

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

Appeal No. 19-04

DECISION

IN THE MATTER OF THE APPEAL OF:

SAM LUCERO,

Appellant,

vs.

DENVER SHERIFF'S DEPARTMENT,

Agency,

and the City and County of Denver, a municipal corporation.

This matter is before the Hearings Officer on appeal of the Agency's five-day suspension of Appellant Sergeant Sam Lucero. Based upon the following findings of fact and conclusions of law, the Hearings Officer reverses the Agency suspension.

I. Procedural Background

Sam Lucero is a Sergeant with the Denver Sheriff's Department. On December 4, 2003, he was suspended for five days without pay after the Agency found he discharged a Taser gun into Deputy Sheriff Travis as a prank. The Agency based its discipline upon asserted violations of Career Service Rules (CSR) 16-50 A. 1), 9), 11), and Denver Sheriff's Departmental Rules 200.2, 200.3, .20015, 300.19, 300.20, 300.21, 1100.1, Departmental Order 5011.1G and Pre-Arrestment and Detention Facility (P.A.D.F.) Procedure Manual 224.00. Sgt. Lucero filed this appeal on February 11, 2004, seeking review of his suspension on grounds (1) the incident did not occur; (2) the discipline violated CSR 16-20, 16-50, 16-51, 19-10 b), Denver Sheriff's Department Rules 300.19, 300.20, 1100.1, Denver City Charter 9.1.4.; and (4) the level of discipline was not reasonably related to the asserted violation.

The hearing regarding this appeal was held on July 27-28, 2004. The Agency was represented by Mindi Wright, Esq., and presented the testimony of seven witnesses in support of its disciplinary action: Deputy Donald Travis, Deputy Troy Motley, Sergeant Barbara Holland, Major Marie Kielar, Commander Elias Diggins, Major Gary Anderson, and Undersheriff and Director of Corrections Fred Oliva.

The Appellant was represented by Reid Elkus, Esq., Hamilton & Faatz, and presented four witnesses: Sergeant Nina Sich, Deputy John Clague, Deputy Clark Jones, and the Appellant.

Prior to the hearing, exhibits 2-5 were offered and admitted on behalf of the Agency. Agency exhibit 6 was entered over the Appellant's objection. The Appellant offered no exhibits.

II. ISSUES ON APPEAL

Three issues are presented for appeal: 1. Did the Appellant fire his Taser the morning of September 20, 2003? 2. Was the Appellant's firing of his Taser under the circumstances alleged by the Agency a violation of the Career Service Rules and Departmental Regulations cited by the Agency? 3. Was the Appellant's five-day suspension without pay reasonably related to the violation? The Agency bears the burden to prove each violation by a preponderance of the evidence.

III. FINDINGS AND ANALYSIS

A. Introduction

The Appellant is a Deputy Sheriff II, with the rank of Sergeant, in the Denver Sheriff's Department. He is assigned to the Denver City Jail, known formally as the Pre-Arrestment and Detention Facility (P.A.D.F.). Adults arrested in Denver, and arrestees from other jurisdictions who are brought to Denver for Denver-based warrants, are first transported to P.A.D.F. for book-in processing. If inmates remain in custody for more than five days, they are transported to the Denver County Jail, just east of the former Stapleton Airport.

The most important question to resolve is whether Sergeant Lucero discharged a Taser weapon into Deputy Travis on September 20, 2003 as alleged in the Notice of Suspension dated February 4, 2004. Evidence by witnesses from each side was conflicting. A security camera in P.A.D.F. recorded the entire incident, so one might suppose the recorded evidence would resolve any doubt. [Exhibit 6]. However, the recording was inconclusive for reasons stated below. Therefore, the decision depends on the credibility of the witnesses.

B. The Taser®

The Taser, sometimes called a “stun gun,” is a non-lethal¹ weapon, the overall shape of which resembles a pistol with an oversized barrel. Sheriff’s Department Regulations permit the use of a Taser when a prisoner is an imminent danger or if a prisoner must be moved and refuses, if officer safety is at risk. [Exhibit 2, p.4-2.] It operates on electricity and, when fully charged, delivers fifty thousand volts at 26 watts and 1.76 joules into the target. The device is either on or off, that is, the operator cannot adjust the charge delivered. A dial on the weapon turns it from “safety” (off) to “cycle” (on). Depressing a trigger, like that on a hand gun, then discharges the electric current in a loud, staccato “tat tat tat tat” for five seconds. The sound is unmistakable and loud enough to be heard clearly fifty feet away through a closed door. [Testimony of Commander Diggins].

There are two methods of firing² (arching) a Taser. When an officer places the end of the barrel directly against skin or clothing⁴ and fires the weapon, this is called a “drive stun.” In the second method, when a cartridge is first inserted, the Taser shoots two wires, attached to darts tipped with metal hooks, from as far away as twenty one feet. When the hooks catch a victim’s skin or clothing, the device delivers the same debilitating shock as the drive stun⁵. Either method renders the subject incapacitated in less than one half second. *Id.* All witnesses were crystal clear that the sound of an arching Taser is loud, unmistakable, carries significant distance, and would be memorable even eleven months later – the period between the alleged incident and the hearing date. [Testimony of Deputies Motley, Clague, Jones, and Holland].

C. Undisputed Facts

In the early hours of September 20, 2003, the Appellant and Sgt. Barbara Holland were the shift supervisors at P.A.D.F. During their shift, a hostile prisoner was transported to P.A.D.F. Because he was resisting arrest, the prisoner was escorted by a group of deputies to an isolation area in P.A.D.F. known as the “C-tanks,” where aggressive inmates remain until they are calm enough to join the general jail population. The deputies accompanying the prisoner included the Appellant, Sgt. Holland, and Deputies Travis, Motley, Clague and Jones. Because the prisoner was aggressive, both Sergeants Holland and the Appellant were holding their Tasers while accompanying the prisoner.

¹ While non-lethality of the Taser was a theme repeated by several witnesses, reports have described deaths of over fifty people in North America after being “tased.”, Canadian Press, July 23, 2004. The manufacturer disputes those reports.

² The witnesses referred variously to “discharging” “firing” “cycling” “activating” or “arching” a Taser to mean the same thing.

⁴ Incapacity results when firing the Taser through up to 2 inches of clothing. [Testimony of Commander Diggins].

⁵ Taser International, Inc. brochure @<http://www.airtaser.com/pdfs/m26brochure.pdf>.

Once the prisoner was secured in his cell, the six officers emerged from the C-tank area, and turned a corner to a long straight corridor leading toward their respective posts.

D. Witnesses Testimony

1. Testimony of Commander Diggins

Elias Diggins (Diggins) is a Commander in the Denver Sheriff's Department. He runs the Denver Sheriff's Department Training Academy, and is a certified Taser instructor. During his testimony Diggins demonstrated the use of the Taser M-26, the only model in use at P.A.D.F. The indelible impression left by the demonstration was the unique, repeating, high-volume sound emitting from the weapon during its five-second discharge. In musical terms, the uniqueness of the sound stems from repeating sharp, metallic attacks and sudden decay. In short, the sound was fairly unforgettable.

When questioned about the usual reaction to being tased, Diggins testified he would expect one to jerk away from even a momentary touch in a drive stun. An individual's reaction would depend on how long contact is made, and where on the body contact is made; reaction would also depend on the individual's physiology. Diggins affirmed Sheriff's Department regulations governing the use of a Taser require a report to be filed each time one is fired.

2. Testimony of Deputy Travis

Donald Travis (Travis) has been a Denver Deputy Sheriff assigned to P.A.D.F. for three years. He works detail one, which is a shift from midnight to eight a.m. On September 20, 2003 the Appellant was his immediate supervisor. Travis confirmed he was part of the group escorting the prisoner to the C-tanks, and was in front of the Appellant when returning from the C-tanks. When asked at hearing if he remembered being tased by Sgt. Lucero, he answered "yes," although he did not report the incident. At the hearing, when Travis was shown the P.A.D.F. security camera recording from the incident, and asked where he was tased, Travis pointed to his right hip and stated the discharge hit his "right cheek". He continued "[i]t hurt one second, maybe." Travis remembered right after being tased, the Appellant joked "I tased you in the nalgas!" When questioned why he did not report being tased, he answered "[i]t's not a big deal to me. I wanted it left alone."

Prior to the incident, Travis was frequently assigned to the scout-car detail, a van sent to various police stations and jurisdictions to pick up prisoners awaiting transport to P.A.D.F. The scout car detail is prized as a relief from P.A.D.F. work. [Major Kielar testimony]. Travis testified he felt he was taken off the scout car detail in retaliation for allegedly reporting the tasing, although when asked at hearing on what basis he felt retaliation by the Appellant, Travis answered it was just an impression. [Travis testimony].

Travis also testified he had always maintained to investigators that the Appellant tased him. In contrast, two witnesses testified Travis first denied being tased by the Appellant, then reversed his statement. On September 20, 2003; Marie Kielar (Kielar) was a Captain and a P.A.D.F. Watch Commander. In that capacity, she was in the chain of command over both the Appellant and Travis. Since then, she was promoted to the rank of Major. Nina Sich (Sich) is a Sergeant assigned to P.A.D.F. and first-line supervisor to Travis.

Kielar testified she heard about the incident from an officer who was not a witness in this case. Based on that information she talked with both Travis and the Appellant "within a couple days" after September 20, 2003. Both denied the tasing occurred. She stated she believed the denials were truthful and decided to take no further action.

About two weeks later Kielar asked Travis again about the incident after another officer reported the tasing took place. Kielar testified that, during the second interview, Travis admitted the Appellant tased him. When she asked why he didn't report it, Travis replied he didn't want problems on his shift and he feared retaliation. Based on this second interview with Travis, Kielar reported the incident to the Internal Affairs division of the Denver Sheriff's Department.

Sich testified as a first-line supervisor to Deputy Travis, she called him into her office soon after the alleged incident to ask him about the tasing rumors she had heard from other officers whose names she did not recall. Sgt. Pham was also present. Sich recalled asking Travis three times "did you get tased by a sergeant?" Travis answered "no" each time. At hearing, when Sich was asked if she had any reason not to believe him, she answered "no."

Sich testified that, in an incident at P.A.D.F. pre-dating this case, Travis claimed she tased him. Although Sich was exonerated of any wrongdoing, Travis' allegation raised the possibility that Sich harbored some vengeful motive to undermine Travis' testimony in the current case. Nonetheless, the Hearing Officer finds no reason to doubt Sich's truthfulness. Moreover, Major Kielar's testimony was not called into question and her testimony was convincing that Travis first told her he was not tased by the Appellant before changing his mind during their second meeting.

In addition, Travis insisted he spoke only once with Sich and once with Kielar about the incident, while both Sich and Kielar remember interviewing Travis twice. The

Hearings Officer finds it unlikely that, knowing he was being investigated as a witness in a serious disciplinary matter, Travis would forget a second interview - twice - particularly when he retained clear details about his "only" interview with Sich and Kielar, such as who was present, and the precise words used in each interview.

For these reasons Travis' testimony is not credible. It is apparent Deputy Travis was truthful about whether he was tased only half the time and it is not possible to tell which half. Therefore his testimony concerning whether he was tased must be disregarded.

3. Testimony of Deputy Motley

Troy Motley (Motley) is Travis' partner. When questioned about his recollection of the September 20, 2003 alleged tasing, Motley testified he did not see if the Appellant tased Travis as he (Motley) was "several feet ahead of [them]." He stated he remembered hearing a Taser arching, and described it's distinctive sound. [Exhibit 2, p.5-2]. Motley was silent as to whether the sound caused him to turn around or what he observed after hearing the Taser discharge. Shortly after the incident, Travis and Motley were making a run in the scout car. During that run, Travis told Motley "Sammy [the Appellant] hit me with the Taser." [Motley testimony].

All witnesses were clear that the sound of a Taser discharge is attention-grabbing, so Motley's testimony - that he heard the Taser but didn't see anything - is puzzling. If the Appellant tased Travis, it seems, the sound would have caused Motley to turn around to see the Taser, or to see Travis grabbing his hip (as Travis testified he did), or to ask "what was that?" Motley's silence as to having any reaction to hearing the tasing and his status as Travis' partner, cause the Hearing Officer to assign less weight to Motley's testimony than other witnesses.

4. Testimony of Sgt. Holland

During her direct testimony, Sgt. Holland (Holland) adamantly denied she was part of the group escorting the prisoner to the C-tanks on the morning of September 20, 2003. She stated she was in the jail infirmary, adjacent to the corridor described above. She even drew a diagram of her exact location in the infirmary with respect to various fixtures in the infirmary. She stated "the noise of the Taser drew me out into the hall," but she did not ask any of the officers what happened. Holland stated she had her own Taser out and switched on in the infirmary because she had used it on the prisoner in the basement when he first arrived at P.A.D.F.

When shown the security camera recording during cross-examination, Holland corrected her earlier testimony, admitting she had accompanied the other officers to C2C and returned with them into the corridor. [Cross-examination of Holland]. The fact that Holland was not in the location she first recalled renders unreliable her recollection that she was drawn out to the corridor by the sound of a Taser discharge. Therefore,

the Hearings Officer gives minimal weight to Sgt. Holland's recollection of hearing a Taser at the approximate time the Agency claims the Appellant tased Travis.

5. Testimony of Deputy Clague

John Clague is a Denver Deputy Sheriff assigned to P.A.D.F. He remembered being part of the group, including the Appellant and Travis, that subdued and accompanied the prisoner to the C-tanks on the morning of September 20, 2003. He stated he knows Travis because their details sometimes overlapped. When shown the recording at the hearing, Clague placed himself within a few feet of the alleged tasing, but testified he neither saw nor heard a Taser being discharged. When asked about his recollection Clague stated "I would have heard it if it was activated."

Clague is one of two witnesses to the alleged tasing whose recollection was not questioned. He knows Travis, but not well, and not as a partner, superior or subordinate. When asked if, knowing Travis, Travis would have said something if he were tased, Clague answered "oh yeah, right then and there. I think he would've made a big fuss over it. He didn't say anything." Deputy Clague's testimony is credible.

6. Testimony of Deputy Jones

Clark Jones has been a deputy at P.A.D.F. for over three years. He testified for the Appellant that on September 20, 2003, he searched the aforementioned prisoner, then followed the group accompanying the prisoner to 2C2. When shown the recording of the group returning from the C-tank area, Jones placed himself about fifteen to twenty feet in front of the others. At the point in the recording where the Agency claims the Appellant fired his Taser, Jones stated he did not remember the sound of a Taser discharge. The Agency referred Jones to the recording, and stopped the replay at the approximate time the Agency claims the Appellant fired his Taser. When asked if he would have heard the arching of a Taser from his position in the recording, Jones answered "I would think so," in a way that left little doubt about his certainty.

Along with Clague, Jones is the other witness to the alleged tasing whose recollection was not questioned. Jones' failure to remember a Taser discharge the morning of September 20, 2003, is credible.

7. Testimony of the Appellant

The Appellant has been with the Denver Sheriff's Department twenty-three years, including over three years in Internal Affairs, and the past three as Sergeant at P.A.D.F. As a Sergeant and first-line supervisor, the Appellant's duties include enforcing policies and procedures of the department, supervising deputies on his shift, and supervising the care and custody of inmates at P.A.D.F. His duties on September 20, 2003 were "basically the same."

The Appellant testified that when he came under investigation, he told Internal Affairs his personal protocol for handling the Taser was first, to follow inmates with the Taser on, then, when the inmate is secured, to turn off the Taser, and finally, to insert a cartridge in the Taser and holster it.

On the morning of September 20, 2003, the Appellant helped process the aforementioned prisoner. Because the prisoner was belligerent and screaming, the Appellant decided to place him in the C-tanks. The Appellant had his Taser out of his holster and on the entire time he escorted the prisoner to the C-tanks. "Once we secured [the prisoner] I turned it off. I was last out of the cell, I'm sure. Supervisors are always last out of a cell." The Appellant did not immediately place a cartridge in the Taser, or holster it. The Appellant admitted this was "uncharacteristic." When referred to the security camera recording at the point the Agency claims he fired his Taser into Travis, the Appellant denied firing it. The Appellant affirmed Sgt. Holland was the only other person in the area who had a Taser at that time.

The Appellant has a direct interest in the outcome of this case, as he was suspended for five days without pay. As there are other witnesses without a direct interest in the case, the Appellant's testimony is discounted.

8. Testimony of Major Anderson

Gary Anderson (Anderson) holds the rank of Major. He is in charge of Internal Affairs for the Denver Sheriff's Department and led the investigation resulting in the Appellant's suspension. Anderson explained the security camera "DigaNet" recording system at P.A.D.F. records digital date-stamped images to a hard drive. The information in the hard drive is then down-loaded to a diskette, such as a compact disk (CD). At the hearing, Anderson played a CD of the alleged tasing from a laptop computer with an attached projector. The Agency submitted Exhibit 6 as a videotape copy of that same digital information.

Anderson explained Tasers are assigned only to the sergeants in P.A.D.F. At each shift change, the Tasers are handed off to the Sergeants in the next shift. Thus, the Tasers are shared and not assigned to each sergeant. In addition, according to Major Anderson, the Taser M-26 records the interval between discharges. He testified that only Holland and Lucero, as the only sergeants on their shift, would have had a Taser. As a result of his investigation, Major Anderson found each of those Tasers was fired once on September 20, 2003. The discharge of the Taser assigned to Sgt. Holland was consistent with her testimony that she had tased the prisoner in the basement of P.A.D.F. before he was taken to the C2C. That left an unaccounted-for discharge of the Taser assigned to the Appellant.

Cross examination of Major Anderson revealed the difficulty of assigning a time of discharge to a particular Taser. In the certification class for the Taser, trainees are taught to arch the weapon at the beginning of their shifts to make certain it cycles due to problems with the Taser. Anderson testified that around September 20, 2003,

sergeants were not arching their Tasers every day. He admitted the firing of the Taser assigned to the Appellant on September 20, 2003 could have been a test fire. [Cross-examination of Anderson].

Additionally, the Taser measures the interval between discharges, but not the date or time. The actual date and time a Taser was fired depends on the clock of the computer to which the information is downloaded. [Cross-examination of Anderson]. So, presumably, if a Taser were fired on September 20, 2003 at 6:00 a.m. and again at 7:00 a.m., the one-hour interval between discharges is recorded by the Taser, but the times and date would not be seen as 6:00 a.m. and 7:00 a.m., September 20, 2003 until the Taser data was downloaded to a computer. Then the computer clock assigns a date and time, while the Taser provides the interval of one hour. During his investigation, Anderson found the Taser's internal clock loses and gains several seconds every day, so at the time the Agency alleged Lucero tased Travis the internal time clock of Lucero's Taser could have been off by "several hours." [Anderson Cross-examination]. Anderson admitted because of those problems, a Sergeant on another shift may have fired the Taser at a time attributed by the security camera to the Appellant. *Id.*

To his credit, Major Anderson was completely forthcoming about these problems, and was in no way trying to or evade questions about the digital date-stamp problems. As a result, the time-related issues raised by cross-examination cast considerable doubt on the reliability of connecting the unaccounted-for discharge of the Taser to the Appellant.

Another concern the Hearing Officer has with Anderson's testimony is his conclusion about what he observed in the P.A.D.F. security camera recording. At the point in the recording when the Agency claims the Appellant tased Travis, Anderson described Travis' reaction as "Officer Travis leaps forward." Exhibit 2 @ 5-2. The Hearing Officer's viewing of the recording was inconclusive as to whether Travis was "leaping forward⁷."

Thus, the Hearing Officer views three problems with Anderson's concluding the Appellant tased Travis: (1) the time of the discharge, if any, is unreliable based on Major Anderson's own admission of time-stamp issues with the DigiNet; (2) only half the witnesses heard a discharge despite clear testimony the sound is heard above almost anything else, and would remain a distinct memory eleven months later; and (3) the DigiNet recording is inconclusive.

⁷ The DigiNet recording plays as a broken series of still photographs rather than as a fluid movie. It appears to capture approximately one second intervals, so information between the stills is lost. At the moment Anderson describes Travis "leaping forward," Travis is blocking a view of the Appellant, and the Hearings Officer could discern Travis merely facing left. The information which may have shown a leap or a turn was not captured. Travis could have been merely looking at something to his left or he could have been pulling away from a negative stimulus such as the *Taser*. The DigiNet recording is therefore inconclusive.

IV. CONCLUSION

There were six witnesses present at the time the Agency alleges the Appellant tased Travis on September 20, 2003. The testimony of Travis is not credible. The testimony of the Appellant is discounted for having a stake in the outcome. The testimony of Motley is deficient and, as Travis' partner, he is too close to Travis compared with the remaining witnesses. The Hearing Officer concludes Holland's recollection is unreliable. That leaves Clague's and Jones' testimony, whose testimony was unimpeached. They do not remember hearing a Taser being fired at the time the Agency alleges the Appellant tased Travis.

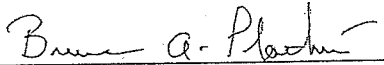
Most importantly, even though Agency established the Appellant's Taser was discharged sometime on September 20, 2003, the visual evidence, and problems with the Taser internal clock, fail to link the time of discharge to the moment in the DigiNet recording when the Agency alleges the Appellant tased Travis.

Thus, based on the evidence presented, and having weighed the credibility of the witnesses, the Hearings Officer respectfully disagrees with the conclusion reached by Major Anderson and Undersheriff Oliva. The Agency has not proven by a preponderance of the evidence that the Appellant tased Deputy Travis on September 20, 2003.

V. DECISION

The Agency's five-day suspension of the Appellant on February 4, 2004, is **REVERSED**. The Agency is ordered to reimburse the Appellant's five days pay, lost benefits, and is further ordered to remove all references to this suspension from the Appellant's personnel file. All remaining issues in this appeal are rendered moot by this decision.

Dated Friday, the 13th day of August, 2004.



Bruce A. Plotkin
Hearings Officer
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing DECISION by depositing same in the U.S. mail, postage prepaid, this 14th day of August, 2004, addressed to:

Sergeant Sam Lucero
5344 Columbine Lane
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Reid Elkus, Esq.
Hamilton & Faatz
1600 Broadway #500
Denver, CO 80202

I further certify that I have forwarded a true and correct copy of the foregoing ORDER by depositing same in the interoffice mail, this 14th day of August, 2004, addressed to:

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Alvin J. LaCabe, Jr.
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