

DECISION

IN THE MATTER OF THE APPEAL OF:

JOSEPH WEBSTER, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Joseph Webster, appeals his dismissal from employment with the Denver Sheriff's Department (Agency), on January 7, 2011, for alleged violations of specified Career Service Rules. A two-day hearing concerning this appeal was held on March 30, 2011 and June 10, 2011. Bruce A. Plotkin, Hearing Officer, presided. The Agency was represented by Andrea Kershner, Assistant City Attorney, while Sergeant Joseph Garcia served as the Agency's advisory witness. The Appellant was represented by Robert E. Goodwin, Esq. Agency exhibits 1, 2, and 5 were admitted by stipulation. Agency exhibits 3, 4, 6-8, and 13 were admitted over objection. The Agency withdrew its exhibits 9-12. No additional exhibits were offered by the Appellant. The following witnesses testified for the Agency: Deputy Kenneth Medina; Deputy Michael Billings; Sergeant Theresa Penson; Sergeant Garcia; and Deputy Manager of Safety Ashley Kilroy. The Appellant and Captain Frank Gale testified for the Appellant. Immediately prior to hearing, the Agency withdrew its claims under Career Service Rules (CSR) 16-60 Y. and Z.

After the hearing, Appellant submitted a "Motion to Dismiss Manage [sic] of Safety Order Terminating the Employment of Deputy Sheriff Joseph Webster," and the Agency submitted a response in opposition to the motion. Appellant's motion is denied for reasons hereunder.

II. ISSUES

The following issues are to be decided:

- A. whether the Appellant violated CSR 16-60 B.; E.3; L.; or M;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to terminate him was reasonable, as determined under CSR 16-20.

III. FINDINGS

Joseph Webster was hired by the Agency in August 2000. Webster's training in defensive tactics enabled him to serve as a defensive tactics instructor, assisting full-time instructors in training new recruits and providing in-service training at the Department. Training included techniques to gain and maintain control over inmates by a matrix of appropriate verbal and physical responses to inmate aggression known as C-4, (Command, Compliant, Contact, and Control). [Webster Testimony, 6/10/11].

On April 19, 2009, Deputies Webster and Medina picked up two inmates from District One. One of them, Alan Trujillo, began yelling obscenities at the Deputies. When Webster explained their function was only to transport him, and were not the police who arrested him, Trujillo calmed down. [Webster; Medina Testimony, 3/30/11]. On the way to the City Jail, Trujillo again became agitated, banging on the sides of the scout car. Webster directed him to calm down, and he complied.

At the City Jail sally port, Trujillo continued his tirade, but began cooperating again at Webster's prompting. [Webster, Medina Testimony; Exhibit 13 -J.] Medina directed Trujillo to put his back against the north wall of the sally port, and proceeded across the room to a countertop on the east wall to complete paperwork. Trujillo stepped forward slightly from the wall. As Deputy Webster entered the sally port, he directed Trujillo to put his back up against the wall. Trujillo responded to Webster, "fuck you, make me bitch." [Webster, Medina Testimony; Exhibit 13 J].

Webster stepped up to Trujillo, reaching out with his right hand, and grasped Trujillo around his left bicep. Less than one second later, Webster struck out with his left hand, striking Trujillo somewhere between his collarbone and his chin, and wrapped his left arm around Trujillo's neck, pulling Trujillo toward the floor. Trujillo resisted going down to the floor, but otherwise did not fight back. Medina turned from where he was completing paperwork and assisted Webster in taking Trujillo to the ground. Webster told Trujillo to calm down. Trujillo immediately ceased resisting, stating, "all right, I'm done." Medina held Trujillo's legs down, while

Webster placed his knee on Trujillo's head to keep it against the floor. [Exhibit 13-A.2]. Meanwhile the other inmate was roaming unattended around the sally port.

Deputy Potts, who heard the incident from the adjacent control center, entered the sally port and directed the other inmate to put his back against the wall. Webster and Medina held Trujillo on the ground until another deputy arrived to escort Trujillo to the elevator. [Exhibit 13-16; 13-24]. The incident was captured on video, as there are two cameras in the sally port; however, only one camera was recording. [Penson, 3/30/11; Medina, Testimony].

When Trujillo arrived at the booking area, Sergeant Penson noticed a cut above Trujillo's right eye and blood next to his left ear. Penson sent Trujillo to be examined by a nurse. Trujillo did not file a complaint against Webster.

Whenever a deputy exerts force against an inmate, the Agency requires the deputy, and any other deputy who witnessed the incident, to write use-of-force reports. [Medina Testimony]. Webster, Medina, Potts, Billings, and Penson wrote separate incident reports regarding Webster's use of force. [Exhibits 13-26]. After reviewing the reports, Division Chief Deeds filed a complaint against Webster with the Internal Affairs Bureau (IAB), alleging Webster may have used excessive force. [Exhibit 13-1]. Garcia was assigned to investigate Webster's use of force.

During his investigation, Garcia interviewed Webster, Medina, Potts, Billings, and Penson. [Exhibit 13-35]. Trujillo could not be located, as he had been released from custody after the incident, and could not be located. [Exhibit 13-28; Garcia Testimony, 3/30/11]. Garcia did not interview the other inmate because he did not know his identity, although he conceded that he could have found out. [Garcia Testimony, 3/30/11].

Webster failed to attend his first IAB interview scheduled for June 24, 2009. Beginning July 13, 2009 he took FMLA leave to attend a six-week training with the Navy Reserves. He cancelled another IAB interview, and then was deployed to Iraq for one year beginning August 21, 2009. [Webster Testimony].

On August 28, 2010, after Webster returned from Iraq, he resumed working for the Department. The Agency gave Webster a copy of the incident report he had written at the time of the incident so that Webster could review it before his interview with Garcia on September 11. Webster's attorney also attended the interview.

Immediately after interviewing Webster, Garcia played the April 19, 2009 surveillance footage from the sally port for Webster for the first time. After replaying the video two or three more times, Webster stated the use of force report he filed at the time of the incident was inconsistent with what he observed

in the video.

On December 7, 2010, the Agency served Webster with a letter in contemplation of discipline followed by a pre-disciplinary meeting on December 16. In attendance were Webster, his attorney, Director Wilson, Division Chiefs Diggins, Deeds, Kielar, IAB Captain Coyle, Sgt. Garcia, Assistant City Attorney Jennifer Jacobsen, Major Brown, and Messrs. Richard Rosenthal and Gregg Crittenden from the Office of Independent Monitor.

Deputy Manager of Safety Ashley Kilroy decided to terminate Webster based on his excessive use of force and dishonesty regarding the incident. The Agency notified Webster of his termination on January 7, 2011. [Exhibit 3]. This appeal followed timely. [Exhibits 1, 2].

IV. ANALYSIS

A. **Jurisdiction and Review**

Jurisdiction is proper under CSR § 19-10 A. 1.b., as the direct appeal of a termination. I am required to conduct a *de novo* review, meaning to consider all the evidence as through no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. **Burden and Standard of Proof**

Throughout the case, the Agency retains the burden of persuasion to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to terminate Webster complied with the purposes of discipline. CSR § 16-20. The Agency must prove its claims by a preponderance of the evidence.

C. **Career Service Rule Violations**

The Agency claimed Webster violated the following Career Service Rules in using excessive force with inmate Trujillo at the PADF and in lying about it.

1. **CSR § 16-60 B. Carelessness in performance of duties and responsibilities**

a. Carelessness in the use of force. The Agency has already claimed Webster violated its use of force rules. The proof for this violation is necessarily the same. The Career Service Board is presumed to have enacted separate rules to address separate performance issues. In re D'Ambrosio, CSA 98-09 (5/7/10), citing Colo. State Civ. Serv. Emp. Ass'n v. Love, 448 P.2d 624 (Colo. 1968), making this claim superfluous.

b. Carelessness in dishonesty. The Agency already alleged Webster violated Career Service and Agency rules against dishonesty. To allege that dishonesty also constitutes a careless performance of the duty to be honest, impermissibly stretches a reasonable reading of the Rules. If such links between the rules were permitted, agencies could allege a careless performance for a breach of nearly any other rule, for example carelessness in failing to obey a lawful order (CSR 16-60 J), carelessness for failing to meet established standards of performance (CSR 16-60 K), or carelessness performance of the duty to observe written departmental or agency standards (CSR 16-60 L). Such a cumulative reading of the rules was surely not intended. See D'Ambrosio, supra, and I decline the invitation to expand it in such fashion here. This claim is dismissed.

2. CSR §16-60 E. 3. Any act of dishonesty, which may include, but is not limited to...Lying to superiors...with respect to official duties, including work duties, disciplinary actions...

A violation of this rule is established where an employee makes any knowing misrepresentation within the employment context. In re Mounjim, CSB 87-07 A., 5-6 (1/08/09). Since an admission of dishonesty is unlikely, proving violations of this rule usually derive from circumstantial evidence.

The Agency asserted Webster was dishonest in claiming (1) Trujillo "pulled away" when he did not, and (2) used a palm heel¹ strike on Trujillo when he did not. Since, taken alone, the significance of these claims is not apparent, some context is necessary. From the Agency's perspective, if Trujillo did not attempt to pull away, then there was no justification for Webster's striking him and forcing him to the ground, thus proving Webster's use of force was excessive. Moreover, If Trujillo was dishonest about the occurrences during the subsequent IA investigation, he interfered with an IA investigation, thus obstructed the function of the Agency, and potentially diminished the public's confidence in the Agency. From Webster's perspective, if Trujillo was attempting to pull away, Webster was justified in using appropriate force to maintain control over Trujillo; and if Trujillo was too close when he resisted Webster, then Webster was justified in putting distance between them with a palm heel strike so that he engaged in no wrongdoing and no cover-up.

Webster denied he was dishonest because (1) his memory was "hazy;" (2) the missing camera angle may have revealed his palm heel strike and Trujillo's tensing to resist or pull away; and (3) the Agency's failure to interview the other inmate who was present may have provided exculpatory evidence.

¹ A palm heel strike is a rapid forward-extension of an open hand, with the palm facing toward the subject. [Webster Testimony]. A palm heel strike to the chest or the face is permissible and effective under the appropriate circumstances; however, Webster acknowledged it should never be administered to a person's neck because it could collapse the airway. [Medina; Webster Testimony].

1. Whether Webster was dishonest in stating Trujillo was attempting to pull away. (a) Hazy recollection. Since Webster was gone for one year between the incident and the time he was interviewed, it is feasible his memory was "hazy." However, the hazy memory defense weakened when, after Webster acknowledged the video did not show any such movement, his recollection later strengthened to certainty that Trujillo pulled away. (b) Second camera. Webster contended if the second camera in the sally port had been working, Trujillo's movements may have been discernable and would support his claim that Trujillo was trying to pull away. The existing video recording is clear and unambiguous. It does not support Webster's assertion that Trujillo pulled away from Webster, (c) The other inmate. Webster speculated another inmate, who was present during the incident, may have seen Trujillo pull away. It is unknown if the other inmate was observing or in a position to see such actions, and, based on the previous discussion, the existing evidence is clear. The Agency established that Webster was dishonest in stating Trujillo pulled away.

2. Whether Webster was dishonest in claiming he used a palm heel strike on inmate Trujillo. Webster's premise, that he was justified in using a palm heel strike, assumes Trujillo came too close, and that a less forceful means of creating distance, such as ordering Trujillo to step back, or stepping back himself, would have been ineffective, but he offered no such evidence. Webster waffled over whether he used a palm heel strike to distance himself from Trujillo. Hazy recollection. Webster's hazy memory was discussed above. For the same reasons, this claim fails here as well. Second camera. At hearing, Webster was certain that a careful dissection of the video and freeze-frame recording proved he used a palm heel strike. Neither the moving nor freeze-frame recordings justify such an assertion. Webster claimed he could feel Trujillo's bicep muscle tense through his layers of clothing, thus justifying the need for a palm heel strike. Even if Trujillo tensed, it is unlikely a second camera angle would reveal such a minute movement. In addition, Webster could not reasonably conclude that such tensing was cause for exerting significant force. In short, there was no justification for use of the palm heel strike, nor does the recording support Webster's claim that he executed a palm heel strike. In addition, Webster's claim is internally inconsistent. He claimed his response to Trujillo's pulling away was to execute a palm heel strike. Since the purpose of his palm heel strike was to increase distance between him and Trujillo, there was no need to create distance if Trujillo was already pulling away. Rather the contrary would seem to be true: that Webster would use force to prevent Trujillo from pulling away. Because Webster's claims were not credible, and he failed to rebut the Agency's evidence, the Agency established Webster's violation of CSR 16-60 E.

3. CSR § 16-60 L. Failure to observe written departmental or agency regulations, policies or rules

An Agency establishes an employee's violation of this rule by showing it provided notice to the employee of a clear, reasonable, and uniformly enforced rule, regulation or policy, and that the employee failed to follow it, regardless of the employee's intent. In re Mounjim, CSA 87-07 A., 6 (CSB 1/08/09). The Agency claimed Webster was aware of, yet failed to observe, the following written Agency regulations and orders:

Departmental Rules and Regulations:

200.4 Deputy Sheriffs and employees shall not depart from the truth, knowingly make misleading statements or falsify any report, record, testimony or work related communications.

The Agency's evidence for this claim was the same as for CSR 16-60 E. The proof for finding a violation is the same proof. For reasons as stated above, under the discussion for CSR 16-60 E., Webster violated this Agency rule.

300.10 Deputy Sheriffs and employees shall not indulge in immoral, indecent or disorderly conduct that would impair their orderly performance of duties or cause the public to lose confidence in the Department.

The Agency failed to allege proof related to this claim. The violation is not proven.

300.19 Deputy Sheriffs and employees shall not violate any lawful rule, duty, procedure or order.

As more specific violations were alleged and found elsewhere, no further discussion is required here.

300.20 Deputy Sheriffs and employees shall not indulge in any conduct that is contrary to Career Service Authority (CSA) rules and regulations.

As more specific violations of the Career Service Rules were alleged and found elsewhere, no further discussion is required here.

300.21 All employees of the Department shall read and obey all directives and orders issued by the Mayor, the Manager of Safety, Director of Corrections and Undersheriff, command officers or their designees that relate to the Denver Sheriff Department's duties and assignments.

As more specific violations of Agency rules and orders were alleged and found elsewhere, no further discussion is required here.

400.3 Deputy Sheriffs and employees shall give clear, concise and reasonable orders to prisoners and shall handle prisoners in a firm and fair manner.

The proof for this violation is subsumed in the discussion for the Agency's Use of Force Order #5011.1H, below.

400.4 Deputy Sheriffs and employees shall not impose or permit the imposition of humiliation, indignities or cruel and unusual punishment on any prisoner.

The proof for this violation is also subsumed in the discussion for the Agency's Use of Force Order #5011.1H, below.

400.6 Deputy Sheriffs and employees shall not injure or strike any prisoner except in the defense of themselves or another, or to prevent a disturbance or attempted escape, and then only using that amount of force necessary and reasonable.

The proof for this violation is also subsumed in the discussion for the Agency's Use of Force Order #5011.1H, immediately below.

Departmental Order 5011.1H Use of Force

1. Purpose: The purpose of this order is to prescribe policy and guidelines for the use of force within the Department.
3. Policy: It is the policy of the Department that officers use physical force only as prescribed by the Colorado Revised Statutes (CRS) and internal department standards to perform any legitimate law enforcement or detention related function. The amount of force will be reasonable and appropriate in relation to the threat faced. In all cases, force will be de-escalated once the legitimate function is achieved or the resistance has ceased.

Physical force will not be used as a punishment, under any circumstances.

Officers should rely on departmentally approved use of force techniques that are taught in training. Officers are responsible for justifying their actions and must report use of force incidents in accordance with departmental rules and CRS. 18-8-111 and CRS 18-8-802 to command staff personnel or a supervisory officer as the situation has stabilized. Officers are responsible to ensure that medical screening is provided to any person who has been injured or alleges injury as a result of being subjected to the use of force.

The Agency asserted Webster's striking Trujillo, wrestling him to the ground by the neck, and using a knee to keep his head on the floor were excessive where Trujillo was not physically resisting any proper command. Webster denied using excessive force because he used only the degree and kind of force required to control resistance by Trujillo. [Exhibit 13-A.2].

The use of physical force by a deputy against an inmate may be appropriate in circumstances such as escalating physical resistance by an inmate. Agency rules, the Career Service Rules, and State law make it clear, however, that a deputy may not use excessive physical force to address insults. What is excessive force depends on the nature and extent of the inmate's resistance. Webster's C-4 training, as well as preponderant evidence from witnesses, established that cursing by inmates is a frequent occurrence which must be handled with Teflon indifference rather than punishing violence.

Webster's blow to Trujillo's neck or face, followed by his placing Trujillo in a headlock-like restraint, forcing him to the floor, and kneeling Trujillo in the head to keep him down, were impermissible overreactions to an evident lack of physical resistance by Trujillo. No parsing of the video evidence by Webster changed the obvious lack of resistance by Trujillo. Without such justification, Webster's four uses of force - the blow to Trujillo's neck area, the necklock-like restraint, pulling on Trujillo's neck to force him to the floor, and kneeling him in the head, were excessive and improper uses of force. Webster's reaction to Trujillo's taunt was physical retribution in violation of Agency Rules 400.3 (unfair handling of inmate), 400.4 (cruel and unusual punishment), and 400.6 (unnecessary and unreasonable force), and Agency order #5011.1H.

Webster's argument regarding the Agency's failure to interview the other inmate who was present at the time Webster struggled with Trujillo was already disposed of, above, in the discussion of CSR 16-60 E. Finally, even if Webster's

claim were true, that Trujillo tensed his arm when Webster grabbed him, Webster's response was unreasonable and disproportionate in violation of those same rules

4. CSR § 16-60 M. Threatening, fighting with, intimidating, or abusing employees or officers of the City, or any other member of the public, for any reason.

This rule is violated where the Agency establishes that a reasonable employee, city officer, or member of the public in the same situation as the target would have been in fear of bodily harm. In re Owens, CSA 69-08, 6 (2/06/09).

The Agency asserted Webster violated this Rule for his use of excessive force on inmate Trujillo. The rule applies only to victims who are City employees, officers, or members of the public. I previously found inmates are not members of the public and therefore found the rule inapplicable to inmates, particularly as other rules address inmate abuse. In re Weeks, CSA 26-09, 5 (7/20/09), *rev'd on other grounds*, City and County of Denver v. Weeks, 2010 CV 545 (Denver Dist. Ct. 6/21/10). This claim is dismissed as unenforceable.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, the employee's past record, and the penalty most likely to achieve compliance with the rules, in imposing reasonable discipline. CSR § 16-20.

A. Severity of the proven offenses.

Webster's actions were egregious in light of the Agency's mission to provide appropriate care and custody of inmates. While deputies may use force in their jobs legitimately, they must ensure they use only reasonable and appropriate force. In addition, the Agency has made it clear that dishonesty, particularly during an investigation, is intolerable. See, e.g. Weeks, *supra*.

Taken out of context, Webster's dishonesty about his palm heel strike and Trujillo's aggression may appear not to justify significant discipline. In the context of Webster's use of excessive force and his persistent cover-up, those dishonesties gain compelling significance, and all-the-more so because he failed to acknowledge his errors at any point.

B. Past record.

During his ten-year employment as a deputy, Webster earned outstanding PEPRs and commendations; however, his prior discipline included a 45-day suspension for improper use of force in October 2010, a significantly aggravating factor. [Exhibit 7]. In that case, Webster violated four of the same violations alleged in this appeal, for an altercation factually similar to this appeal, to wit: on January 21, 2009, less than three months prior to the incident in this appeal, Webster was interacting with a verbally aggressive and uncooperative inmate, who did not exhibit physical resistance. Webster grabbed the inmate's arm in an effort to make him cooperate, and then administered a knee strike when the inmate continued his verbal insults. Webster was also dishonest in his account of the incident.

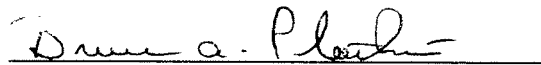
C. Penalty most likely to achieve compliance.

Webster's recent 45-day suspension for conduct similar to the present case, and Webster's failure to acknowledge wrongdoing, support the Agency's position that any lesser discipline would have been unlikely to alter Webster's conduct. Consequently, the Agency's choice of discipline was not clearly excessive, nor was it based substantially upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), citing In re Delmonico, CSA 53-06, 8 (10/26/06).

VI. ORDER

For reasons stated above, the Agency's decision to terminate the Appellant's employment on January 7, 2011, is AFFIRMED.

DONE August 9, 2011.



Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 *et seq.*, within **fifteen** calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

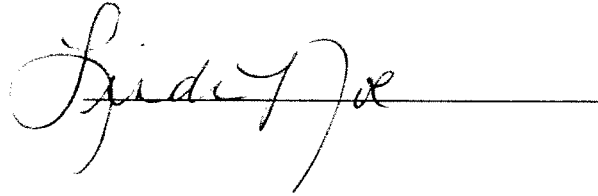
Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

I certify that, on August 9, 2011, I delivered a correct copy of this DECISION to the following, in the manner indicated:

Mr. Joseph Webster, c/o Robert E. Goodwin, Esq.,
Robert E. Goodwin, Esq., 1343 Delaware St., Denver, CO 80204 (via U.S. mail);
City Attorney's Office at Defiling.litigation@denvergov.org (via email);
Ms. Lili Tran, HR., Lili.Tran@denvergov.org (via email).

A handwritten signature in cursive script, appearing to read "Lili Tran", is written over a horizontal line.

