.10, p. 2132).

The officers are taught the circumstances under which the Colorado statute and the Department's Operations Manual authorize the use of deadly force. They are told to consider three factors in deciding whether to use such force: whether they perceive immediate danger, the distance between them and the danger, and the ability of the suspect to inflict serious injury or death. In a fairly rare instance in which these written materials refer to an edged weapon, they are told that "a stick or a chemical spray" is not an adequate defense against such a weapon. (Ex. 10, pp. 2246-2249).

Also placed into evidence were four videotapes of actual lesson presentations. Three of these were from one series, which demonstrate the principles of communication, movement, and shooting. (Ex. 60a, 60b, and 60c). These videos emphasize the necessity for communicating, both with the suspect in a loud clear voice and with fellow officers, the necessity for movement and cover in a gun battle, and the portions of the suspect's body for which the officer should aim his or her weapon.

However, these principles are displayed in these videos only with reference to a suspect armed with a gun. There is a mention only once of an edged weapon and of a "retreating" movement. And, both these references demonstrate that it is possible both to move and to shoot at the same time so as to debunk the notion that each function must be done separately. The video shows the officer retreating from an apparent threat by an edged weapon, while repeatedly firing his weapon. No other reference to either an edged weapon or retreating is contained in any of these three videos.

The fourth video (Ex. 61) is a course on edged weapons. It emphasizes that most officers are injured by such weapons, because they are hidden on or about the suspect, and the officer does not approach the suspect with the necessary caution. It does note that, if a suspect is within 21 feet of an officer with a holstered weapon, the odds are that, if the suspect attacks, the suspect will wound the officer before he can bring his weapon into play. Likewise, even if the officer has already drawn his gun, he probably will be unable to fire two shots (which is the recommended response if deadly force is to be used) before the attacker has wounded him, if the armed suspect is within five feet.

This video does emphasize that, in the case of an edged weapon, distance from the suspect is safety. It also recognizes that circumstances may not allow for distance; therefore, it also instructs in the use of a baton, arms, hands, and feet, when faced with a suspect armed with an edged weapon.

In addition to these materials, the evidence describes the Department's use of a simulated house search as a training device. This training, however, does not present a suspect with an edged weapon. There is no simulated training against a suspect with such a weapon.

After Officer Turney's graduation from the Academy and until the events on July 4, 2003, he appears to have been at least a good, if not a better than average, police officer. (See his supervisor's ratings at Ex. 9, pp. 912-972; 989-1009). He has received an oral reprimand for a preventable accident (Ex. 9, p. 973-974) and another for missing a court date. He also has received a letter of commendation from the United States Attorney's Office (Ex. 9, p. 1015), and two formal commendations.

In addition, he was awarded a medal of valor for his work in the Gregory Smith case. (Ex. 9, p. 940). In that incident, Officer Turney and another officer reported to a private residence in response to call, which apparently did not involve an “in progress” report. They entered the home and spoke with one of the residents, who told them that a distraught member of the family had a knife and had gone into the basement. Officer Turney went to the basement and found the door shut where the suspect was located. He went back upstairs, and the armed suspect later ascended the stairs with a knife. Officer Turney fired his weapon without moving backwards, killing the suspect. He was not disciplined; he was commended for good police work and awarded a medal.

Another subject should be mentioned here. The evidence (Ex. 30, pp. 5274-5567) is that, during the 20 years between 1983 and 2003, there were 28 incidents in which a suspect armed with an edged weapon was shot by a Denver police officer. In all but three of those instances, the suspect either attacked, advanced, raised the weapon, or turned. Seventeen of those suspects were killed; seven were injured. In 18 of those cases, more than one officer was present. In 25 of those 28 cases, the suspect was within 12 feet of the officer, the officer had placed himself in a position of peril, and in at least 21 of those cases, the officer did not take “cover.” In all cases, commands were given to the suspect which were not complied with.

In Chief Whitman’s testimony, he said that, in at least three of these 28 cases, including one occurring as recently as March 2003 in which two officers confronted a suspect on the porch of a private residence, the officers did not use the best tactics. It is undisputed, however, that in each case, the District Attorney refused to file charges against the officers, and no internal Departmental discipline was imposed.

My review of the above materials leads me to arrive at the following general findings :

First, while the Department's training emphasizes the concept of "cover," among others, this concept is applied only in the context of a suspect armed with a firearm. Indeed, the Department defines "cover" as something that provides protection from a bullet.

Second, in instructing upon "in progress" calls, officers are told that they are to protect life and property and to apprehend the suspect.

Third, in the single course on defenses against edged weapons that I have been provided for review, the advantage of distance is emphasized, but there is little, if any, emphasis placed upon "cover" or "retreat", as such.

Finally, during the twenty-year period before the Childs' Incident, very few, if any, of the Denver police officers faced with a suspect armed with an edged weapon, who have felt it necessary to use deadly force upon that suspect, have retreated or sought cover before engaging him. This may well reflect a previous lack of training upon these subjects with reference to defenses against edged weapons.

#### The Expert Testimony

As noted, there were nine witnesses who testified in the hearing who could well be considered experts in police tactics, because of their prior training and experience. Included among these nine witnesses are the Manager, who was a police officer with the New Orleans Police Department before he later became an Assistant District Attorney in

Denver and later served in the United States Attorney's office in Colorado, and Chief Whitman, of course.

The other seven experts were two civilians, one of whom testified for the Manager and one for Officer Turney; two long-term Denver police officers who are now retired; and three officers who have had experience as training officers at the Denver Police Academy.

Each of these witnesses either expressed an opinion as to the propriety of Officer Turney's conduct leading up to his confrontation with Paul Childs or his testimony implied an opinion upon that subject. A short synopsis of the testimony of each reflects the following:

First, it should be noted that all witnesses were in agreement that it is impossible to teach an officer how to deal with any specific situation. Each situation may call for a different approach, and there may be more than a single appropriate method that might be employed in any given circumstance. All that can be taught are general principles that the officers must consider in dealing with what he or she is faced with at a particular time.

The testimony of Manager Alvin J. LaCabe was based both upon his prior experience as a police officer in New Orleans and as a Denver Assistant District Attorney and upon his expectations for Denver police officers. As I have previously noted, the Manager does not assert that, when Paul Childs advanced toward Officer Turney, the officer used unnecessary force in firing his weapon. However, he considered that Officer Turney employed improper tactics that led to his use of deadly force. In his view, it was questionable whether Officer Turney employed good tactics in going to the door when he

first arrived. However, even at that point, after he was reasonably assured that all of the innocent parties were outside, he should not have ordered Paul Childs to come out, and when he saw that Paul was still armed with a knife, he should have allowed the security door to close, so as to provide a barrier between Paul and himself. He also should have moved backwards to place more distance between the two and to provide more time to adopt a plan for Paul's apprehension. He also finds fault in Officer Turney's failure to speak with the family members after they were outside in an attempt to discover what Paul's circumstances were. The Manager recognizes that no police officer can be trained to deal with every conceivable circumstance, but he asserts that the commonly accepted general principles that police officers are taught would dictate considerably more caution than was displayed by Officer Turney in this case. In summary, the Manager testified that the "essence" of what Officer Turney did wrong was (1) ordering Paul to come out from behind the front door, and (2) not closing the security door when Paul came out with the knife still in his hands.

Chief Whitman's opinion coincided with the Manager's. However, he emphasized that, considering the report that a suspect was attempting to stab several persons, the officers who answered the call were required to intervene to attempt to rescue the innocents and to take them to safety. Hence, he does not fault Officer Turney in going to the door of the home. Once the other persons were outside, however, the Chief's opinion was that there was sufficient time for Officer Turney and the other officers to speak with the family members while still containing the suspect. Officer Turney's failure to move away from the door and to close it violated the basic principles of "cover, move, and shoot".

The civilian expert called by the Manager, Larry Danaher, is presently the Director of Safety and Security for Lafayette, Indiana, and he had been employed in various positions in the Lafayette Police Department for a number of years previously. (See Ex. 59). While this witness has not been certified as a trainer by any nationally recognized organization, he has taught several courses and acts as a consultant. Based on his experience, the hearing officer recognized his expertise and allowed him to express opinions as to Officer Turney's actions. This witness, however, disagreed with both the District Attorney and the Manager, and it is his opinion, apparently, that Officer Turney's use of force was excessive. In addition, he criticized him for going up to the door of the residence; he suggests that he should have stopped at some bushes or at the corner of the house and should have ordered the occupants to come out one at a time. He agrees that, once Officer Turney learned the suspect was armed with a knife behind the wooden door, it was not safe to order him to come out. He also agrees that, although some 95% of all suspects obey the commands given by an officer, Officer Turney should have shut the security door and disengaged by slowly backing up, while keeping his weapon trained on Paul.

Officer Turney's civilian expert was David Grossi, who is an independent police trainer, whom City and County of Denver has employed as an expert in other cases. (See Ex. U). This witness emphasized that, based upon the contents of the dispatcher's report of an attempted stabbing in progress, there was a need for immediate action to protect possible victims. Hence, he agrees with the Chief, and disagrees with Mr. Danaber, that Officer Turney was not engaging in improper tactics when he approached the door to the residence with a cover officer (Geddes) to back him up. He also considers that Officer



Turney acted reasonably in asking if the suspect was still in the house and if he was still armed. This witness emphasized that there is really no perfect tactical approach to every circumstance and that, in every encounter with a suspect, it is the suspect who controls the result; the officer merely reacts to the suspect's actions. He also considered it reasonable to order Paul to come out and to keep the door open, because Paul's reaction to the first command, to come out, was indicative of a compliant attitude. Further, with the security door closed, nothing less than deadly force could have been used had Paul decided to come out, and any suspect presents a greater danger outside, because there is a much larger area within which to contain the suspect. He is critical of Officers Krause and Naysmith for taking up positions behind Officer Turney. In his view, these officers, without the necessity for any explicit command, should have proceeded to the rear of the house to prevent an escape out the back. He also disagrees that Officer Turney should have backed up, given the positions of the other officers and the possibility that he might have lost his footing. A disengagement should be made, he said, only if it can be done safely.

The other six experts gave express or implied opinions generally supportive of Officers Turney's actions in this case.<sup>6</sup> Of these six witnesses, I consider the testimony of Michael T. O'Neill and Douglas Bader to be most important. Mr. O'Neill is a retired police officer who served with the Department for 37 years. During those years, he served in a variety of capacities: as the Commanding Officer of Districts 2 and 4, as a field training officer, and with IAB, among others. In 2000, he served as the Administrative Assistant to Chief Whitman and in 2002 was asked by the Chief to

prepare the Use of Force Policy that was in effect until its most recent amendments. He has acted as a trainer on defensive tactics, on the proper methods of arrest control, and on officer safety. He has testified in several courts on the use of force.

Mr. O'Neill stated that the call to the Childs' residence here was a priority call, which required immediate intervention to save lives. This required Officer Turney to transfer the risk to these persons from them to himself. It was, therefore, reasonable to approach the door and to order the people out. He also opined that it was reasonable to order Paul to come out and to drop the weapon. Most suspects comply with these commands. Further, he said, once an officer has contact with a suspect, he or she must never lose that visual and auditory contact. Echoing Mr. Grossi's concerns, he expressed the view that shutting the door and retreating would not have been reasonable; it would have lessened visual contact and Officer Turney's containment efforts. He also testified that, while there were different factual circumstances between the Childs' case and the Gregory Smith case, there are certain parallels in that, in neither case, did Officer Turney retreat in the face of a threat with an edged weapon. He finally opined that, given the circumstances and the limited time for action, no reasonable officer would have given a thought to closing the security door.

Douglas Brader is also a retired Denver police officer, who now works at training the Colorado Police in tactics, terrorism, and rapid deployment; he is certified as such a trainer. While on the force in Denver, he spent 18 years on the SWAT team and has attended a number of SWAT training sessions outside the Department. In his opinion, a responding officer's first priority to an in progress call is to stop him from inflicting

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<sup>6</sup> The other officers present at the time of the shooting also testified favorably for Officer Turney. While I have not disregarded their testimony, I do recognize that their inherent self-interest may have had some

physical injury. The first arriving officer must make immediate decisions. In this respect, while time and distance are an officer's friends, they are not absolute concepts; an officer may have to leave such guidelines behind. Ultimately, the responding officer is to effect an arrest, and to do this, the officer must give verbal commands to the suspect and demand compliance. In addition, this witness also testified that, once an officer has verbal and visual contact with a suspect, that contact should not be lost.

The other three witnesses, Robert Rathburn, Albert Albright and Robert Winkler, are all training technicians at the Denver Police Academy.

Robert Rathburn reviewed the training provided recruits at the Academy. He described the concepts of "communicate, move, and shoot," noted that movement, if possible, is an advantage, but also noted that many confrontations consume only 2.5 seconds, and that, ultimately, the officer must close ground and effect an arrest. He is not surprised that in the 28 cases from 1983 to 2003, the officers did not retreat; this is because (1) officers are not taught to retreat, and (2) in many instances, retreat is impracticable. In his view, the concept of "cover" only applies to firearms, while "movement" is an officer's defense against other weapons.

Officer Albert Albright verified that there was no simulation training for edged weapons, and he has never heard of the idea that a door should be used as a barrier. Further, recruits are taught to command suspects to come to the officer; the officer should not go to the suspect.

Robert Winkler opined that, because of the nature of the call, it was reasonable to go to the door of the Childs' residence; that getting the people out of the residence was reasonable and consistent with the training. Further, when Officer Geddes made Officer

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impact upon that testimony.

Turney aware of the threat of Paul and his knife, it was reasonable to demand that he come out with his hands up. He said that this scenario was similar to ordering a suspect to come out of a vehicle. He also testified that, in his view, to shut the door might have allowed the suspect to get another weapon, such as a gun. In addition, by shutting the door, sight of the suspect is lost; if a suspect is in sight, you must get him out, he said. Finally, this witness conceded that movement is a good idea, but, here, the suspect was very close to Officer Turney, and there were officers behind him with drawn guns.

Again, as a layman, it is difficult for this hearing officer to assess the validity of the various opinions expressed by these witnesses, and it is particularly difficult to determine whether the training received by Officer Turney would have prepared him to take the actions that the Manager and the Chief apparently expected of him. Given these reservations, however, I nevertheless make these determinations:

- It was reasonable and in accordance with Officer Turney's training for him to go to the door in an effort to save the persons whose lives had been reported to him as being in danger;

- With hindsight and with the present knowledge of Paul Childs' disability and of the fact that there were no other weapons in the house, the *ideal* tactic would have been for Officer Turney to have closed the door after the family had exited and to have conferred with them about the ongoing incident. At same time, however, officers are instructed that one of their goals is to arrest an offender, to issue firm and loud commands to him or her, and to have him or her come to the officer. Officer Geddes' statement as to Paul Childs' whereabouts came almost immediately after the last of the other persons had come out. I find that, under these circumstances, it would have

been almost instinctive for any reasonable officer to have immediately ordered the suspect to come out with his hands up. Likewise, when Paul Childs came out still holding the knife, it would have been instinctive to order him to drop it.

- Again, with hindsight, the *ideal* tactic when Paul Childs did not drop the knife might have been to close the security door (although given the time frame and the lack of any evidence about the time it would have taken for that door to close, I am not sure of this). Nevertheless, given the very few seconds that transpired, I am convinced that no reasonable Denver police officer with Officer Turney's training and background would have thought of this tactic. Even if he had, in the face of a suspect armed with a foot-long knife only a few feet from him, and with a six inch step and two other officers with drawn firearms immediately behind him, a reasonable officer might well have concluded that he could not safely remove his leg from the door and step backwards.

(b) Conclusions of Law

At the time of the Childs' Incident, the Department's Operations Manual contained a statement describing its policy respecting the use of force (Sec 1.05, Ex. 29, pp. 5018-5021). The essence of this policy was stated in two paragraphs as follows:

The Denver Police Department recognizes that the duties of a peace officer may require officers to use force. The Department will *support* the *lawful* use of reasonable and appropriate force by officers in the performance of duty. Use of force that is not lawful, reasonable and appropriate will not be tolerated. Department Policy as well as relevant *Federal, State and Local law* shall govern the use of force.

The level of force applied must reflect the totality of the *circumstances surrounding the immediate situation*. The officer need only select a level of force that is within the range of "objectively reasonable" options. Officers must

rely on *training*, experience and assessment of the situation to decide an appropriate level of force to be applied. Reasonable and sound judgment will dictate the force option to be employed. (emphasis supplied)

The Operations Manual made explicit reference to the Colorado statutes regulating the use of force by a peace officer. These statutes include:

- C.R.S. 18-1-707 (2) (a), which specifically authorizes an officer to use deadly force, if the officer “reasonably believes” that the use of such force is “necessary” to “defend himself or a third person from what he reasonably believes to be the ...imminent use of deadly physical force; and

- C.R.S. 18-8-803, which provides that any peace officer who uses “excessive force” is to be subject to the criminal laws to the same extent that a private citizen would be.

It also referred to *Boykin v. People*, 22 Colo. 496, 45 P. 419 (1896), which held that Colorado law does not require an officer to retreat from an attack.

The manual listed some five factors to be considered in determining whether the force used is “objectively reasonable:”

- The imminence of injury posed by that threat;
- Whether the suspect is actively resisting arrest;
- Whether the circumstances are “tense, uncertain, and rapidly evolving.” If so, a greater level of force may be reasonable;
- The seriousness of the crime; and
- Whether the suspect is attempting to evade seizure by flight.

At the same time, the Operations Manual had another section, 3.13, that required all officers to “direct and coordinate their efforts” so as to “establish and maintain the *highest* standard of efficiency and safety.” (emphasis supplied)

In the years preceding the Childs Incident, the Denver District Attorney had interpreted the Colorado statutes referred to in the Department’s use of force policy as requiring the focus to be upon the immediate circumstances facing him at the time the officer used deadly force. This meant that, for purposes of determining whether an officer had exceeded the authority granted to him by the Colorado statutes, the events preceding and leading up to the use of deadly force could not be considered. The District Attorney’s Office had issued a protocol describing that office’s view of the statute’s requirements, which suggested that the actions of officers preceding the “final frame,” if unreasonable, should be dealt with administratively and not under the criminal laws. It commended the use of the Firearms Discharge Review Board (FDRB) for this purpose. (Ex. 29, pp. 4777-4780).

This hearing office is not entirely confident that this interpretation of the pertinent statutes is the correct one under all scenarios. For example, if a peace officer intentionally took previous actions to goad a suspect into attacking him, I am not at all sure that that officer could not be found to have used excessive force, even if the attack itself presented an immediate circumstance authorizing the use of deadly force. Indeed, as I read *Johns v. District Court*, 192 Colo. 462, 561 P2d 1 (1977), the Colorado Supreme Court has considered the events leading up to an officer’s use of force as a relevant consideration in determining whether such use is warranted.

Nevertheless, I fully understand that it is the District Attorney, and not this hearing officer, who is charged with the administration of the criminal laws within this judicial district. And, there can be no criticism of the Manager or the Department for accepting the District Attorney's protocol and acting in accordance with it.

The Manager has also concluded that the use of force policy in effect in 2003 incorporated only the standards of the state statutes referred to in that policy. Hence, it was his view that, if an officer's use of force did not violate these statutes, the Department's then existing use of force policy was not violated.

I again have some difficulty in accepting this premise. Not only did this use of force policy make explicit reference to "Federal" law, as well as to the state statutes, but it also required officers to rely on their "training" in making a decision to use force. If this does not refer to the type of training that the evidence here described, I have no idea what it does refer to. The Manager argues, however, and I agree, that, as the person in charge of the administration of the Department and the implementation of its rules and regulations, deference must be paid to the meaning placed upon the use of force policy by the Manager. Indeed, while Mr. LaCabe, the Manager here, had been in his position only a short while before the Childs' Incident, his interpretation of the then existing use of force policy is apparently consistent with the interpretation placed upon that policy and its predecessors by previous Managers. In no case prior to the Childs Incident was a Denver police officer ever disciplined for an excessive use of force under the Department's policy in an instance where the District Attorney had decided not to prosecute that officer under the Colorado statutes.



It should also be noted that no officer, prior to Officer Turney, has ever been disciplined under Section 3.13 for not maintaining the highest standards of safety, based upon a claimed faulty choice of tactics that led to the use of force. And, this has been the history of the Department, even though there have been other instances, one as recently as May 2003, in which the Chief concluded that the officers' poor choice of tactical options might have contributed to the use of deadly force.

The Manager testified that he considered the Childs' Incident to be a "watershed moment" for the Department. While he did not fully explain what he meant by this, I take it that the Manager was convinced that, while Officer Turney's use of deadly force was reasonable in light of Paul Childs' advancing toward him with a foot-long knife, Paul's death might not have occurred had Officer Turney, as the lead officer on the scene, adopted other tactics to deal with Paul. Yet, if this were the case, given the District Attorney's clearance letter and his protocol, and the Manager's conclusion that the use of force policy was not applicable to an officer's choice of tactics, there had to be some means found to authorize the discipline of officers who fail to observe reasonable tactical maneuvers when dealing with an incident that could lead to the use of deadly force. The vehicle the Manager chose to use for this purpose was Section 3.13.

Counsel for Officer Turney argues, however, that this section of the Manual may not be applied in such circumstances. I agree with this conclusion, but not necessarily for all of the reasons advanced by counsel.

First, I am concerned that neither Officer Turney nor any other officer in the Denver Police Department was ever put on prior notice that the tactics used by him or her could be the basis for discipline under section 3.13, even if his or her use of force was

consistent with the Department's use of force policy. Never before this case has the tactical decisions of an officer when using deadly force been the subject of discipline. Tactical errors have been treated as a matter for post-incident critique and further training. Indeed, the DRB, while recommending a "written reprimand" to Officer Turney for the Childs' Incident, concluded that this case presented a "training issue" and that Officer Turney should not be punished for what officers might "be trained on in the future." (Ex. 8). Likewise, the FDRB, which the District Attorney in his protocol recommended be relied upon, concluded that a charge under Section 3.13 could not be sustained, although it also concluded that Officer Turney had violated the use of force policy. (See Ex. 3).

The Manager argues, however, that he is not bound by policies adopted by his predecessors and that he may change those policies. I fully concur with that premise. However, any such fundamental policy change as that involved here must be communicated to the affected officers so as to give them notice of what is to be expected of them. Here, the prior policy was not to discipline officers for their actions in using deadly force if their actions did not violate the use of force policy, as interpreted by the Manager. In no instance had Section 3.13, which did not even refer to matters of "safety" until it was amended in 1999 (Ex. 23, p. 5674), been used to discipline officers for alleged tactical errors prior to the use of deadly force.

I conclude, therefore, that Section 3.13 cannot be relied upon to discipline Officer Turney because he was given no previous notice that this provision was intended to apply to tactical decisions in a deadly force context.

This conclusion is in no way dependent upon an application of the “comparative discipline” provisions of § 9.4.14(F) of the Charter. That provision only assures that an officer will not be discriminated against in the matter of the degree of punishment imposed for a sustained violation. My conclusion here, rather, is based upon considerations of due process and innate fairness -- no party should be punished for acts or omissions, unless he or she has been given prior notice that they may furnish a basis for punishment.

In this respect, it should be noted that, in August 2004, the Department’s use of force policy was amended and expanded upon in a number of ways. Among other things, that policy now requires that, in deciding to use a firearm, an officer must act in accordance with “all accepted Denver Police Department *policies, practices and training.*” (Ex. S). This amended policy came about as a result of the recommendations of a citizen’s task force, created after, and at least to some extent as a result of, the Childs’ Incident. While I fully recognize that the interpretation of this new policy is, initially, a matter for Chief and the Manager, this hearing officer is satisfied that it was intended to, and does, put all Denver police officers on notice that, in the future, if their tactical decisions are inconsistent with their prior training, they may be disciplined for a violation of the new use of force policy. In the future, therefore, the Chief and the Manager will not be lacking for an adequate basis for the imposition of discipline for faulty tactical decisions resulting in the use of deadly force.

In addition to the question of adequate notice, Officer Turney’s post-hearing brief asserts several other grounds for concluding that Section 3.13 cannot be used as a

disciplinary tool in this case. However, given my conclusion set forth above, I need not address those other considerations, and I do not pass upon their validity.

I should, however, expressly reject the assertion that the Chief's or the Manager's actions in this case were the result of an improper consideration of the public outcry at the death of Paul Childs. The public reaction to this awful tragedy was based, in large part, upon the fact that Paul was a developmentally disabled teenager. Yet, at the time he was shot, none of the officers involved was aware of this, and the Manager recognized that much of the public's reaction was based upon faulty information. While neither the Chief nor the Manager could be unaware of this public outcry, I am convinced that their actions in this case were not undertaken because of the organized protests. They acted, I am persuaded, by what they viewed as the best policy for the Department and for the citizens of Denver.

Based upon the foregoing findings and conclusions, therefore, I conclude that the specification alleging a violation of RR-102, as it pertains to *Operations Manual §3.13*, has not been sustained.

## VI. THE DISCIPLINARY SANCTION

I have concluded that only two of the violations sustained by the Manager merit affirmance. And, the two sustained are, in my view, the least serious of the four. I have concluded that Officer Turney violated RR-105 by his call to Mrs. Orme and RR-102 by his excessive use of his cell phone while he was on duty. While both these violations are indirectly related, they were, nevertheless, separate violations.

The Manager imposed a single disciplinary sanction of a ten-month suspension for all four violations that he found to have been sustained. In a previous order, I have expressed my concern as to how a hearing officer is to proceed in such a case, if, as here, not all violations are affirmed. I still hold the view that it is the responsibility of the Manager, in the first instance, to impose a sanction for a violation and that the hearing officer has only the authority to review that sanction to determine its inherent reasonableness and whether it comports with the requirement for comparable discipline.

Here, however, both Officer Turney (in the alternative, at least) and the Manager assert that I should assess a disciplinary sanction for any violation found by a reference to past cases, evidence of which I have been provided. Hence, I will accede reluctantly to that request.

As is usual, however, the prior disciplinary cases to which I have been referred are not really “comparable” to the facts found here. With respect to the call to Mrs. Orme, in one previous case, where the officer made threatening calls to his wife, the officer was suspended for fifteen days. Likewise, another officer received a two-day suspension for making a series of calls. (Ex. J, case nos. 1 and 19, pp. 1-3). Based on these summaries provided, I conclude that a five-day suspension for the violation of RR-105 would be appropriate.

Concerning Officer Turney’s excessive use of his cell phone while on duty in violation of RR-102 as it pertains to *Operations Manual §17.02*, there are no real comparables. I note, however, that the DRB recommended a one-day fine and that the Chief concurred in this recommendation. Given both these parties’ concurrence, I adopt this as a suitable sanction.

Therefore, Officer Turney shall be suspended for five days, and he shall be fined one day's pay.

## VII THE DECISION

The suspension for ten-months is disapproved and reversed. Officer Turney shall be suspended for five days and fined one day's pay. He shall be reimbursed for any loss of pay and benefits resulting from the prior suspension, less the pay and benefits resulting from the suspension and fine hereby approved.

Done this *13<sup>th</sup>* day of January 2005

SS/ *John A. Criswell*

JOHN A. CRISWELL

Hearing Officer

### Notice of Appeal Rights

Pursuant to Charter § 9.4.15(E), and Rule XII § 6(A) and (B), the decision of the Hearing Officer may be appealed to either the Civil Service Commission or directly to District Court in accordance with the Colorado Rules of Civil Procedure currently in effect. Any appeal to the Commission shall be initiated by filing a notice of appeal with the Commission within fifteen (15) days after completion of service of the decision of the Hearing Officer by the Commission