

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

STEVEN KOEHLER, Appellant,

vs.

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

The hearing in this appeal was held on Feb. 25 and Mar. 18, 2010 before Hearing Officer Valerie McNaughton. Appellant was present and represented by Brian Reynolds, Esq. The Agency was represented by Assistant City Attorney Robert D. Nespor. Major Murray 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 Steven Koehler is a Deputy Sheriff with the Denver Sheriff's Department (Agency). This is his appeal of his termination dated Dec. 11, 2009. The parties stipulated to the admissibility of Agency's Exhibits 2 – 7, and Appellant's Exhibits A – C-3, G, and J - BB.

The issues presented in this disciplinary appeal are 1) whether the Agency proved the cited rule violations by a preponderance of the evidence, and 2) whether termination was an appropriate discipline for the proven misconduct.

II. FINDINGS OF FACT

Appellant was employed by the Denver Sheriff's Department as a Deputy Sheriff since 2000. The termination was based on events during Appellant's transport of a prisoner, Robert Duran, from a holding area to a jail cell at the City and County of Denver's Pre-Arrestment Detention Facility (PADF). Appellant was charged with six acts of misconduct related to that incident: 1) placing a violent arrestee in an elevator with three other inmates; 2) slamming the arrestee into the back of the elevator; 3) grabbing Mr. Duran by the upper torso to remove him from the elevator; 4) pushing Mr. Duran into a cell, causing him to cut his head on a metal box; 5) knocking Mr. Duran to the floor with his leg, and 6) pushing Mr. Duran back to the floor using the bottom of

his foot. The Agency claims that these actions were unwarranted based on the threat posed by the prisoner, and thus violated the Agency's policies regarding the use of force, among other rules. The Agency also charged Appellant with dishonesty during the Internal Affairs investigation into the incident.

1. March 22, 2009 Incident

The evidence includes PADF video of the events at and near the elevator and sally port, a cell located on the fourth floor. [Exh. 4, DVD C1, files g, h & i.] Appellant asserts that his actions were necessary to protect the safety of himself and his fellow officers, and that termination was too severe given his disciplinary record and the threat posed by the prisoner's aggressive actions and HIV-positive condition. He also denies that he was dishonest during the investigation.

On Mar. 22, 2009, at 11:24 pm, Appellant was stationed at the 2nd floor elevator to transport a group of four prisoners to their temporary housing assignments on the fourth floor. The parties stipulated that the computers were down that evening, which caused long delays in booking arrestees and overcrowding in the holding tank. Appellant was aware that one of the prisoners, Robert Duran, had been arrested for assault, and had just struck another inmate while in the holding cell.

Mr. Duran, shown shirtless and in a white hat in the video, stopped in front of Appellant with his arms folded and asked Appellant for a sack lunch. Appellant refused, and pushed Mr. Duran into the elevator with both hands, causing Mr. Duran to hit the far side of the elevator with his right shoulder. Mr. Duran reacted by raising his fists and jumping up and down in anger. Three other inmates were waiting to be loaded, and witnessed the incident. Prisoner Riddle asked to be taken up in a separate elevator from Mr. Duran. Appellant ignored the request and directed the other inmates into the elevator. He closed the internal cage-style door between him and the inmates, and pushed the button to the fourth floor. During the ride, Mr. Duran swore and pointed his finger angrily at Appellant, saying, "I'll kick your white ass". A few seconds later, he stepped toward Appellant and swore at him. When they arrived at the fourth floor, Appellant got out and took the trip sheet paperwork on the four inmates to the officers at the desk. He informed them that he had an aggressive, hostile prisoner on board, then went back to the elevator and opened the door. Deputies Timothy Lyons and Kenny Medina followed him to assist if necessary, in response to the yelling in the elevator and Appellant's report of an aggressive inmate.

When the door opened, the other inmates were crowded into a corner away from Mr. Duran, who lifted his forearms with palms up. Appellant immediately grabbed him by the upper torso, pushed him to the back wall, and pulled him off the elevator by his neck and right shoulder. The other inmates were left in the open elevator. Mr. Duran kept his hands up while being pushed by Appellant to the sally port a few feet to the left of the elevator, and hit his head on the door jam on the way in. Deputies Lyons and Medina followed them in and attempted to restrain the inmate. During the struggle, Mr. Duran cut his head against the sharp corner of a metal key box jutting

eight inches from the wall at about chest level. A few seconds later, Mr. Duran crawled out of the cell, and the three deputies held onto him as he lay on the floor, still resisting. Appellant put his knees on the inmate's chest, while Deputy Lyons was at his legs and Medina at his shoulders. Blood began to pool beneath Mr. Duran, who was held largely immobile by the deputies for the two minutes that elapsed while he was out of the sally port. After being ordered to stop resisting by Deputy Medina, Mr. Duran held his arms still and Lyons handcuffed his hands behind his back. Deputy Medina went to the desk to call a sergeant. Appellant and Deputy Lyons carried the prisoner into the sally port backward by his cuffed arms.

A second scuffle ensued when he was placed back in the sally port. The three deputies again tried to control Mr. Duran, who ended up sitting on the floor near the right door jam, still trying to get up. Deputy Lyons held him back with his hands on his chest, and told the other deputies to leave. Deputy Medina stood a few feet behind Deputy Lyons in order to help if needed, and Appellant stood farther back in the room. Deputy Lyons continued to hold Mr. Duran by his upper body and ordered him not to move. When Mr. Duran shifted suddenly toward the entryway, Deputy Medina went back in the cell. Appellant also re-entered, and forcefully kicked Mr. Duran in the head with the bottom of his boot. Mr. Duran was then locked in the sally port. Appellant reported the incident to his sergeant, and Mr. Duran was given medical attention for the injuries sustained during the incident. A post-incident video shows that Mr. Duran was bandaged on the right side of his head, and was bleeding at both elbows and his right shoulder. [Exh. 4, DVD C1, file m.] Mr. Duran ultimately received five stitches in his head to close the wounds. [Testimony of Ms. Malatesta.]

2. Deputies' Written Reports that Evening

At the request of his supervisor, Deputy Medina wrote a report of the incident shortly thereafter. He stated that the inmate was verbally abusive, tense and resisting. Deputy Medina "saw D/S Lyons securing the inmate to stay in east sally port", but Mr. Duran tried to stand up. "I witnessed a strike by D/S Koehler foot to the inmates upper head." [Exh. N.]

Deputy Lyons also wrote his report that evening. Appellant "pushed Duran into the blue control box, thus striking his head on the box." Appellant "took Duran down to the floor" and controlled his head and upper body, while Deputy Lyons controlled his legs and lower body. They picked him up and placed him all the way into the sally port, and Lyons told the other deputies to leave. As Deputy Lyons tried to exit, Mr. Duran "rolled over and tried to get up. . . As I was holding prisoner from getting up D/S Koehler's boot came from behind me and struck the prisoner in the head area." [Exh. O.]

Appellant's written report that evening stated Mr. Duran was hostile, having assaulted a homeless man and being "generally disruptive" during booking. He "stopped in front of me and began yelling at me making hand gestures in an aggressive matter." Appellant reported he pushed Mr. Duran onto the elevator. After

the door closed, Mr. Duran made threats against him, including that he was going to "kick my white ass." When they arrived at the fourth floor, he ordered the inmate off the elevator, but he "refused and continued his hostile and resistive demeanor". Mr. Duran "took a fighting stance", preventing use of an escort hold. Appellant held Mr. Duran's upper torso with both hands and removed him from the elevator. When Mr. Duran tried to free his arms and pull away, Appellant used "a leg sweep and took him to the floor" to try to regain control of him. When the inmate tried to get up, Appellant knelt on his torso and head. He noticed blood on the floor. With the assistance of the 4th floor officers, he got Mr. Duran on his stomach and handcuffed. They moved him into the sally port, and Appellant left. The inmate immediately began to stand up while Deputy Lyons was holding onto his torso. "Because I feared for D/S Lyons safety . . . I pushed Duran back into the sally port and back onto the floor with the bottom of my foot. All officers were then able to exit" and Mr. Duran was locked into the sally port. [Exh. M; 4-82.]

3. Internal Affairs Investigation

The next day, an Internal Affairs (IA) investigation was begun regarding Appellant's use of force on Mr. Duran. [Exh. 4.] Written and oral statements were given by Appellant, Deputies Lyons and Medina, among others. The four inmates on the elevator also gave statements. [Exh. 4-15 to -20.]

During his IA interview two months after the incident, Appellant admitted that he pushed Mr. Duran onto the elevator, and placed three other inmates in there with him, knowing Mr. Duran had just assaulted a homeless inmate in the holding cell. "I thought, even though he was violent, I could get him upstairs with those three people because he had just spent hours in F Tank and E Tank with them, and I just wanted to get him upstairs and let him sleep off whatever he was on." [Exh. 4-26.] Appellant told IA that Mr. Duran was yelling something, and refused his three requests that he get in the elevator. "He just stood there yelling, so I grabbed his arm and pushed him on the elevator which kind of escalated his behavior . . . he literally started throwing a temper tantrum". [Exh. 4-26, -27.]

Appellant told IA that "he was jumping up and down on the elevator from the time I closed the gate to the time we were on the second floor to the fourth floor." Appellant said he "told Mr. Duran to calm down. Things kind of escalated and my verbiage kind of went to 'you have proven that you can beat up people that can't defend themselves'." [Exh.4-27.] "I wanted to let him know that when I open the door . . . that I was capable and ready to defend myself if I had to." Appellant stated that Mr. Duran put his hands up near Appellant's head, and so "I pushed him as hard as I could to the back of the elevator. I wanted to pin him and gain control to bring him off of the elevator." [Exh. 4-27.]

Appellant grabbed Mr. Duran's right hand, put his other hand on the inmate's back, and walked him off the elevator. "I thought I could escort Mr. Duran into the sally port with the officers standing by without getting them involved." He started to resist

and pull away, and “that is when we started fighting.”

I felt like I needed to get him on the ground and tried to do a leg sweep, and ended up kind of bouncing off the walls in the sally port. At some point bouncing off the door jam, and then one wall, and inside we bounced off the key holder he was cut, so now he is bleeding. [We] ended up back in front of the elevator and I’m on him. . . . Mr. Duran was bleeding pretty well and there was a puddle of blood. . . I put my knee on his head.

[Exh. 4-28.]

The sight of the blood caused Appellant to conclude that “the threat has escalated” based on Mr. Duran’s HIV-positive status. Appellant admitted the prisoner was not striking at them, but he was resisting and trying to pull away. Based on the presence of blood, Appellant did not want Mr. Duran “splashing around” while they tried to handcuff him. Appellant and the others “scoted him along the floor and into the sally port.” Mr. Duran was still on his stomach, with Appellant on his upper torso, closer to the entrance, and Deputy Lyons was “kind of lower”. Deputy Lyons told him to get off the inmate. When he did, Mr. Duran tried to get up, despite the handcuffs behind his back. Appellant told IA he pushed him down with his hands, and Mr. Duran ended up on his back, with his back against the left wall, still trying to get up. [Exh. 4-28.] Appellant then “pushed him down with the bottom of my right foot and Lyons and Medina were able to get up and exit the sally port. . . . I did a stomping motion”. He used his foot because he did not want to get exposed to the blood. [Exh. 4-29.] At the time of his IA interview, Appellant had not seen the Agency videos of the incident. [Exh. 4-30.]

Deputy Medina told IA that during the incident, Mr. Duran told them he was HIV-positive, and “there was blood all over the ground.” [Exh. N; 4-83.] At midnight, a half-hour after the incident, Deputy Medina asked if he could talk to Sgt. Mazzei about the incident. He told him that “I saw Deputy Koehler kick this guy in the head when we were in an altercation with him and I don’t know what to do.” Sgt. Mazzei told IA that he was not Deputy Medina’s supervisor, but assumed the “rookie officer” felt comfortable talking to him. He advised him that he needed to write down what he did and what he saw, and not leave anything out. [Exh. 4-24, -25.] Fourth Floor Control Desk officer George Rodriguez told IA that Deputies Medina and Lyons were both upset after the incident and asked him what to do about it. [Exh. 4-32.]

Michael Riddle, one of the prisoners in the elevator, stated he asked Appellant to let him take the next elevator, since Mr. Duran was drunk and saying “I’ll whoop your ass” to inmates and officers alike. He was “acting out like superman.” Upon their arrival at the fourth floor, “[t]he guard [Appellant] got fed up with the mouth, opened the cage where the inmates were and grabbed [Mr. Duran] by the throat and arm and shoved him to the back of the elevator. . . . they fell out in front of us with the guard kind of helping the guys head hit the ground a little bit.” Mr. Riddle saw a lot of blood

on Appellant's face. "[B]oth the inmate and the guard were wrong." [Exh. 4-15, -16.] Another prisoner, Simeion Francis, stated he saw Appellant grab Mr. Duran by the neck and take him off the elevator after Mr. Duran made a "threat stance." [Exh. 4-18, -19.] In his own statement, Mr. Duran admitted he was drunk at the time, but denied that he provoked Appellant by profanity or resisting. He stated that Appellant "crushed [my] head into the cement [and] kneed me in the ribs." [Exh. 4-20.]

4. Disciplinary Proceedings

After reviewing the investigation file and materials, Division Chief Marie Kielar recommended the commencement of pre-disciplinary proceedings. [Exh. 4-2.] Director of Corrections/Undersheriff William Lovingier conducted the pre-disciplinary meeting along with Division Chiefs Kielar, Gary Wilson, and Elias Diggins, Major Venessie Murray, Sergeant L. Robirds, Richard Rosenthal from the Office of Independent Monitor, and Assistant City Attorney Robert Nespor. Dir. Lovingier found that Appellant admitted kicking the inmate's head into the floor, and stated that the action was taken to prevent his blood from splashing. He also found that Appellant admitted he failed to give the inmate commands, failed to submit a complete report, and failed to inform other officers or a supervisor that Mr. Duran was combative and threatening. Dir. Lovingier noted Appellant's prior discipline consisting of three reprimands and a cautionary letter within the past four years, and recommended termination. [Exhs. 1-23; 6.] Deputy Manager of Safety Mary Malatesta issued the letter of termination on Dec. 11, 2009. [Exh. B.]

5. Evidence at Hearing

Deputy Lyons stated that he received training at the Police Academy and annual refresher training on the Agency's policy regulating the use of force by an officer. [Exh. G.] That policy requires the use of sound judgment, recognizing that each situation is unique. "In all cases, force will be de-escalated once the legitimate function is achieved or the resistance has ceased." [Exh. G-1.] Deputy Lyons testified that the general guideline is that force must be reasonable given the nature of the threat faced. Mr. Duran was exhibiting "defensive resistance" as defined in the policy just before Appellant kicked him, and Deputy Lyons was applying "verbal commands" and "control holds." Resistance can be characterized as defensive under the policy only if there is no attempt to harm an officer. [Exh. G-7.] Deputy Lyons did not believe Mr. Duran had the present ability to assault him at the time of the kick, and so he perceived no need to escalate force beyond what he was already using on the inmate.

After the incident, Deputy Lyons, who has been on the force for only a few years, was angry and upset. He did not believe Mr. Duran should have been moved from the elevator so quickly, and thought the incident could have ended differently if more time had been taken. He has himself used force on inmates on about ten occasions. Deputy Lyons acknowledged that the situations tend to be unpredictable, and cause an adrenaline rush and narrowed focus.

Deputy Medina testified that after the deputies took Mr. Duran to the floor in the sally port, the inmate continued to work his way out the door. His head hit the ground, and blood was dripping from his face. He said, "I'm HIV-positive and I hope you guys get it." [Exh. K-2.] After they succeeded in handcuffing Mr. Duran, Deputy Medina returned to the front desk and called the sergeant, and the other two pulled the inmate up to his knees. When Deputy Medina returned, Mr. Duran was still moving around, but was in the sally port on his knees facing the back wall and no longer actively resisting. Deputy Medina stood behind Deputy Lyons to assist if needed. Deputy Lyons was controlling him, and attempting to get Mr. Duran to stay far enough back in the sally port so the door could be closed. Deputy Medina then saw Appellant's boot come from the side and strike Mr. Duran's head.

Deputy Medina graduated from the Police Academy in July 2008, and has worked at the jail since that time. He recalled when the use of force policy was changed from the concept of "continuum of force" to that of "reasonable response", which requires that any use of force must be a reasonable response to the threat posed by the situation. He uses the Agency-issued laminated card listing the types of resistance and use of force options as an aid to memory. [Exh. Z.] Deputy Medina stated that Mr. Duran demonstrated "defensive resistance" in use of force parlance on the way to the sally port. At the time Appellant's boot struck his head, Mr. Duran showed no present ability to inflict any harm, except perhaps to spit at the deputies.

Appellant testified that earlier in the evening he had taken the homeless man assaulted by Mr. Duran to the ambulance, and heard the emergency medical technicians say there was a lot of blood in the holding tank where the assault occurred. Appellant told Internal Affairs that "right away [I] knew that Mr. Duran was violent and dangerous and unpredictable." [Exh. 4-26.] Appellant had filled out Mr. Duran's questionnaire at booking, and learned that he was HIV-positive and had been arrested for assault. Appellant considered Mr. Duran disruptive during booking because he hid money in his clothes, despite his knowledge during previous arrests that the city collects \$30 during the booking process. Mr. Duran also failed to follow instructions to put his hands on the bars at the shake desk.

Activity at the jail was steady that evening. Appellant was working the elevator, transporting inmates from the second floor after booking to the fourth floor, where they were assigned to cells for the night. Mr. Duran was the first one to the elevator, and Appellant asked the booking officer to give him a few more prisoners to take up. Mr. Duran, who was obviously drunk, stopped in front of Appellant and demanded a sack lunch. Appellant refused and pushed him onto the elevator. Appellant believed he was justified in pushing Mr. Duran because "he was refusing my lawful commands by refusing to get in without a sack lunch." [Testimony of Appellant, 3/18/10, 2:42 pm.] Appellant also believed Mr. Duran was demonstrating psychological intimidation and verbal noncompliance under the Agency's use of force policy.

Jail protocol requires that a deputy working alone notify a supervisor if an inmate becomes aggressive or hostile. It further requires that aggressive hostile inmates should be separated from other inmates. [Exh. 4-119.] Appellant testified he

made the decision to transport Mr. Duran with three other inmates because they had been in the holding tank together for two to three hours, and Appellant thought he could get them up and into cells quickly. Appellant did not believe Mr. Duran was being aggressive in asking for a sack lunch and not moving into the elevator. [Testimony of Appellant, 3/18/10, 12:01 pm.]

Once the elevator started, Mr. Duran's demeanor changed significantly. He began to threaten Appellant, who became angry himself and "verbally escalated" in response to Mr. Duran's threats. Mr. Duran got louder, began pacing, and pointed at Appellant, saying, "You're dead!" Appellant saw the threats at that time as "active aggression" under Agency policy.

Appellant testified that, based on this behavior, he felt a sense of urgency to get Mr. Duran off the elevator. He delivered the trip sheets to the fourth floor front desk, and told Deputy Lyons he had an aggressive hostile inmate on board. He put on rubber gloves, returned to the elevator and opened the door. Mr. Duran spread his arms out, a gesture Appellant viewed as putting him in "a position of advantage", as if to say, "What are you going to do? I just told you I was going to kick your ass." Appellant pushed him back, grabbed him by the chest and neck, and took him off the elevator. "I took the initiative because I didn't want to be in a place of vulnerability." Appellant testified that he may not have given Mr. Duran a command to leave the elevator in order to deny him any reaction time. Appellant believed Mr. Duran was continuing to display active aggression as they left the elevator.

Appellant pushed Mr. Duran towards the sally port, and Mr. Duran pushed back in resistance. "We ended up going straight", but Mr. Duran hit the door frame. During the struggle, Mr. Duran also cut the top of his head on the box in the sally port. At some point, Appellant did a "leg sweep", knocking Mr. Duran to the floor. Appellant testified he later lost control of him, and Mr. Duran got out the door. All three deputies grabbed him and held him down, and blood pooled under the inmate. Appellant got one of Mr. Duran's hands out from under him as he lay on the floor, and Appellant and Deputy Lyons succeeded in handcuffing him. Appellant did not hear Mr. Duran say that he had HIV and hoped they got it, but Appellant knew of his HIV status, and viewed the threat posed by the bleeding inmate as aggravated active aggression based on that status.

Once Mr. Duran was cuffed and brought back into the sally port, Deputy Lyons held Mr. Duran down with his arms around his torso and gave him commands to stop moving. Appellant observed that the inmate was almost standing up, and was still trying to exit the sally port. Appellant pushed him down with his foot to Mr. Duran's cheek or chin, and everyone left the sally port.

Appellant believed Mr. Duran was demonstrating psychological intimidation by yelling and trying to get up from a sitting or crouching position. He chose a stomping motion over verbal commands, control holds or use of restraints because he wanted to avoid exposure to the prisoner's HIV-positive blood. Appellant conceded during his

testimony that the inmate was not fighting him at any time, but was instead resisting his efforts to get him off the elevator and into the sally port. He believes that the force he used was justified as a part of his obligation to enforce his instructions to a prisoner based on the Colorado statute referred to in the Agency's policy on the use of force. [Exh. G-3, citing C.R.S. 17-20-122.]

Appellant reported the incident within minutes, while his own adrenaline and heart rate were still up. His thumb was hurt during the struggle. Appellant testified that he wrote the report in haste, but would change only the words "fighting stance" to "position of advantage" to describe Mr. Duran's demeanor when Appellant opened the elevator door. [Exh. M.] His later viewing of the videos changed his recollection of the incident somewhat, and he believes his testimony at this hearing provides the same account as he gave at the pre-disciplinary meeting.

Appellant has been employed by the Agency since his Aug. 2000 graduation from the Academy. His martial arts training taught him to distinguish between a foot push, which is used to create distance, and a kick, used to deliver force and impact. Throughout the disciplinary proceedings and appeal, Appellant has consistently described the motion he used on Mr. Duran in the sally port as a push with his foot, or a stomping motion, and denied it was a kick because he hit him with the bottom and not the tip of the shoe.

Captain Frank Gale has served as Appellant's Watch Commander and Sergeant, and worked with him since Appellant started with the Department. After viewing the videos of the incidents, Capt. Gale concluded that Appellant was not authorized to use force in pushing Mr. Duran into the second floor elevator if the latter was merely asking for a sack lunch, and not refusing to get on the elevator. Appellant also violated policy by placing other inmates on the elevator with Mr. Duran, who had become belligerent and uncooperative after being pushed against the wall. "He made the situation by putting the other inmates in there. Now he's got them all." An officer is trained to act "so as not to put the others in harm." Appellant committed a third violation when he opened the elevator door without calling a supervisor. "Now other officers may be at risk, so there will have to be force." A fourth violation occurred in Capt's Gale's opinion when no one secured the elevator after Appellant removed Mr. Duran. [Testimony of Capt. Gale, 3/18/10, 5:18 pm.]

Training Academy Commander Captain Michael Than testified that the Agency provides pre-service and in-service training on its use of force policy. Training on the new policy began in late 2007 and was concluded by the August 2008 Democratic National Convention in Denver. The policy provides the same use of force options, but removes the obligation "to go step by step", i.e., begin with the least restrictive option before escalating to a more forceful method of restraint. Instead, a deputy must be able to justify a use of force by articulating why it was reasonable under all the circumstances, including, most importantly, the type of resistance that was offered by the inmate. [Exhs. G, Z.]

After viewing the video of the March incident at the jail, Capt. Than concluded that Appellant used excessive force in pushing the inmate into the elevator. Thereafter, Appellant pulled the inmate off the elevator without notifying a supervisor, proving in Capt. Than's opinion either that the inmate did not pose an immediate threat, or that Appellant violated the policy to call a supervisor when an inmate becomes aggressive. Capt. Than testified that the video demonstrated there was no obvious threat posed by the inmate, as shown by the body language of the deputies standing by, one of whom had his hands in his pockets. The video also showed Appellant's forceful kick of the inmate while he was cuffed and posing no immediate threat to the officers. [Testimony of Capt. Than, 3/18/10, 6:25 pm.]

Director of Corrections/Undersheriff Bill Lovingier testified that he worked as a deputy sheriff and many other positions at the Agency before his promotion to Director. Sheriff's Department policy requires that a deputy must notify a supervisor before moving an aggressive hostile inmate from a cell. Deputies are trained to give verbal commands first to determine whether the inmate will comply with orders, and to "protect in place", i.e., put an aggressive inmate in a position where there are adequate resources to handle the prisoner's behavior. The Agency policies on use of force mandate that the force must be objectively reasonable to address the threat posed. Therefore, the type of resistance offered determines the level of force that should be used. [Exh. G.]

Director Lovingier recommended termination because Appellant's statements significantly departed from the truth, and Appellant violated several of the Agency's policies and guidelines on the handling of aggressive prisoners, including those governing use of force. He recalled that the other deputies described the inmate as tensed up and resisting. Such behavior, which in Dir. Lovingier's experience is typical of inmates at the jail, is deemed compliance or passive resistance. He considered as aggravating factors Appellant's giving the inmate a humiliating hard shove, transporting other inmates with an aggressive prisoner, and kicking Mr. Duran in the head while handcuffed. Dir. Lovingier also considered that Appellant failed to issue commands to control the inmate, call a supervisor, or write a complete report of the incident. In mitigation, he considered Appellant's lack of prior suspensions. However, he noted Appellant's denial of any wrongdoing despite nine years of experience at the department, and concluded that Appellant's actions were inconsistent with the length of his experience and his knowledge of Agency policies. Richard Rosenthal of the Office of Independent Monitor also recommended termination.

Deputy Manager of Safety Mary Malatesta is the Manager of Safety's designee for disciplinary decisions involving deputy sheriffs. Ms. Malatesta stated that she reviewed the entire file prior to making the termination decision, including all jail videos and statements. She found that Appellant's initial push of Mr. Duran onto the elevator was an excessive use of force, to which the inmate reacted by becoming aggressive. After their arrival on the fourth floor, "it appeared that Deputy Koehler had had enough" and lost his temper, as illustrated by his actions in quickly taking Mr. Duran by the throat, yanking him off the elevator, and bouncing his head directly into the door frame.

She found that the statements of the inmates and other deputies were consistent with each other and the videos, and inconsistent with Appellant's version of the events. Ms. Malatesta determined that Appellant's stated reason for putting other inmates on the elevator was internally inconsistent, and his initial statement that Mr. Duran took "a fighting stance preventing me from taking an escort hold" at the fourth floor was dishonest. She was not convinced by Appellant's argument at the pre-disciplinary meeting that Appellant executed the push with his foot in order to avoid the inmate's blood and protect the other officers. "Why would you kick him in the face when two deputies were closer, almost guaranteeing blood would be splattered?" She also found that he departed from the truth in his initial statement and IA interview as to his own actions and those taken by the inmate, exaggerating the threat posed and minimizing his own use of force, in violation of D.R. 200.4 and §16-60 L.

Ms. Malatesta found that he was careless in failing to follow the protocol to call a supervisor regarding an inmate he believed was a threat. His aggressive acts toward Mr. Duran constituted disorderly conduct and impaired the performance of his duties by violating internal prison protocols, imposing punishment on and causing injury to an inmate. As a result, she found Appellant violated CSR §§ 16-60 B, E, L, Y and Z, departmental rules 200.4, 300.10, 300.20, 300.21, 400.4, and 400.6, and Departmental Order (D.O.) 5011.1H.

Ms. Malatesta decided to terminate based on the seriousness of the behavior, including her conclusion that Appellant's use of force was in violation of policy and completely out of line with the level of resistance offered by the inmate. She found that he failed to accurately evaluate the threat level, call his supervisor, or assess or plan tactics. He acted out of anger, then refused throughout the process to acknowledge any lapses in judgment, instead insisting that his use of force was appropriate because of the presence of HIV-infected blood. Moreover, she considered his escalation illogical, since inflicting further injury by kicking the inmate's head would only increase the risk of exposure to blood. Ms. Malatesta noted that the inmate's hands were cuffed behind his back at the time when Appellant claimed the threat level had increased, justifying a strike or kick. She also found he was dishonest during the investigation, employing different and contradictory details in his statements in order to defend his actions. Given Appellant's nine years of experience, Ms. Malatesta concluded that Appellant's behavior could not be corrected by the imposition of lesser discipline, despite the absence of any previous suspensions.

III. ANALYSIS

A. Disciplinary Violations

The Sheriff's Department supports its discipline by alleging that Appellant violated Career Service and departmental rules on honesty and the use of force by deputies, among other rules.

1. Use of Force Rules

The Agency claims Appellant violated its use of force policy, D.O. 5011.1H, as well as its departmental rules prohibiting disorderly conduct, the imposition of humiliation or punishment on a prisoner, and striking or injuring a prisoner except in self-defense or defense of others.

Departmental rules prohibit use of force that is unreasonable given the amount of resistance offered. "The amount of force used 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." [Exh. G-1, D.O. 5011.1H.] Physical force is defined as "[f]orce applied to a person or persons to achieve compliance to the legitimate objective." [Exh. G-8.] Factors used to determine if a use of force is objectively reasonable under the totality of the circumstances include whether there is an imminent threat of injury, whether the subject is actively resisting a lawful command or attempting to flee, and the severity of the crime at issue. [Exh. G-6.]

a) Push into Elevator

The first asserted violation of these rules is Appellant's admitted push of Mr. Duran into the elevator. Appellant claims that the inmate was demonstrating psychological intimidation and verbal noncompliance by refusing to get in the elevator without a sack lunch, and thus he was justified in enforcing his authority under C.R.S. 17-20-122 and Agency policy. The video shows that, in answer to the inmate's request for a lunch, Appellant gave Mr. Duran a hard push into the back wall of the elevator, without either giving him an order to get in or an opportunity to comply with such an order.

At the hearing, Appellant said the inmate had demanded a sack lunch, but was not aggressive, and so he decided to transport him with three other inmates. The two statements place his actions in substantial conflict. If Mr. Duran was not aggressive, the push was unjustified under the use of force policy. If he was aggressive, Appellant's decision to transport him with other inmates violated the Agency policy on the treatment of aggressive inmates. The video resolves the issue by showing that Mr. Duran merely stood in front of Appellant with his hands folded over his chest. The Agency appropriately found that the push was an excessive use of force.

b) Removal from Elevator

Next, the Agency claims that Appellant used excessive force in removing Mr. Duran from the elevator. Appellant admitted at hearing that he did not order Mr. Duran off the elevator because the latter had threatened him during the elevator ride, and he did not want to give him a chance to react. The undisputed evidence is that Appellant made no plan with the other two deputies on how to remove the hostile inmate and protect the other three inmates. Instead, the video shows that Appellant moved in

without hesitation, pushed Mr. Duran against the wall, and grabbed him by the neck and under his arm as he bounced off the wall. Mr. Duran had his hands up, and kept them up as Appellant moved him so rapidly to the sally port that Mr. Duran's head ran into the far door jam. Appellant's lack of planning and actions caused a chain reaction of events that compliance with the use of force policy could have avoided: inmates were left unsupervised in the elevator, the deputies were involved in a three-minute struggle to restrain an inmate, and the inmate suffered injuries to his head and other parts of his body.

Appellant argues that the inmate was demonstrating active aggression at the time, based on his threat, "You're dead!" during the elevator ride. "Active aggression" under the policy requires a threat plus the present ability to carry it out, reasonably indicating that an assault or injury is imminent. When first questioned, Appellant stated that the prisoner had said he was going to "kick his white ass". During the IA investigation, Appellant said he was "yelling". At hearing, Appellant testified that Mr. Duran said, "You're dead." Given the testimony of Deputy Medina that the inmate was swearing and making racist comments, I find that Mr. Duran actually said, "I'll kick your white ass", and that he was behind a gate at the time with no present ability to carry out the threat. Thus, the inmate was not demonstrating active aggression on the elevator.

When the door opened, Mr. Duran was standing with his arms up, displaying, at most, verbal noncompliance or passive resistance. Appellant was justified in foregoing a verbal command based on the prisoner's recent threat and aggressive behavior, but pushing the inmate into the back of the elevator and grabbing his neck was an excessive use of force under the circumstances.

c) Head Injury from Key Box

The Agency also asserts that Appellant used excessive force in causing Mr. Duran to hit his head on the metal box and fall to the floor in the sally port. Neither deputy in the cell at the time claimed either Appellant's "leg sweep" or the hit on the box was excessive force. By that time, all three deputies stated that Mr. Duran was fighting to break free for their grasp and get out of the cell. The fact that he succeeded in getting out the door despite the efforts of three deputies to restrain him is testimony to the effectiveness of his efforts. At that point, the inmate was clearly demonstrating defensive resistance, and the officers were justified in physically restraining him. Injury from a sharp and jutting metal box could have occurred accidentally during the melee of four struggling persons within the small cell. While Appellant's actions escalated the situation to this point, there is no convincing evidence that these injuries themselves were caused by Appellant's use of excessive force.

d) Kick to Head

Finally, the Agency claims Appellant used excessive force in pushing or kicking the inmate in the head while he was handcuffed and sitting or squatting in the sally

port. Appellant conceded during his testimony that the inmate was not fighting him at any time, but was instead resisting his efforts to get him off the elevator and into the sally port. Appellant testified that Mr. Duran was demonstrating psychological intimidation just before the push by yelling and trying to get up and out of the cell. He argues that the push to the head was justified as a part of his obligation to enforce his instructions to a prisoner, citing the Colorado statute referred to in the Agency's policy on the use of force. [Exh. G-3, citing CRS 17-20-122.] However, Appellant admits he gave no orders to the inmate before using a "stomping motion" with his foot. In addition, Deputy Lyons had control of the prisoner at that point.

Appellant also argues that his choice of a push with his foot was more appropriate than control holds or use of restraints because he wanted to avoid exposure to the prisoner's HIV-positive blood. Appellant perceived the threat posed at that time as aggravated active aggression because contact with the HIV-positive blood could have caused death or serious bodily injury.

Aggravated active aggression is present when "the subject assaults or attempts to assault the officer or others with the intent to produce death or serious bodily injury." [Exh. G-7.] Here, Appellant admitted the inmate never assaulted him, and so the nature of the inmate's intent was not at issue. Ms. Malatesta stated that deputies are trained to take precautions in dealing with inmates having infectious conditions, but that the presence of an infectious disease is not itself considered a threat or assault under Agency policy. Such a disease is instead one of the circumstances to be considered in assessing the objectively reasonable level of force that may be used when resistance is offered.

Appellant interpreted Mr. Duran's HIV-positive status as active aggression, despite the lack of an overt act of assault or present ability to carry out a threat or assault under the Agency's use of force policy. In this respect, Appellant chose to place his own interpretation on the Agency's policy, an interpretation that is inconsistent with the definitions of resistance in the policy and the training given on that policy. It is worth noting that neither this argument nor the facts supporting it were raised in Appellant's first report of the incident that evening. [Exh. M.] Moreover, a fear of infection did not prevent Appellant's earlier contact with Mr. Duran outside the sally port, when Appellant spent at least two minutes with his hands and face in close contact with Mr. Duran while the officers attempted to cuff him.

Since the prisoner's hands were handcuffed behind his back and he was either sitting or squatting on the floor, he was in no position to carry out a threat or assault. Thus, Mr. Duran was demonstrating defensive resistance by trying to stand up and move toward the door, in violation of Deputy Lyon's order to stay put. I find that Appellant used excessive force by kicking the handcuffed, injured prisoner in the head under these circumstances. The verb kick means to strike out with the foot. [Merriam-Webster's Online Dictionary, Apr. 29, 2010.] The Agency therefore established by a preponderance of the evidence that Appellant violated D.O. 5011.1H, the use of force policy, and D.R. 400.6, which prohibits injuring or striking a prisoner by an

unreasonable use of force. It thereby also proved violations of CSR § 16-60 L for failure to observe departmental policies, and the parallel D.R. 300.2C., barring violation of the Career Service Rules. Violation of D.O. 5011.1H also establishes a violation of D.R. 300.12, which requires obedience to departmental orders and other directives.

Deputy Manager of Safety Malatesta concluded that Appellant's aggressive acts also constituted disorderly conduct by impairing the performance of his duties and having the potential to cause the public to lose confidence in the Agency, in violation of D.R. 300.10. She explained that Appellant had a duty to treat the inmate in a humane manner, but in disregard of that duty he slammed Mr. Duran into the back of the elevator, caused him to become aggressive.

The term disorderly conduct is not defined in the city municipal code. However, the ordinance on disturbance of the peace refers to the state misdemeanor of disorderly conduct. See D.R.M.C. 38-89. The municipal ordinance is violated by "violent, tumultuous, offensive or obstreperous conduct or by loud or unusual noises or by unseemly, profane, obscene or offensive language calculated to provoke a breach of the peace", or permitting such conduct. The relevant portions of the state crime of disorderly conduct include offensive public utterances or displays, making unreasonable noise, or engaging in fights in a public place. C.R.S. § 18-9-106. The evidence here does not support a finding of either the municipal or state violation.

Finally as to the use of force allegations, the Agency claims that Appellant "imposed humiliation, indignities or cruel and unusual punishment" on the prisoner, in violation of D.R. 400.4. Ms. Malatesta based her finding on Appellant's acts in twice shoving Mr. Duran against the back wall of the elevator, grabbing him by the neck, causing him to cut his head on the door jam and key box, and kicking him in the head while he was handcuffed and on the floor. The evidence is undisputed that the prisoner was displaying only passive and defensive resistance during the entire incident. His status as HIV-positive does not itself convert his actions to active aggression. Appellant's action in slamming the inmate against the far wall of the elevator merely for delaying his entry into the elevator by asking for a sack lunch was the imposition of humiliation, indignity and punishment, in violation of D.R. 400.4. Likewise, his action in kicking the inmate in the head while handcuffed, near the floor, and under the control of another deputy constituted punishment rather than an appropriate use of force.

2. Dishonesty

The Department based its discipline in large part on its finding that Appellant had been dishonest in his statements regarding the incident, in violation of C.R.S. § 16-60 E.3, and Departmental Rule 200.4.

Appellant's initial report that night was untruthful in several respects. First, Appellant said Mr. Duran was yelling and making "hand gestures in an aggressive

manner” on the second floor, justifying the push into the elevator. [Exh. M.] The video of that event shows that Mr. Duran spoke to Appellant briefly and with apparent calm, with his hands folded around his chest. Appellant admitted at the hearing that Mr. Duran was asking for a sack lunch. Appellant justified the shove into the elevator by stating that the inmate was refusing his orders “by refusing to get in without a sack lunch.” In the video, Appellant’s shove happened a second after Mr. Duran stopped in front of him to ask for the lunch. If Appellant ordered Mr. Duran to get in the elevator without the lunch, he left no time for him to comply with the order. [Exh. 4, DVD C1, files g) and h).] I find that Appellant was untruthful in his report that Mr. Duran was yelling, making aggressive hand gestures, or refusing his order to get in the elevator.

Next, Appellant wrote that he “ordered Duran off the elevator and into the east sally port”. [Exh. M.] Appellant also told IA that he ordered Mr. Duran off the elevator three times. He admitted at the hearing that he in fact did not issue an order. The video did not show that Appellant gave any instructions in the elevator, or gave him any time to comply with such an order. Appellant also stated that Mr. Duran “continued his hostile and resistive demeanor. I moved into the elevator to escort Duran into the sally port when he took a fighting stance preventing me from taking an escort hold on his arm.” [Exh. M.] In contrast, the video clearly shows that Appellant did not hesitate between opening the door and pushing Mr. Duran against the wall. As the elevator door opened, the inmate raised his hands and shoulders in a gesture that was more shrug than challenge. Appellant immediately grabbed him by the back of the neck, held him under the right arm and walked him quickly to the sally port. The two deputies stood nearby and took no action until Duran was wrestled into the sally port. [Exh. 4, DVD C1, file h, 11:24:40.] Appellant was dishonest in his report and during the IA investigation by stating that he ordered the prisoner off the elevator, and that the latter was demonstrating hostility or resistance when the door opened.

The report also said that Appellant pushed Mr. Duran “back into the sally port and back onto the floor with the bottom of my foot.” [Exh. M.] The video shows that Mr. Duran was still in the sally port with Deputy Lyons when the kick occurred. [Exh. 4, DVD C1, file i, 11:28:00.]

Appellant also failed to include several important details in his initial report, including that the inmate was HIV-positive, and that he started bleeding after “bouncing off the door jam and then one wall, and inside we bounced off the key holder”. [Exh. 4-28.] When interviewed by Internal Affairs, he added those details, and stated that he pushed Mr. Duran down with his foot to avoid getting near his blood or his body. However, Appellant and the other deputies had their gloved hands on Mr. Duran for a full two minutes before he kicked him. Appellant held Mr. Duran down with his face close to the inmate’s bloody face for almost that long just before executing the push with his boot. Moreover, it is not believable that an experienced deputy would have risked splattering blood on deputies holding the inmate by kicking his already-injured head if he was concerned about contact with HIV-infected blood. The most credible evidence, including the video, shows that Appellant was dishonest during the

Internal Affairs investigation when he stated that he pushed Mr. Duran with his foot in order to avoid his blood or protect the other deputies.

3. Carelessness in Performance of Duties

The Agency also 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). Ms. Malatesta found that Appellant was careless based on his failure to follow the protocols governing HIV-positive inmates, and the requirement that a supervisor must be called if an inmate becomes aggressive. Appellant admits his knowledge of these work protocols, but justified his failure to follow them by stating that he thought he could remove Mr. Duran from the elevator without involving other officers. In the process, Appellant left three inmates unsupervised, and involved two other officers in a long physical struggle with the inmate. During the incident, the inmate suffered injuries to his head requiring five stitches, and other lacerations.

The evidence also established that Appellant transported three inmates in an elevator with an aggressive, hostile prisoner, in violation of the rule that aggressive inmates must be separated from the general population. As a result, the inmates were unprotected in the elevator as Mr. Duran threatened and swore at Appellant from behind the barrier. Appellant also failed to use verbal commands or control holds on Mr. Duran at any point, although they were necessary to transport and direct the prisoner. The two less experienced officers both issued commands, at least one of which was obeyed. Mr. Duran did comply with Deputy Medina's order to relax and stop resisting, allowing Deputy Lyons to apply the cuffs. As a result of Appellant's failure to use verbal commands or holds, he used more force than was reasonably necessary in light of the resistance offered and the totality of the circumstances, and the inmate was seriously injured.

It is clear that Appellant chose not to follow the above protocols in performing the important work duty of transporting inmates to their cells, and that his lapses caused injury to a person who was in his care and custody. The Agency thus established a violation of § 16-60 B, carelessness in the performance of duties.

4. Conduct Violating Career Service Rules

As determined above, the Agency proved that Appellant violated CSR §§ 16-60 B, E, and L, and thereby also violated this rule, § 16-60 Y.

5. Conduct Prejudicial to Good Order

This rule is violated by evidence showing that the Agency was hindered in its ability to perform its mission by Appellant's conduct, or there is actual injury to the city's reputation or integrity. In re Compos, CSA 56-08, 15 (12/15/08), *citing In re Catalina*, CSA 35-08, 8 (8/22/08). The Agency presented no evidence that it was hindered in any significant respect in its ability to perform its mission, or that the city's

reputation or integrity was damaged based on Appellant's actions. Therefore, this violation was not proven.

B. Appropriateness of Termination

Ms. Malatesta conceded that Appellant's disciplinary history is free of any serious violations, and that he is a hard worker with many years of experience. However, the Agency supported its decision to terminate by its conclusions that Appellant's actions escalated a complying inmate into an aggressive one, committed violations of work rules and policies, and that he misled the Agency during its investigation into the incident. Ms. Malatesta was concerned that Appellant continued to state that his use of force was appropriate, even after seeing the video. She concluded that keeping Appellant on the force would put the department at risk in the event of further such incidents requiring the exercise of judgment in the use of force against prisoners.

The evidence showed that Appellant ignored a number of rules and protocols and misinterpreted others in order to hurry four prisoners to their cells. In the process, he caused Mr. Duran to become aggressive, endangered three inmates, and involved two other deputies in a struggle to restrain Mr. Duran, who suffered serious injuries. The two deputies were both relatively new on the force, but recognized that Appellant overreacted by kicking the handcuffed inmate, and reported the incident to command staff. More importantly, Appellant then made an incomplete and inaccurate report, never corrected those inaccuracies, and continued to deny any wrongdoing. Under the circumstances, the Agency did not act in an arbitrary or capricious manner in concluding that the Agency could not correct Appellant's behavior by lesser discipline.

IV. DECISION AND ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency's termination action dated Dec. 11, 2009 is AFFIRMED.

Dated this 29th day of April, 2010.


Valerie McNaughton
Hearing Officer for the
Career Service Board