HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 102-05

DECISION

IN THE MATTER OF THE APPEAL OF:

KENNETH BROWN,
Appellant,

vs.

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

The hearing in this appeal was held on January 5 & 6, 2006 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Marc F. Colin, Esq. The Agency was represented by Assistant City Attorney Robert D. Nespor. Captain Mike Horner served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the following findings of fact, conclusions of law and order are entered herein.

I. INTRODUCTION

Appellant Kenneth Brown is a Deputy Sergeant II with the Denver Sheriff's Department. This is his appeal of a three-day suspension imposed on September 6, 2005. The parties stipulated to the admissibility of all exhibits, which are Agency's Exhibits 1 - 14 and Appellant's Exhibits A - G.

The issues presented herein are as follows:

1) Did the Agency establish that Appellant violated the cited section of the Career Service Rules (CSR), and

2) Was a three-day suspension justified under the CSR's disciplinary rules?

II. FINDINGS OF FACT

Appellant has been employed by the Denver Sheriff's Department for twenty-four years. For the past four years, he has been in charge of daily operations at the Pre-

arraignment Detention Facility (PADF), 1351 Cherokee Street in Denver, which books and houses prisoners immediately after their arrest.

On March 28, 2005, at about 11 p.m., PADF received a call to expect the arrival of an intoxicated, aggressive and uncooperative arrestee. Appellant called for a number of officers to meet him at the dock for the arrival of the police van. Eight to ten deputy sheriffs responded. The male prisoner was banging and yelling racial epithets inside the back of the van. Appellant ordered him several times to stand up and get out of the van. [Exh. F-10, p. 5.]] The prisoner rolled over and vomited onto the van floor and his own shoulder, resulting in a large amount of wet vomit in the van and on the prisoner. [Exhs. F-3, p. 2; F-5, p. 2; F-10, p. 7.] He sat down, threw up again, wiped the vomit from his mouth, and flicked some of it onto Deputy Szumowski's pants. The officers picked up the prisoner and removed his belt. His handcuffs were adjusted from the back to the front of his body. The prisoner spit vomit on the deputies as they removed him from the van. [Exh. F-3, p. 2; testimony of Appellant.] He was walked from the van to the elevator, escorted by Deputy Damien Jones, who held the prisoner's right arm up as protection from further vomit, and Deputy Gerald Pound, who held his left upper arm. Appellant followed with a taser pointed at the prisoner's head. During this time, the prisoner continued to call Deputy Jones, an African American, a "f---ing n-----", and to yell, "f--- all you cops; I'll own this place." The remaining deputies followed to provide additional security.

The Diganet video showed that when the prisoner reached the elevator that led to the second floor jail cells, the prisoner's pants fell to his shoes, exposing his genitals, as he was wearing no undergarment. In the elevator, Appellant instructed the prisoner to pull his pants up. The prisoner did not obey, but continued to direct racial insults at Deputy Jones. [Exhs. F-5, p. 8; F-7, p. 2; F-8, p. 5; F-9, p. 2.] He was told, "[d]on't be swinging that puke around." [Exh. F-9, p. 5.]

When the elevator door opened, the prisoner fell backwards out of it, and remained in a seated or huddled position, with his pants still down. Appellant and others ordered the prisoner to stand up. [Exh. F-8, pp. 4 – 5; F-9, pp. 3 -4; F-10, p. 9.] The prisoner, who was 6'3" and 250 lbs., remained on the floor. [Exh. D-3.] Appellant instructed the deputies to drag him to the cell sixty feet away. [Testimony of Appellant.] Deputies Jones, Lewis and Pound dragged the prisoner on his back by his upper arms, coat and shirt through a hallway past deputies of both sexes and into a cell. The video showed that the deputies' hands slipped from the upper arm to the wrists during the course of the dragging process. [Exh. 12.] A few seconds after the prisoner was secured in the cell, he stood and pulled his pants up. [Exh. 12.] Appellant washed the vomit off the taser after the prisoner was locked in the cell. Booking was delayed by his intoxication until the next morning.

Later that day, Appellant filed a use of force report, and obtained reports from Deputies Jones, Szumowski, and Pound. [Exhs. 6 – 9, F-5, p. 11.] Major Connors requested an Internal Investigations review of the incident based upon the reports' narrative that a prisoner was dragged to his cell with his pants at his ankles.

After reviewing the investigation file and materials, Division Chief Walter R. Smith of the Downtown Division recommended a pre-disciplinary meeting for Appellant and another supervisor present during the incident. [Exh. D-8.] Chief Smith also recommended non-disciplinary counseling letters for Deputies Darkis, Rico, Lovato, Villani, Lewis, Cheney, and Cole for failing to submit a report, and to Deputies Szumowski, Jones and Pound for filing incomplete reports. The latter three were also advised that the departmental policy does not permit the humiliation of prisoners. [Exhs. D-8, D-10, and D-11.] After the pre-disciplinary meeting, Appellant was issued a three-day suspension based upon his asserted failure to submit an accurate report and to exercise good judgment in directing the movement of a combative inmate within the jail. Two written reprimands within the previous four years were considered in determining the appropriate discipline. [Exh. 3.] Appellant's work history was not considered as a part of the disciplinary decision. [Testimony of Manager of Safety Alvin J. LaCabe.]

III. ANALYSIS

The Agency claims that Appellant's action in ordering the dragging of the prisoner while his pants were down violated the following rules: (1) CSR § 15-10 requiring employee conduct to reflect credit on the CSA and the city, (2) CSR § 16-51 A. 2), failure to meet established standards of performance, (3) CSR § 16-51 A. 5), failure to observe departmental regulations, including those prohibiting the use of humiliation, cruel and unusual punishment, taunting, embarrassment, intimidation, threats or harassment against any prisoner. [Exh. 3, citing Dept. Rules 300.19 - .21; 400.4 - .5; D.O. 2440.1E.] Carelessness in violation of CSR § 16-51 A. 6) is also alleged. At hearing, the Agency also offered Departmental Order (D.O.) 5011.1G into evidence, and argued that Appellant had also failed to comply with that policy. [Exh. G-1.] Appellant counters that he exercised his judgment in accordance with the policies and practice of the Department at the time of the incident.

A. Violation of Departmental Policies

The issue presented by this appeal is whether dragging a prisoner exposed from the waist down is a violation of the departmental policies related to the treatment of prisoners. Resolution of that issue is necessary before determining whether Appellant violated the cited Career Service Rules.

According to departmental policy, "the amount of force used will be proportional in relationship to the threat faced", and will be discontinued once the legitimate detention-related function is achieved. [Exh. G-1, Departmental Order 5011.1G, p. 1.] Physical force is defined as "[f]orce applied to a person or persons to achieve compliance to the legitimate objective." The policy mandates a use of force report for (a) discharge of a firearm, (b) use of chemical agents, (c) use of physical force, and (d) inmates remaining in restraints at the end of a shift. Use of force reports are required

from officers using force as well as witnesses to the use of force. [Exh. G-1, pp. 1 - 3.]

It is undisputed that the Department requires deputies to exercise their judgment as guided by policy in the means used to transport an inmate. [Testimony of Mr. LaCabe.] Departmental policies provide general guidelines by their prohibition of humiliation, taunts, embarrassment, threats, or harassment in the treatment of prisoners. The policies also forbid the imposition of indignities or cruel and unusual punishment. [Exh. 3, p. 3, Dept. Rules 400.4, 400.5.]

The parties agree that dragging is a use of force within the meaning of this policy, and that Appellant filed a use of force report, acknowledging that force was used to transport the prisoner. The legitimacy of the detention-related function is also uncontested. The specific issues to be determined under the use of force policy are (1) whether other reasonable alternatives had been exhausted or would have been clearly ineffective within the meaning of D.O. 5011.1G [Exh. G-1.], and (2) whether dragging the prisoner under the circumstances present on March 28th was proportional to the threat faced. In addition, under the remaining departmental policies, it must be decided (3) whether dragging a naked prisoner constitutes the imposition of humiliation, indignities or cruel and unusual punishment under the departmental rules.

(1) Were Reasonable Alternatives Considered?

The applicable policy states that use of force must be preceded by either exhaustion of reasonable alternatives, or a conclusion that they would be ineffective under the circumstances. [Exh. G-1, p. 1.]

The Agency argues that Appellant failed to consider reasonable alternatives before he ordered the use of force, in violation of D.O. 5011.1G, as illustrated by his immediate decision to have the prisoner dragged. Appellant claims all reasonable alternatives were impractical under the circumstances.

Chief Smith testified that the police academy and on-the-job training instructs deputies to use verbal commands to gain voluntary compliance. If that is ineffective, the prisoner may be held under the arm, and may be carried by supporting the trunk of the body, grabbing the upper arms or legs, or using the back of the shirt and pants as a kind of handle. A wheelchair may also be used to transport a prisoner who is unable or unwilling to move. Blankets may be used to cover a naked prisoner or as a surface upon which a prisoner may be transported.

Appellant testified that he lifting was not a viable option for a number of reasons: the prisoner was too heavy to safely lift, they could not have carried him through the narrow cell doorway, and he believed the prisoner would have fought the deputies if they had tried to lift him. Deputy Lewis testified he did not believe they used force in dragging the prisoner, since deputies could not have carried him under the circumstances in order to remove him from a high traffic area. Appellant stated he did not consider a wheelchair because in his experience non-compliant prisoners merely

straighten their legs and prevent the chair from moving. Blankets were available about fifty feet away, but he believed that a blanket would not have remained on because of the prisoner's resistance. Appellant decided that dragging the prisoner would meet the immediate need to secure the prisoner in a cell and would confine the minor disturbance created by the prisoner's resistance to the smallest possible area. Appellant believed it was useless to delay securing the prisoner by giving him additional time to comply with orders, since he had refused to obey every order given to him since his arrival, and had finally fallen down and refused to stand. The other eleven officers present concurred. [Exh. F-1 to F-11.]

The disciplinary decision was in part based upon the Agency's conclusion from viewing the video that Appellant had given the prisoner very little time to comply with any order to stand. The parties agree that it is difficult to determine elapsed time from viewing the video, which appears to present sequential pictures rather than a video recording. By judging the pace of the other events recorded by the video, I conclude that the prisoner sat on the floor for two to five seconds before the deputies began to drag him to the cell. [Exh. 12.]

Appellant testified that he decided to abandon efforts to obtain voluntary compliance because the prisoner had consistently refused to obey repeated orders to stand, get out of the truck, stop spitting, and pull up his pants. The deputies and sergeant who were present confirmed that the prisoner had ignored all previous commands. [Exh. F.]

The level of a threat posed by a prisoner may be judged by the surrounding circumstances, including the prisoner's recent behavior. The silent video captured only the short walk to the elevator and the prisoner's backward fall out of the elevator before the decision to drag was made. It did not include the events inside the van or elevator, where all eyewitnesses confirmed that the prisoner was most belligerent. In determining the facts de novo, I conclude that reasonable alternatives to a use of force, including voluntary compliance, would have been clearly ineffective.

(2) Was Dragging Proportional to the Threat?

The policy next requires that any use of force must 1) be limited to that needed to handle the threat, and 2) be discontinued once the legitimate detention function is achieved. In addition, 3) the technique must be of the type for which the officer has been trained, and be authorized by the Agency. [Exh. G-1.]

The evidence indicates that dragging is a permissible use of force under some circumstances. Chief Smith testified that dragging may be used in an emergency or to move a prisoner who is unable or unwilling to move on his or her own, such as the removal of a prisoner from under a bunk. It may also be used as a last resort if other options are ineffective. Appellant testified he was trained in the use of force continuum, which requires that an officer may use only enough force to handle the perceived threat. He stated that the procedure for dragging was taught at the training academy,

and that the policy and his training permitted the use of pain compliance methods such as numchucks to deal with a non-compliant prisoner. For that reason, he considered dragging to be within the range of methods that could be used under the policy. He testified he considered it an accepted practice because he had seen intoxicated prisoners dragged to cells at PADF on many occasions. Appellant said he has never been criticized for use of inappropriate force, failing to file such a report, or failing to require others to file a report under similar circumstances to those present here.

Manager of Safety Alvin J. LaCabe testified that deputies have a general obligation to maintain care and custody of inmates in a respectful, non-humiliating way, and to protect the safety of their fellow deputies. He acknowledged there was some confusion about dragging as a means of transporting prisoners, since some deputies expressed the belief during the investigation that it was a common practice. As a result, non-disciplinary counseling letters were issued to those officers, emphasizing their obligation to write a thorough use of force report, along with a statement of the need to avoid the imposition of degrading or humiliating conditions on inmates.

The parties dispute whether the Agency trains officers in the method used, and whether it is authorized. Appellant testified he was trained in its use, and offered his memory that the jail's fitness trainer Captain Bob Crickey used a 100-lb. dummy to test officers' ability to drag and lift a body of that weight. Director of Corrections and Undersheriff Fred J. Oliva testified that officers are trained to carry non-compliant prisoners in a four-point hold, and that he considers dragging a naked prisoner a violation of his policy. I conclude that Appellant used a technique that had been approved by the Agency for use when appropriate.

Appellant claims that he exercised proper judgment based upon the policies and standards of which he had notice at the time of the incident. He based his decision to drag the prisoner on facts he considered as presenting exigent circumstances. The prisoner was hostile, combative and potentially physically violent, as demonstrated by the information radioed by Deputy Lewis that he had attempted to break the handcuffs upon his arrest, as well as his actions on arrival, including kicking, spitting vomit, loud and abusive racial remarks, and resistance to orders. In addition, the prisoner refused to move from the front of the elevator in the hallway that provided access to the jail for all other inmates, creating a potential danger averted by Appellant's actions.

Officers are trained to consider a suspect's behavior during the arrest in determining the nature of the threat. Appellant had the benefit of his long experience in law enforcement in making his decision on the use of force. The evidence shows that this prisoner posed a threat of physical harm to the officers and himself because of his extreme state of intoxication, belligerence, and his attempts to spit vomit on the deputies. The prisoner's state of mind was personally hostile to two of the deputies based on their race, and his judgment was severely impaired by alcohol. The prisoner's behavior demonstrated he was unrestrained by social norms or his own self-interest, and thus was unpredictable.

The Agency policy on use of force guides an officer's judgment by limiting use of approved techniques to the minimal amount needed to be effective. That policy also requires that officers shall be informed of the limitations of their authority to use force.

Detention officials are trained and required to make immediate judgments about the likelihood that each inmate will present a danger to himself or to them, and the technique best suited to meet that danger. They do this without the benefit of a medical or mental diagnosis, criminal history, or any facts which may influence the inmate's state of mind other than his present behavior and those given to them by the arresting officers. Deputies interviewed by Internal Investigations stated they believed it was common practice to drag noncompliant intoxicated prisoners who are too large to carry. [Exh. F, pp. 1, 3, 7, 10, excerpt of interviews with Deputies Lovato, Jones, and Darkis, and Sgt. Gioso.] Deputy Szumowski believed it was common practice, but had never witnessed it before this incident. [Exh. F, p. 9.] The Agency corrected the misconception that dragging prisoners too heavy to carry was permissible by issuing counseling letters to three deputies.

Here, the deputies informed the investigator that the prisoner's spitting and refusal to obey orders limited what they could reasonably to do control him. Appellant's experience with wheelchairs and blankets further limited the available options, as did the prisoner's size. Appellant was aware of the facts and behavior surrounding the prisoner's arrest and detention, and believed there was an immediate need to remove the prisoner from the elevator door to avoid a more dangerous situation. He made a judgment to mitigate the threat by removing the prisoner to a cell by the fastest, most effective method he believed was available, a method that had not been previously criticized. It was not rendered unreasonable simply because the prisoner was exposed by his own refusal to pull up his pants, despite repeated instructions and an ability to do so. Madyun v. Franzen, 704 F.2d 954 (7th Cir. 1983) (holding that prison security outweighs a prisoner's interest in avoiding incidental intrusion into his privacy rights.) The other deputies present agreed that immediate movement by dragging was appropriate. The Diganet video shows the deputies working to transport the prisoner in an efficient but detached manner, without any apparent attempt to humiliate or abuse him. Even those deputies who were verbally insulted by the prisoner conscientiously performed their duties.

The evidence showed that dragging as a use of force was effective to prevent the prisoner from using his limbs as weapons, and allowed the gloved deputies to avoid contact with his bodily fluids, thus protecting them from the threat of disease. The force was narrowly designed to achieve the legitimate function of quickly and safely removing the prisoner from a main entryway into the jail, and securing the prisoner with minimal and temporary harm to him. Two officers commended Appellant for securing the prisoner without resort to the taser. [Exhs. F-5, pp. 12-13; F-11, p. 32.] The force exercised was discontinued as soon as the prisoner was secured in the cell, and no other force was used.

The Agency presented no evidence from which I could conclude that Appellant's actions were disproportionate to the threat posed by the intoxicated prisoner. I am persuaded that Appellant complied with this policy based upon my review of the evidence and witness testimony, the unanimous corroboration of Appellant's fellow officers, and Appellant's years of experience in working at the jail under this policy.

(3) Did Dragging the Prisoner Impose Humiliation or Other Conduct Prohibited by Departmental Rules?

The Agency claims Appellant's higher level of responsibility as a supervisor establishes that he should have known dragging a prisoner under these circumstances violated departmental rules requiring the respectful and humane treatment of prisoners. Appellant rejoins that he took no action to humiliate, embarrass, threaten, harass or punish the prisoner, and that the Agency failed to give him the information from which he could derive notice of that fact. He also states the Agency acknowledged that lack of notice by refraining from discipline of the other deputies involved.

The Agency supports its claim that discipline is appropriate by the evidence of the video showing that Appellant did not assist the prisoner in getting up, and gave him almost no time to comply with any orders to stand. Mr. Oliva testified that the video showed no life-threatening urgency to move the prisoner, and no effort to assist him to his feet. He stated the academy teaches officers how to move prisoners so no one gets hurt, and that Appellant failed to do that.

The issue then is whether a reasonable supervisor would have known that dragging a naked prisoner violated the policy against the imposition of humiliation and other improper treatment of prisoners.

The law has recognized that prisoners' "liberty interests protected by the due process clause are limited to freedom of restraint which 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Kelsch v. Hill, 2001 U.S. Dist. LEXIS 21453 (Dist. Kan. 2001.) By virtue of their incarceration, prisoners are not entitled to the same freedom from incidental intrusion of their First Amendment privacy rights or Fourth Amendment rights. "Prisoners . . . are subject to indignities and deprivations that would be impermissible outside prison." Madyun v. Franzen, supra, 704 F.2d at 962. Even gender-based distinctions in treatment such as a policy allowing "frisk searches of male prisoners by female guards is reasonably adapted to serve the important state interests of providing adequate prison security and equal opportunity for women to serve as prison guards." Id. at 960. In other words, a prison's legitimate need to maintain the safety of its officers and other inmates outweighs a prisoner's right of privacy.

Appellant and several deputies testified that the prisoner was told to pull up his pants several times in the elevator, and instructed to stand while he remained on the floor. The video does not show what occurred in the elevator, although it is clear that the prisoner's pants were down since just before he entered the elevator.

An officer shows respect to every prisoner by an even-handed application of the policies at issue for the purpose of safe detention of the prisoners entrusted to the Agency. However, a prisoner cannot thwart legitimate detention objectives by behavior that requires an officer to choose between achieving those objectives and imposing some indignity on the prisoner. Respectful treatment of prisoners is not inconsistent with a policy that supports the use of appropriate force to safely detain prisoners. Thus, Appellant did not violate the policies prohibiting mistreatment of prisoners merely because he took the steps needed to secure the prisoner at a time when his pants were down. The Agency presented no evidence that supervisors were given additional training from which Appellant should have know his actions were improper. The totality of the evidence demonstrated that the use of force was appropriate under the policy. I find that the Agency failed to prove Appellant violated the cited departmental rules and regulations by a preponderance of the evidence.

For the same reasons, I also find that Appellant did not violate CSR § 15-10, which requires an employee to conduct themselves in a manner reflecting credit on Career Service and the City and County of Denver.

B. Standards of Performance

The Agency contends that Appellant violated established standards of performance in dragging the prisoner while naked. As the Agency did not present evidence of the existence of such standards, I find that the allegation had not been proven.

C. Carelessness

Finally, the Agency asserts that Appellant was careless in the performance of his duties. Proof of carelessness had been held to require an absence of ordinary care in performing an assigned duty. In Re Mitchell, CSA 05-05, 7 (6/27/05). The Agency did not separately argue this allegation, but relied solely on the evidence offered to support the existence of a violation of departmental rules. The Agency has not established that Appellant failed to exercise ordinary care in the performance of any duty.

IV. CONCLUSION AND ORDER

The evidence is insufficient to prove by a preponderance of the evidence that Appellant violated any of the cited rules by means of his conduct on March 28, 2005. The three-day suspension imposed on September 6, 2005 is therefore REVERSED.

Dated this 15th day of February, 2006.

Valerie McNaughton
Hearing Officer for the
Career Service Board