

DECISION AFFIRMING 4-DAY SUSPENSION

DUKE COLE, Appellant,

v.

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

I. INTRODUCTION

This is an appeal of Appellant's 4-day suspension for alleged violations of a specified Career Service Rule (CSR). A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on March 14, 2018. The Agency was represented by Charles Mitchell and Amanda Bauer, Assistant City Attorneys, while the Appellant was represented by Brian Reynolds, Esq. Agency exhibits 1, 3-9 and 16-19 were admitted. Appellant offered no additional exhibits. Appellant testified during his own case-in-chief, and also called Deputy Eishi Yamaguchi and Civilian Review Administrator Alfredo Hernandez. The Agency offered no additional witnesses.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Agency's finding that Appellant violated Career Service Rule (CSR) 16-29 R was clearly erroneous; and
- B. whether the Agency's application of its disciplinary matrix in establishing the degree of discipline was clearly erroneous.

III. FINDINGS

The Appellant, Duke Cole, has been an officer in the Denver Sheriff's Department (Agency) for 12 years. At the time of the incident underlying this appeal his rank was, and remains, sergeant. He is charged, as all officers in the Agency, with the care and custody of inmates. He is also responsible for being familiar with, complying with, and, as a supervisor, enforcing the Agency's use of force rules and policies. Two Agency directives were at issue in this case as they apply to CSR 16-29 R, "conduct which violates... agency policies or rules."

RR 300.22 Inappropriate Force
Deputy Sheriffs... shall not use inappropriate force in... dealing with a prisoner..."

D.O. 5011.1M Use of Force
... The amount of force used will be reasonable and appropriate in relation to the threat faced to accomplish a lawful objective....

On May 12, 2017, JM was being booked in at the Downtown Detention Center. He had just placed his personal items, including his cell phone, on the Intake desk when he began yelling at the intake officer, grabbed his phone off the booking desk, and began walking away with it while the booking officer yelled at him to return it. Cole observed the commotion and approached JM to direct him to relinquish his phone. JM tried to walk away while Cole attempted to restrain him by the arm. Another deputy wrested the phone from JM while Cole tried guiding JM back to the desk to finish his booking. JM shoved Cole in the chest, causing him to stagger backward.

Cole and three deputies wrestled JM to the floor while two other deputies stood ready to assist if needed. JM resisted being taken down, and continued to resist when he was on the floor, kicking and flailing his arms. While other officers controlled one limb each, Cole placed one knee behind JM's ear and exerted pressure for 8-10 seconds to gain control by pain compliance. After the officers gave several orders for JM to place his hands behind his back, he finally complied, Cole released his knee, and JM was handcuffed and carried face-down to a cell. Cole instructed the deputies to adjust their holds while carrying JM, to ensure he would not be injured. As a precaution, Cole also called for a nurse to examine JM once he was secured in a cell.

The Agency teaches its officers a procedure called the mandibular angle pressure point technique. That practice calls for applying pressure with a finger or knuckle to a nerve behind a subject's ear to gain compliance through pain. Use of a knee instead of a thumb or knuckle is not taught or recommended due to the risk of injury.

JM filed two grievances claiming he was subject to excessive force. An investigation ensued. The Agency convened a contemplation-of-discipline meeting December 4, 2017. Cole attended with his attorney-at-law. The Agency issued a notice of discipline December 26, 2017, suspending Cole for four days. This appeal followed timely.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR 20-20 A.2., as the direct appeal of a suspension. In disciplinary actions under CSR 20, review is not *de novo*.¹

B. Burden and Standard of Proof.

The Appellant retains the burden of persuasion, throughout the case, to prove the Agency's finding that he violated CSR 16-29 R. was clearly excessive or that the Agency's application of its disciplinary matrix in assessing the level of discipline was clearly excessive. See CSR 20-56 A.

C. Appellant Claims

1. Violations. To overcome the presumption that his use of force was unreasonable and inappropriate, in violation of the above-stated rules, Cole contends the following evidence proves the Agency's findings were clearly excessive: the nurse who examined JM saw no visible marks or injuries after Cole used his knee to apply mandibular angle pressure; Cole placed all, or nearly all his weight on the knee that was on the floor, and not on the knee behind JM's ear; the amount and kind of resistance by JM justified a pain-compliance technique; and finally, Cole

¹ This is the first appeal decided under CSR 20, effective January 10, 2018. Previously, discipline of employees in the Sheriff's Department Deputy classification were entitled to a *de novo* review of appealable discipline.

explained he used his knee instead of a finger or knuckle to implement the mandibular angle pain compliance technique because, in prior instances of applying it with a finger, he always injured his finger.

Cole's claim that the nurse who examined JM found no injury conjures the logic of "no harm, no foul." While the degree of injury may relate to the degree of discipline assessed, it is not a factor addressed in the matrix to determine whether the force used in a situation was inappropriate. Thus, whether the nurse who subsequently examined JM observed visible injury was not a significant factor in the Agency's determination whether Cole violated RR 300.22 or DO 5011.1M. Instead, it was Cole's disapproved use of his knee to press behind JM's ear that was the appropriate focus of the Agency's determination, rather than the result.

Regarding the amount of force exerted, Deputy Yamaguchi was the Agency's use of force instructor. He taught the mandibular angle pressure point technique. He told the IAB interviewer, and repeated at hearing, that pressure is applied with a thumb, knuckle, or index finger, but specifically denied it is ever taught with use of the knee. [Exh. 16-6, 16-7]. "We try and avoid the head and neck... [w]e don't teach that – to put direct pressure on the head or neck." [Id; 16-12]. He further explained the use of a knee on the head does not make sense since it is too unstable to control the subject's head. [Id]. Yamaguchi's opinion is buttressed by common sense. Controlling the amount of pressure exerted on a specific point behind an inmate's ear with one knee, while balancing on the floor with the other knee, all while the inmate is flailing,² is inaccurate and dangerous³ compared with using a thumb or knuckle.

Finally, if Cole feared injuring a finger by the proper application of the mandibular angle pressure point, then a different technique or approach was called for. As stated by Yamaguchi, and as is evident, balancing most of the weight on one knee while attempting to apply a limited amount of weight to the other knee to control a combative inmate, makes little sense. Many other deputies were involved or immediately available, and other options were available to Cole, as described by Yamaguchi. Since these factors prove Cole's application of the mandibular angle pressure point by using his knee was inappropriate, in violation of RR 300.22, and was unreasonable and inappropriate under D.O. 5011.1M, then the Agency's findings were reasonable. Consequently, Cole failed to prove the Agency's finding that he violated CSR 16-29 R. via those directives was clearly erroneous, as required under CSR 20-56.

2. Degree of discipline. Cole's second contention is the Agency's choice of discipline was clearly excessive. In response Cole claimed the Agency was required, but failed, to follow the factors set forth in Appendix C of its disciplinary matrix when it determined the degree of discipline. Cole cited four factors the decision-maker should consider under Appendix C. [Exh 1-66 through 1-82]: the vulnerability of the inmate, including whether he posed a threat or resisted officers; whether force was used as punishment; the motivation in applying force; and the way force was applied.

First, the four factors cited by Cole were matrix were not exclusive, but simply examples of factors to consider. Next, even assuming the four factors cited by Cole were determinative, the evidence does not support Cole's claim that the evidence renders clearly erroneous the Agency's conclusions. Taking each cited factor in order:

² In response to being asked why he did not use his hand to apply pressure instead of his knee, Cole answered he is not limber and it was more awkward than applying a knee. [Cole testimony]. This explanation is patently illogical.

³ It should be evident that too much pressure exerted on a head or neck with the weight of an officer using his knee could easily inflict excessive injury.

(a) the vulnerability of the inmate, including whether the inmate was posing a threat to or resisting the officers;

The Agency did not dispute that JM resisted the officers. He resisted being taken to the floor and kicked and flailed while on the floor. Yet four officers controlled him, and two other stood at the ready if they were needed. Under those circumstances, using a knee to control the head or neck area with pressure was unnecessary and dangerous. [See n. 3]. Even if the decision-maker did not apply this factor, the evidence failed to prove the Agency's decision was clearly erroneous.

(b) whether the force used was to punish the inmate;

The evidence supports Cole's contention that he did not use force to punish JM, but only to control him. JM was actively resisting commands and physical restraint; Cole released pressure behind JM's ear as soon as JM became compliant; Cole instructed deputies carrying JM to adjust their holds so as not to risk injury to JM; Cole called immediately for nursing staff to evaluate JM; and the Agency did not dispute these contentions.

(c) the deputy's motivation in applying force, i.e. was the use of force for a proper reason;

This factor is intimately related to the factor immediately above. Cole exerted force to control an out-of-control inmate. Some use of force was appropriate, but the kind and degree of force exerted remained problematic.

(d) the way in which force was applied, including whether force was applied so as to minimize the risk of harm to the inmate.

This factor addresses the way force was applied, regardless whether actual harm resulted. There was conflicting evidence whether JM was harmed by Cole's knee. Regardless, the risk of harm was elevated by his improper application of the mandibular angle pressure technique. Yamaguchi's testimony was credible and not rebutted. He testified he never taught that it was acceptable to use a knee with this technique.

On balance, the Agency's finding, that Cole violated RR 300.22 and DO 5000.1M, establishes violations, in each instance, of CSR 16-29 R. Those findings were supported by the record evidence, and are not contrary to what a reasonable person would conclude from the record. For reasons stated here and above, those findings were not clearly erroneous.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-41. As with the rule violations, above, the Appellant retains the burden of persuasion to prove the degree of discipline elected by the Agency was clearly erroneous. CSR 20-56.

A. Severity of the proven offenses

The lowest category for penalizing an inappropriate use of force in the Agency's disciplinary matrix falls under its category D. Conduct under that category, including a violation of RR 300.22, is defined as "conduct that is substantially contrary to the guiding principles of the department, or that substantially interferes with its mission, operations or professional image, or

that involves a demonstrable serious risk to deputy sheriff, employee or public safety." Cole did not directly refute the Agency's choice of category.

The Agency followed the next step in the matrix, determining that a first violation of a Category D violation calls for a penalty from a four-day suspension to 16 days, depending on the degree of mitigation or aggravation. The Agency assessed the lowest mitigated penalty of a 4-day suspension. Cole's argument here appears to be the penalty, while mitigated, is nonetheless excessive because he complied with the Agency's use of force rules.

For reasons stated above, the use of a knee on JM's head/neck area, under the circumstances of this case, was an inappropriate use of force in violation of RR 300.22 and DO 5000.1M. The penalty assessed was within the parameters of the Agency's disciplinary matrix and was not excessive. In addition, the Agency expects supervisors to set an example in upholding its rules and orders. With five deputies standing nearby or engaged with JM, Cole's inappropriate use of force set a poor example for those subordinates.

Mitigating circumstances were considered and applied by decision-maker Alfredo Hernandez in assessing discipline pursuant to the Agency's disciplinary matrix. Mitigation included Cole's prior record, Cole's attempt to limit the amount of pressure he applied with his knee to JM's head, his direction to subordinates intended to protect JM from undue injury as he was carried to a cell, and Cole's call for medical attention as soon as practical. [Exh. 19-12].

B. Prior Record

Cole had one previous violation, a minor verbal reprimand in 2015 unrelated to the present case.

C. Likelihood of Reform

While Cole disagreed that he violated the cited authority, his actions appear to be a misunderstanding of the application of the Agency's use of force policies, rather than deriving from any ill-intent. There appears to be no reason Cole will not conform his actions to the Agency's policies.

For reasons stated above, the Agency's determination of the degree of discipline followed its internal guidelines, was not clearly erroneous, complied with CSR 16-41, and the decision maker did not exceed his authority. CSR 20-56 B.1.c.

VI. ORDER

The Agency's assessment of a four-day suspension is AFFIRMED.

DONE April 6, 2018.



Bruce A. Plotkin
Career Service Hearing Officer