HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 42-10

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

DEAN A. GONZALES, Appellant,

vs.

DEPARTMENT OF ENVIRONMENTAL HEALTH, DIVISION OF ANIMAL CARE AND CONTROL, and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was heard on December 1, 2010 before Hearing Officer Valerie McNaughton. Appellant was present at the hearing and represented by Michael O'Malley, Esq. The Agency was represented by Assistant City Attorney Robert A. Wolf, and Division Director Doug Kelley served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE APPEAL

Appellant Dean Gonzales, an Animal Control Officer (ACO) with the Division of Animal Care and Control in the Department of Environmental Health (Agency), challenges his two-week suspension dated June 18, 2010 for his conduct during an April encounter with a citizen at Cheesman Park. The parties stipulated to the admissibility of Agency Exhibits 1-16, and Appellant's Exhibits A-I. Exhibit J was admitted without objection during the hearing. The Agency withdrew Exhibit 15 and Appellant withdrew Exhibit C at the conclusion of the hearing.

II. ISSUES

The issues in this appeal are as follows:

1) Did the Agency establish by a preponderance of the evidence that Appellant's conduct justified discipline under the Career Service Rules (CSR), and

2) Did the Agency establish that a two-week suspension was within the range of penalties that could be imposed by a reasonable administrator for the violations proven in the disciplinary letter?

III. FINDINGS OF FACT

The Denver Environmental Health Department's Division of Animal Care and Control hired Appellant as an Animal Control Officer in October 2008[1]. His duties include investigating complaints regarding animals, customer service, enforcing the municipal laws on licensing, vaccinations and use of leashes, performing euthanasia, and collecting, impounding and caring for animals. [Exh. 1-1; D.R.M.C. Chapter 8.] Appellant received on-the-job training from Officer Andrew Martinez for eight to eleven weeks. [Kelley, 11:21 am; Appellant, 11:27 am]. Prior to his employment with the Agency, Appellant served as a Denver police officer for eight years. [Appellant, 11:25 am].

On the afternoon of Apr. 17, 2010, Appellant was on bike patrol in Cheesman Park, and observed three people with their dogs off leash. He asked each of them for identification. One of them, a man later identified as Craig Selner, stated his name was Mike Johnson of 1144 Ogden Street, and that his dog, a mastiff, was registered, neutered and vaccinated. Appellant called the Denver Municipal Animal Shelter to confirm that information, and the dispatcher informed him she could find no records under that name. Appellant then informed Mr. Selner that he would be calling the police to confirm his identity. After insisting that his dog had been on a leash but it had broken, Mr. Selner walked away and refused to stop when Appellant ordered him to do so. Appellant left the other dog owners without ticketing them, and followed Mr. Selner out of the park on his bicycle for four blocks. Appellant repeatedly requested him to stop, and reminded him that the police were on the way.

Mr. Selner went up the steps and into the entryway of a high-rise apartment building located at 1441 Humboldt Street. Appellant followed him into the building. On the other side of the entryway is a secured door with keypad access, which opens into the building lobby. [Selner, 8:46 am]. While Mr. Selner entered his code into the keypad to the right of the locked door, Appellant took a stance in front of the dog and blocked the door. Mr. Selner jerked the door open, striking Appellant's foot. Appellant reacted by pushing the door into Mr. Selner, pinning him between the door and the door jamb. Appellant admitted at hearing that his action was instinctive, but also said he pushed back to keep Mr. Selner from entering his building. [Appellant, 11:57 am.] For eight seconds, both men shoved the door toward the other from opposite directions. [Exh. 5-1.] During that time, the mastiff passed behind Mr. Selner and entered the inner lobby. Finally, Mr. Selner succeeded in closing the door behind him. Appellant then left the building. The entryway is filmed by the building's security camera, and the incident was captured on tape. [Exh. 16.]

A short time later, Appellant learned Mr. Selner's real name from other residents, and issued him a citation for violations of the leash, license, vaccination and neutering laws, as well as interference with DMAC employees. The citation was served on Mr. Selner by a police officer who responded to the scene at Appellant's request. [Exh. 7.]

Two days later, Mr. Selner called 311, the city's information line, and emailed

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[1] Animal Control Officers are also referred to as Animal Control Investigators. [Boldoe, 9:09 am.]

Division Director Doug Kelley a complaint about the incident. [Exh. 3.] That same day, Director of Operations Frank Boldoe viewed the security video from the lobby on the internet site YouTube, which had been posted by Mr. Selner. [Exh. 16.] The story was also featured on the local nightly news. Mr. Boldoe contacted Mr. Selner to discuss the incident, and wrote a report memorializing their conversation. [Exh. 4.] After confirming that Mr. Selner's dog was registered, vaccinated and neutered, Mr. Boldoe dismissed all charges but the violation of the leash law, in accordance with Division practice. On Apr. 22nd, Mr. Selner paid the penalty for the leash violation. [Selner, 8:57 am; Exh. 4-1.]

As a result of this incident, Appellant was served with a pre-disciplinary letter for asserted violations of CSR § 16-60 B, M and O. [Exh. 2.] At the pre-disciplinary meeting on June 11, 2010, Appellant submitted a four-page letter addressing each allegation. Therein, he argued that his actions were in keeping with departmental practice for over a year. He also claimed that his actions were reasonable in light of the absence of a formal policy to deal with defiant behavior by citizens encountered in the course of their animal control duties, a policy he believed was made necessary by the hostility of Cheesman Park dog owners against Animal Control employees. [Exh. 9.] On June 18, 2010, Mr. Boldoe imposed a five-day suspension based on his findings that Appellant's actions constituted carelessness, abuse of a member of the public, and failure to maintain a satisfactory relationship with a member of the public. [Exh. 1.] Appellant had accumulated no other discipline during the 18 months since his hire.

At the June pre-disciplinary meeting, Appellant's representative Ed Bagwell suggested that the Agency issue written policies governing the use of force by Animal Control Officers. On July 23, 2010, Appellant received a copy of a 31-page document entitled General Operating Procedures. The policy requires that ACOs "meet the public with professional courtesy and consideration", and prohibits unbecoming conduct, including a breach of the peace. [Exh. I-2.] Under its terms, an ACO is barred from entering private property without a warrant or permission from the owner unless the ACO had witnessed a violation outside the private area. [Exh. I-20.]

In response to Mr. Bagwell's suggestion, the policy entitled "Use of Force by Animal Control Officers Against Individuals" was issued on Nov. 16, 2010. The policy stated that it was intended to "memorialize in writing the existing policy defining the level of force permissible to obtain compliance by Animal Control Officers toward the public." [Exh. J; Kelley, 10:53 am].

> . . . animal control officer should use tact, professionalism, positive verbal skills, de-escalation, persuasion, and common sense to defuse the situation [to handle a confrontation with an individual.] However, at no time should an animal control officer use any type of physical force to obtain the compliance of a member of the public.
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> Use of force . . . is defined as intentionally and forcibly touching another person, blocking their movement, using offensive language or cursing, or throwing objects at a person or otherwise using physical force or weapons. Additionally, the fact that someone is attempting to leave a scene is not a justification to use force to

> prevent a person from leaving. [ACOs] should not block an individual's movement, but within reason, follow the person . . . in a non-confrontational manner to identify a place of residence. At no time should an officer who is following a person who has left a scene forcibly attempt to enter the person's residence or apartment building.
>
> . . . Failure to follow the instructions of this document may be cause for disciplinary action, which may include suspension and/or dismissal.

[Exh. J.]

Appellant believed the discipline was unwarranted because his behavior was respectful and taken in good faith to prevent Mr. Selner's attempt to avoid a citation, although he conceded that he should have used better judgment during the incident. In support of his actions, Appellant related two prior citizen encounters he believed were similar to this incident, neither of which resulted in discipline. In the first such incident, Appellant was partnered with Officer Gino Martinez at Cheesman Park in May 2009. Both were writing citations to dog owners for leash violations when Appellant heard yelling. He turned to see a man charging Mr. Martinez with his fists clenched. Appellant rode his bicycle toward them, and the man and a woman with him started running away. Appellant attempted to block their path out of the park with his bicycle. The man clenched his fist at Appellant and ran towards him, but passed him on his way out of the park. The pair split up. Appellant told Mr. Martinez to follow the woman and he would pursue the man. Mr. Martinez followed her into an apartment building on Race Street, up the elevator and onto the fourth floor. He confirmed the apartment number she entered, and issued the citation. Mr. Martinez testified that he maintained a distance of at least five feet from the woman at all times, even when they rode the elevator together. [Exh. H-8; Gino Martinez, 1:56 pm.]

For his part, Appellant testified that he secured a door to keep the man from leaving the park on that day. However, the statement he made just after the incident does not mention that detail. [Appellant, 11:56 am; Exh. H-5, H-6.] Mr. Martinez testified that he did not see Appellant hold any door closed during this incident, and he did not hear Appellant tell his supervisors he did so during their meeting to discuss the matter. [Gino Martinez, 2:00 pm]. Mr. Martinez' testimony is corroborated by both his hand-written report that day, and his typed statement several months later made to the Denver Board of Ethics in response to the woman's complaint. [Exhs. H-3 to H-4; H-7 to H-9.]

The second incident cited by Appellant occurred in Nov. 2009 during an encounter with a dog owner at Denver Christian Field. Appellant testified that he stood between the man and the park gate, and held the gate door closed with one hand. "He hit me in the face, and then grabbed ahold of me and jerked me off the fence, knocked me onto the ground." [Appellant, 11:42 am.] Appellant added that he reported the injury to his sergeant, Mr. Boldoe and Mr. Kelley, and filed a worker's compensation claim based on injuries to the tendons in his fingers.

In his pre-hearing statement, Appellant alleges that he "prevented a citizen from leaving by holding a door closed while the police arrived" on Nov. 11, 2009. [Pre-hearing Statement, p. 2.] As a result of this statement, Sgt. McSpadden researched the matter at Mr. Boldoe's request, and issued a report of his findings on Aug. 27, 2010. [Exh. 12.] The report said he responded to Appellant's call for assistance on Nov. 7, 2009[2] after Appellant radioed that he had been punched at Denver Christian Field. While en route, Sgt. McSpadden heard Appellant tell dispatch that the suspect was leaving the scene in a white Cadillac with Tennessee plates. Within eight minutes, Sgt. McSpadden arrived, and Appellant told him that the suspect who punched him had left. [Exh. 12.] Likewise, Sgt. McSpadden's original account of the incident does not mention any statement by Appellant that he prevented the man from leaving by holding the gate, or that he had injured his hand. [Exh. 14.] Appellant's police statement in the assault complaint two days after the incident mentions only that the suspect "punched the victim one time with a closed fist in the face causing swelling", and does not complain of an injury to his hand. [Exh. G-2.]

Appellant also argued at hearing that the standard of conduct for handling angry citizens – that ACOs should use their own discretion - was too vague to be enforceable, and that no clear policy on the matter had been reduced to writing until months after the event in question.

Appellant testified that soon after he was hired, Mr. Boldoe told him ACOs were omitting vital information on citations, causing 90% of the citations to be dismissed by the courts, despite a Sept. 2008 memo that outlined and explained the requirements for animal summonses and complaints. [Appellant, 11:24 am; Exh. B.] In Nov. 2008, Appellant was asked to conduct a report-writing class to train his fellow investigators on how to include all necessary information on the citation form, a skill Appellant had learned and used when he was on the police force. On at least one other occasion, he suggested that the Division use police methodology to improve its enforcement of animal ordinances. [Exh. D.] Appellant testified that he used police techniques as an ACO in situations where the Division had no policies "because they kept me out of trouble [while on the force]." [Appellant, 1:25 pm.]

Soon after he began with the Division, Appellant observed that many citizens approached by ACOs responded with anger and hostility, and often left the park after refusing to identify themselves. At the time, ACOs were not permitted to ask persons to produce identification documents. When Appellant asked the managers for an operations manual or policy governing contact with the public, Mr. Boldoe responded that ACOs must exercise their own discretion, but must follow persons who leave before the citation is issued and try to get an address. [Appellant, 11:35 am.]

During the hiring interview, Mr. Kelley and Mr. Boldoe emphasized to Appellant, a former policeman, that an Animal Control Officer had different requirements, authority, and functions than that of a police officer. [Boldoe, 9:13 am; Kelley, 10:21 am]. Mr. Boldoe testified that his instructions were to use common sense and follow them at a

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[2] The police report confirms that the incident occurred on Nov. 7, 2010. [Exh. G-2.]

safe distance, but avoid going on private property. [Boldoe, 9:36 am]. He stated that ACOs were not told to take whatever action is necessary in order to issue a citation. [Boldoe, 9:49 am].

Three other investigators agreed with Appellant that they often encounter rudeness and difficult situations at Cheesman Park, which produces a disproportionate number of unsubstantiated citizen complaints against ACOs. [Andrew Martinez, 2:11 pm; Jeanine Apolinor, 2:02 pm; Gino Martinez, 1:53 pm.] As a result, ACOs are now instructed they should not patrol that park at night. [Andrew Martinez, 2:11 pm.] Ms. Apolinor said she was not given the new policy on use of force until Nov. 2010, months after this incident, but that she was not surprised by its contents, since it summarized what they were already doing. Her practice is to walk alongside a person and talk to them about accepting the ticket, but she would not put her hand out or otherwise try to prevent a citizen from leaving. If Ms. Apolinor believed an assault was imminent, she would tell them to back off, but she would not touch them. [Apolinor, 2:04 pm.] Andrew Martinez stated it was "common sense" not to block a person's progress, and added he was "pretty sure" he conveyed that to Appellant during their on-the-job training. Richard Muton, an ACO with 31 years of experience, agreed. "It goes without saying that you don't do a hands-on." [Muton, 1:51 pm.] Andrew Martinez added that ACOs have the right to protect themselves if they are attacked, but he has never put his hands on anyone during his 15 years with the Division. After viewing the tape of the incident between Appellant and Mr. Selner, Andrew Martinez was of the opinion that Appellant was protecting himself. [Andrew Martinez, 2:15 pm.]

IV. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and show that the penalty imposed was within the range of discipline that can be imposed under the circumstances. In re Gustern, CSA 128-02, 20 (12/23/02); Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

1. Carelessness in performance of duties under § 16-60 B.

An employee is careless in violation of this rule when he fails to exercise reasonable care in performing an assigned duty, resulting in potential or actual significant harm. See In re Mounjim, CSA 87-07, 5 (7/10/08). A person exercises reasonable care when he acts with that degree of care which a reasonable person would use under similar circumstances. In re Feltes, CSA 50-06, 6 (11/24/06).

Agency Director Kelley determined that Appellant was careless in trying to detain a number of people at once to issue citations because good customer service requires that officers focus on each individual, an unwritten policy. [Kelley, 10:49 am]. Mr. Kelley conceded that ACOs have discretion to detain multiple individuals, depending on the circumstances. Since Appellant's actions resulted in Mr. Selner becoming upset and walking away, Mr. Kelley found that Appellant should not have exercised that discretion under these conditions.

There is no question that Appellant was performing an assigned duty at the time under the leash ordinance. However, a standard of care must be objectively enforceable. Mr. Kelley concluded that Appellant was not acting with reasonable care because one of the persons contacted became upset. Under this standard, a decision to detain multiple persons could only be deemed reasonable after the fact, depending on the subjective emotional response of those contacted. While that may be one relevant factor in determining the wisdom of engaging in a joint interview with dog owners, that alone does not present an objective measure by which an ACO may govern his conduct, given the inability to predict with reasonable accuracy how any person may react to an enforcement encounter. Absent a more objective standard, the Agency failed to prove Appellant was careless by detaining more than one dog owner at a time.

Next, Mr. Kelley found Appellant was careless because he entered the apartment building alone and positioned himself directly in front of the large mastiff being held on a leash by Mr. Selner. Mr. Kelley believed these actions placed Appellant at risk of a physical altercation with the dog owner and injury from the dog. Appellant then forcefully pushed the door against Mr. Selner for eight seconds, during which time the dog was in a position to attack Appellant. [Kelley, 10:35 am; Exh. 16.] Mr. Kelley stated that officers are instructed not to enter private property, and are trained to protect themselves from canine attacks.

Appellant as an ACO has a duty to enforce the animal control laws in accordance with Division policies. Those policies were that an ACO must follow a dog owner who refuses to identify himself in order to obtain an address for the citation. Appellant stated he understood from Mr. Boldoe that "[w]e had little to no discretion in issuing a citation in the field. My understanding was that we were to follow subjects out of the field, to identify and address where they lived so that a summons or a ticket could be issued to them at a later date." [Appellant, 11:39 am]. Appellant's assumption that he was required to follow a suspect and issue a citation at any cost was contradicted by his own action in leaving other dog owners behind to pursue Mr. Selner. In addition, Mr. Boldoe and all four ACOs testified to the limits implicit in ACO enforcement efforts.

Appellant further admitted that he was not authorized to use force against the person to be cited, but argues that his action in pushing against the door was not a use of force. [Appellant, 1:25, 1:41 pm.] A review of the security video resolves this issue against Appellant, who is shown pushing the door into Mr. Selner and pinning him against the door jamb using all his weight four distinct times over the space of eight seconds. [Exh. 16.] "Use of force" is defined in the Division policy as "intentionally and forcibly touching another person, blocking their movement, using offensive language or cursing, or throwing object at a person or otherwise using physical force or weapons." [Exh. J.] Use of a glass security door to repeatedly squeeze a person between it and the wall falls easily within that definition. Thus, Appellant failed to exercise reasonable care in performing his duty to enforce the ordinance by his unauthorized use of force in violation of Division policies, resulting in temporary physical harm to Mr. Selner.

Since Appellant knew he was not authorized to use force as an ACO, the fact

that the policy was unwritten at that time is not relevant to this violation. Police policies are based on the very different mission and powers of police officers, and therefore Appellant cannot reasonably assume he may adopt those policies in the performance of his animal control duties. That assumption was explicitly contradicted by his managers at the hiring interview. In addition, the four ACOs who testified were unanimous that the Division does not allow blocking a person's departure by physical means.

The May and November 2009 incidents cited by Appellant do not show that the Division permitted use of force against a person to be charged under the animal control ordinances. In both cases, an officer with experience in report-writing, and who trained other ACOs in report-writing, could be expected to have included the details surrounding a serious on-the-job injury. Sgt. McSpadden testified that Appellant did not inform him of the incident or injury, and his own report is consistent with that testimony. I am persuaded from this evidence that Appellant never reported that he held a door closed to detain a suspect during either the May or November incidents, and so the Division cannot be said to have authorized or condoned that type of action. [Exhs. H-5, H-6; G-2.] Appellant offered no other evidence in support of his claim that his actions were in keeping with Division practice.

The totality of the evidence indicates that Appellant's duties were not performed with reasonable care given the circumstances, creating an unreasonable risk of harm to himself, and causing actual harm to Mr. Selner, in violation of this rule.

2. Abusing any member of the public under § 16-60 M.

An employee violates this rule by inflicting abuse on another. Abuse has been defined in similar appeals as physical maltreatment. In re Freeman, CSA 40-04, 75-04, 5 (3/3/05), *citing* Black's Law Dictionary (Abridged 6th Ed. 1991). As found above, Appellant employed physical force against Mr. Selner when he pushed the security door into him for several seconds in an unauthorized attempt to prevent him from leaving his presence without a leash citation. This action constitutes a violation of the rule prohibiting abuse of a member of the public.

3. Failure to maintain satisfactory working relationships under § 16-60 O.

This section is violated by conduct that an employee knows or reasonably should know will be harmful to coworkers, other City employees, or the public, or will have a significant impact on the employee's working relationship with them using a reasonably objective standard. In re Burghardt, CSA 81-07A, 2 (8/28/08).

Director Kelley determined that Appellant violated this rule based on Appellant's actions against Mr. Selner in the apartment building entryway, which resulted in a citizen complaint, a negative posting on YouTube, and a story on the nightly news to publicize what Mr. Selner believed was abuse of a citizen by a city worker. [Kelley, 10:41 am]. Thereafter, six citizen complaints against Appellant surfaced. [Boldoe, 9:48 am; Kelley, 10:42 am; Exh. 8]. Mr. Kelley did not consider the latter complaints in

assessing this discipline. [Kelley, 10:48 am].

In support of this violation, the Agency established that Appellant physically abused a member of the public because he gave a false name and left the park in an attempt to avoid a citation under the leash law. Appellant failed to prove his conduct was justified by a misunderstanding of the Division's use of force policies. As a result of Appellant's unauthorized actions, the citizen was pressed against the wall by a security door for several seconds. Mr. Selner demonstrated his angry reaction by posting the security video on the internet and publicizing the incident on the local television news. This adverse publicity held the Division up to public criticism for use of force against a member of the public.

A reasonable person would know that actions of this type would negatively affect his working relationship with that citizen. Mr. Selner's complaint and widespread publication of the event strongly indicates that his relationship with Appellant has been harmed by the incident, in violation of this rule.

4. Appropriateness of Disciplinary Action

In evaluating the appropriate degree of discipline, the Agency must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. In re Norman-Curry, CSA 28-07 and 50-08, 23 (2/27/09). An Agency's determination of penalty must not be disturbed unless it is clearly excessive or based substantially on unsupported considerations. In re Owens, CSA 69-08, 8 (2/6/09).

The Agency established that Appellant violated three Career Service Rules in his Apr. 17, 2010 interaction with a member of the public. Although Appellant did not have any prior disciplinary history, Director Kelley determined that a suspension was consistent with progressive discipline principles based on the seriousness of the misconduct and its effect on the Agency's enforcement mission. While he discounted imposition of a more substantial suspension or dismissal, he believed that the two-week suspension would send a strong message which would discourage Appellant from such conduct in the future. [Kelley, 10:43 am].

The Agency's analysis is rationally related to the principles of progressive discipline based on its consideration of the severity of the offense and the penalty most likely to alter the misconduct. I conclude that the two-week suspension was within the range of discipline that could be imposed by a reasonable administrator, in keeping with the goals of discipline under the Career Service Rules.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency's suspension action dated June 18, 2010 is affirmed.

Dated this 30th day of December, 2010.

Valerie McNaughton
Career Service Hearing Officer