HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Consolidated Appeal Nos. 29-16 and 30-16

DECISION AND ORDER REVERSING SUSPENSIONS

BRET GAREGNANI, and
DAMIEN JONES, Appellants,

v.

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

I. Introduction

In these consolidated appeals, Appellants, Deputies Brett Garegnani and Damien Jones, request the reversal of their respective 16 and 10-day suspensions assessed by their employer, the Denver Sheriff's Department (Agency), for alleged excessive use of force against an inmate in violation of the Career Service Rules (CSRs) and Agency rules. Both appeals arose out of the same events. Bruce A. Plotkin, Hearing Officer, presided at hearing on January 30, 2017. Both Appellants were represented by Don Sisson, Esq., and Lucas Lorenz, Esq., of the firm Elkus and Sisson, P.C. Agency exhibits 1-8 were admitted by stipulation before hearing as were Appellants' exhibits A-D, H, I 347-357, J, and O. Exhibit 12 was admitted over Appellants' objection. The Agency called one witness, Civilian Review Administrator Shannon Elwell, for its case-in-chief. At the end of Elwell's testimony, Appellants moved for a directed verdict, which I now deem a motion to dismiss. The motion was granted. The Agency's motions to continue the hearing and to amend its witness list were denied. Those orders are now incorporated into this decision.

II. Jurisdiction and Motion to Dismiss

Jurisdiction for these appeals is proper under Career Service Rule 19 A.1.b., as appeals of Appellants' suspensions. Colorado Rules of Civil Procedure 41(b)(1) controls a motion to dismiss in the administrative arena, when cases are tried without a jury. Nova v. Industrial Claim Appeals Office, 754 P. 2d 800 (Colo. App. 1988); In re Crenshaw, CSA 18-06, 2 (4/6/06). After a plaintiff (here the Agency) completes its evidence, C.R.C.P. 41(b)(1) provides that the defendant (here Appellants) may move for a dismissal on the grounds that the Agency failed to prove any of its claims even without Appellants presenting any evidence. In that regard, the following findings enter.

III. Findings

Garegnani and Jones are Denver Deputy Sheriffs and Career Service employees subject to the rules of their Agency and those of the Career Service Authority. CSR 16-29. On September 12, 2013, Appellants were on duty in the Downtown Detention Center where inmate DA was housed. DA began to flood his cell, and encouraged other inmates to do the same.

A sergeant ordered Appellants to remove DA from his cell in housing unit 2D and to escort him to a restrictive housing unit, 3D. Appellants escorted DA into an elevator to transport

him. They placed DA face-first into the far corner of the elevator and one or both of them ordered DA not to move several times, but DA began pushing back, and later admitted he tried to mule-kick and head-butt Appellants who were standing behind him.

Sergeant Minter entered the elevator, saw DA trying to get away from the Appellants, and also ordered DA to stop resisting, but DA would not. Minter then ordered Appellants to "take DA to the ground." [Exh. 1-5].

Garegnani, assisted by Jones, forced DA backward and down to the floor of the elevator on his back. DA flailed violently, Appellants struggled to control DA. Several other deputies entered the elevator to assist, but there was little room for them to manoeuver to aid the Appellants. The deputies turned DA onto his stomach, each gained control of a limb. Garegnani lifted DA by the handcuffs, behind DA's back while other deputies lifted DA's legs with DA face-down. [Exh. 3-7].

The deputies carried DA a few feet until they were outside the elevator, repositioned themselves to support DA and carried him, face-down in an approved method toward the 3D housing unit.

On April 11, 2016, some 2 ½ years after the incident, the Agency notified the Appellants to answer why they should not be disciplined. [Exh. 4 - 5] and on May 17, 2016 served them with their respective notices of suspension. [Exh. 1 and 2]. Both Appellants filed timely appeals.

Shannon Elwell has been the Civilian Review Administrator under the Denver Department of Safety for over two years. Stephanie O'Malley, the Executive Director of the Department of Safety, is Elwell's supervisor and is the Agency's appointing authority under the Career Service Rules. That designation makes O'Malley the disciplinary decision-maker for employees in her agency. An appointing authority may delegate disciplinary decisions to a subordinate. [CSR 16-15].

In past Career Service hearings, Elwell consistently testified she alone determined whether uniformed officers in the Agency violated Career Service and Agency rules and, if so, she also determined the level of discipline.[1] In this appeal, although Elwell signed the notices of discipline, she was not O'Malley's delegee for discipline, and had no authority to assess discipline. The findings of fact and bases for discipline were decided by O'Malley. Elwell merely reduced to writing the findings and fact and bases for rule violations as communicated to her by O'Malley. [Elwell cross-exam].

When an allegation of substantial misconduct arises, the case is first assigned to the Internal Affairs Bureau within the Agency in order to conduct a fact-finding assessment. The Conduct Review Office (CRO), also in the Sheriff's Department, reviews those findings and recommends whether discipline is appropriate and, if so, to what degree. The CRO found no rule violations by either Appellant and recommended no discipline. [Elwell cross-exam]. At the second level of review of the Appellants' actions, Elwell, in her role as Civilian Review Administrator, also found no rule violations by either Appellant and no basis for discipline. Elwell did not know if O'Malley reviewed the notices of discipline after she (Elwell) drafted them. [*Id*].

[1] In re Williams, CSA 52-16, Bates No. 000738 (12/14/16); In re Steckman, CSA 30-15, Bates No. 000501 (6/30/16); In re Roybal, CSA 44-16, Bates No. 000333 (10/3/16); In re Rocha, CSA 19-16, Bates No. 000466 (9/14/16); In re Leyba, 31-16 CSA 31-16, Bates No. 000331 (8/30/16); In re Jackson, CSA 42-16, Bates No. 000904 (11/21/16); In re Espinoza, CSA 14-16, Bates No 000904 (7/27/16); In re Gale, CSA 02-15, Bates No. 001411 (11/23/15), *Aff'd* In re Gale, CSB 02-15A (7/21/16); In re Fuller, CSA 46-16, Bates No. 517 (10/11/16). Elwell stated O'Malley was the ultimate decision-maker in only one previous appeal. In re Romero, CSA 28-16, Bates No. 000354 (9/9/16).

At the end of the Agency's case-in-chief, Appellants moved for a directed verdict. The Agency objected. The Appellants' motion was granted, whereupon the Agency asked for a continuance in order to submit briefs as to why the evidence was sufficient to avoid a directed verdict. That motion was denied, and the Agency requested permission to amend its witness list to include Executive Director O'Malley so that she could testify as to the basis for the Agency's notice of discipline. That motion was also denied, and both disciplinary actions were reversed. The hearing was adjourned and the forgoing is now reduced to this decision and order.

IV. Analysis

The Agency's notice of discipline alleged the following violations.[2]

1. CSR 16-60 A. Neglect of Duty.

Under this rule, the Agency must prove it communicated a duty to Appellants which they subsequently violated. [In re Gutierrez, CSA 65-11, 5 (8/28/12); *citing* In re Mounjim, CSA 87-07, 4 (7/10/08)]. The notices of discipline, which were virtually identical, did not specify any particular duty, and only broadly referred to having "tremendous responsibility, especially as it pertains to the authority to use force." No duty is found beyond that specified under Sheriff's Departmental Rules 300.22 and 5011.1M, regarding excessive force. Those rules carry their own conduct specifications and analysis. More is required under this rule than citing another rule. [In re Gordon, CSA 10-14 (11/28/14)]. Therefore, no violation is found under this rule 16-60 A.

2. CSR 16-60 L., Failure to observe written departmental or agency regulations, policies, or rules, as it pertains to:

Departmental Order (DO) 5011.1M, Use of Force, and DSD Rule/Regulation(RR) 300.22, Inappropriate Force.

The Agency's notice of discipline linked these two directives together in its allegation of wrongdoing. RR 300.22 states "Deputy sheriffs and employees shall not use inappropriate force in… dealing with a prisoner…" The notice of discipline specified "as it pertains to… DO 5011.1M, Use of Force," and quoted from that order: "Under the Department's use of force policy, '[o]fficers should recognize that their conduct immediately connected to the use of force may be a factor which can influence the force option necessary in a given situation.'" The notice of discipline found Jones and Garegnani improperly forced DA's face into the corner of the elevator, and opined their conduct likely provoked DA into resisting.

The only objective evidence - video recordings of the incident – did not prove either deputy forced DA's head into the corner of the elevator beyond what was reasonable and necessary to control an evidently-unruly inmate, or to forestall being head-butted or mule kicked, as inmate DA admitted he attempted to do. Without other reliable evidence, this allegation remains unproven.

Next under these rules, the notice of discipline accused both deputies of using undue force to take DA to the elevator floor "in a violent and forceful manner." The Agency found that, because DA was handcuffed, "any immediate threat to the safety of the deputies was diminished if not eliminated entirely…" and also found their takedown of DA was done in a manner disproportionate to the threat he posed. Notably, the notice of discipline acknowledged DA's attempts to head-butt and mule-kick the Appellants, but reasoned

[2] The Career Service Rules have been revised since Appellants' actions in this appeal occurred. Because the previous version of the rules was in effect at that time, the earlier version applies here.

because the kicks were backward, they "were of a lesser threat to the deputies, as they did not employ the aim and velocity of an assaultive forward kick."

There are several apparent problems with those findings. It is common sense that a backward kick may inflict significant injury to the knees, ankles or legs of the person standing behind. It was evident in the video recording that DA was flailing significantly during nearly the entire incident inside the elevator. Even though DA was handcuffed, it required four, much larger deputies to restrain him sufficiently to remove him from the elevator. Additionally, Appellants were ordered to take down DA by the sergeant who witnessed the entire interaction, lending some credibility to the necessity of a forceful takedown.

Careful replays of the recording reveal Garegnani's first motion, to force DA to fall backward, was forceful and violent. Then, notably, as DA began falling backward with his hands handcuffed behind him, Garegnani noticeably slowed DA's fall - as if the recording suddenly played in slow-motion. Contrary to the Agency's assertion, Garegnani appeared to take care to avoid DA's head striking the floor. [Exhibit 3-6]. The evidence does not support the conclusion that Appellants' take-down of DA in the elevator was unreasonable, exceeded the least amount of force necessary to accomplish a lawful objective, or was disproportionate to the threat DA posed, in violation of RR 300.12 or DO 5011.1M. This claim remains unproven.[3]

Next, the notice of discipline claimed the Appellants used excessive force in violation of RR 300.12 and DO 5011.1M when they lifted the inmate by the handcuffs which were behind his back. The notices of discipline diverge somewhat as to what facts support these violations. As to Garegnani, his notice of discipline states "Deputy Garegnani picked inmate DA off the ground by handcuffs in a manner that is not taught by the Department… risked serious injury to the inmate, in that the inmate's arms are behind him and he is picked up by his arms off the ground, placing a significant strain on his unsupported shoulders."

D.O. 5011.1M is silent with respect to lifting an inmate by the handcuffs. It was not apparent which portion of this order the Agency deemed to be violated. The order requires, generally, that an officer must select a force option which is objectively reasonable under the circumstances. [Exhibit 12-3; 12-6, citing Graham v. Conner, 490 U.S. 386, 397 (1989)]. In that regard: the confined space in the elevator did not allow the five deputies involved in subduing DA much flexibility to employ other options; DA's flailing and persistent non-compliance required a significant use of force to overcome his resistance;[4] Garegnani, along with other deputies, lifted DA only for as long as it took to remove DA from the elevator; all deputies, including Garegnani, immediately lowered DA to re-position him into an approved carry position; since other deputies lifted DA by his limbs in concert with Garegnani's lift, Garegnani's lifting of DA by the handcuffs exerted much less stress on DA than had he lifted DA's entire weight by the handcuffs[5] [Exh. 3-7]. DA posed an imminent threat of injury to Garegnani and Jones; DA was actively and severely resisting; and neither the Conduct Review Office nor Elwell both of whom are tasked with making such findings, determined that Garegnani's lift (or any of his actions toward DA) was excessive. [Elwell cross-exam[6]]. Those factors amount to an objectively reasonable justification for Garegnani momentarily picking up DA by the handcuffs under this DO. [Exh. 12-7].

---

[3] The only other evidence offered by the Agency to justify a finding of a violation of this and the other cited rules was Elwell's testimony; however, her testimony, as it pertained to O'Malley's justification for discipline, was stricken.

[4] *Contrast* In re Valerio, CSA 22-14, 2 (9/2/14); *aff'd In re Valerio* CSB 22-14A (2/19/15) (finding where the inmate was compliant, the deputy initiated both violence and an unnecessary lift of an inmate's entire weight by handcuffs behind his back).

[5] *Contrast* Valerio, n.4. at 7.

[6] Although Elwell's testimony was stricken as a hearsay expression of O'Malley's reasons to impose discipline, it was not stricken for other purposes, such as her contrary opinion and that of the CRO.

Jones did not lift DA by the handcuffs and did not "initiate" the lift in any way, contrary to allegations contained in the notice of discipline. [Exh. 3-6]

Next, according to the notice of discipline, Garegnani placed his knee on the back of JD's head after deputies carried him to 3D and lowered him to the floor, face-down. The notice alleged:

> Garegnani applied his considerable body weight on inmate DA's head by placing his knee on inmate DA's head for approximately two and a half minutes. There is no objective demonstrable need to control inmate DA's head in this manner at this time… which risked additional serious bodily injury in the form of a severe head injury and was not the least amount of force he could have used. [Exh. 1-7].

The video recording from that time does not show what Garegnani was doing with respect to JD because the view of them is blocked by another deputy. [Exh. 3-11; Exh. 3-12]. The same evidence fails to establish whether JD continued to struggle or to what degree, which may have justified the use of force to control him. In his contemplation of discipline meeting Garegnani acknowledged he used his "knee slightly on the back of [the inmate's] neck and head area, just enough to control him from getting up and from being able to spit at anyone as he was earlier." [Exh. 6-10]. This undisputed evidence fails to establish excessive force under the above-cited rules.

The notices of discipline specified that both Appellants violated RR 300.22 only as it pertains to DO 5011.1M. Having failed to establish any violation of DO 5011.1M, no violation of RR 300.22 may be established. Accordingly, no violation of CSR 16-60 L. was established. Based on the exhibits and testimony admitted into evidence, the Agency failed to establish any of the alleged rule violations by either Appellant by preponderant evidence.

V. Motion to Continue

Regarding the Agency's motion to continue hearing (in order to amend its pre-hearing statement to include Executive Director O'Malley and to permit her to testify about the notice of discipline), the following factors apply. The parties to every Career Service appeal are required to file pre-hearing statements, including witnesses and their proposed testimony. CSR 19-44. The Agency had not endorsed Ms. O'Malley as a witness, and expressly stated it would only be calling Ms. Elwell as their only witness.

A party's failure to provide proper notice of a witness or the content of that witness's potential testimony, subjects that witness to exclusion. Jordan v. City and C. of Denver, 15CV30960, at 4 (Denver Dist. Ct. February 10, 2016); CSR 19-44 C. There is little doubt that, had the situation been reversed, the Agency would have sternly opposed an Appellant's motion to continue when the Appellant had not endorsed an essential witness.

VI. Motion to Dismiss

Where a court is a trier of fact, as in Career Service appeals, a motion for a directed verdict is deemed a motion to dismiss pursuant to C.R.C.P. 41(b). Frontier Exploration v. Am. Nat., 849 P.2d 887 (Colo. App. 1992); Nova v. Industrial Claim Appeals Office, 754 P.2d 800 (Colo. App. 1988). Unlike a summary judgment motion before trial, I do not view the evidence in the light most favorable to the non-moving party (here, the Agency) to establish a *prima facie* case before hearing; nor do I "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the Agency under C.R.C.P. 41(b)(1). See Rowe v. Bowers, 417 P.2d 503, 505 (Colo. 1996); Blea v. Deluxe/Current, Inc., W.C. Nos 3-940-062 (June 18, 1997).

Rather, I determine whether judgment for Appellants is justified on the Agency's evidence. American National Bank v. First National Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Bruce v. Moffat County Youth Care Center, W. C. No. 4-311-203 (March 23, 1998). *see also* Campbell v. Commercial Credit Plan, Inc., 670 P.2d 813 (Colo. App. 1983); C.R.C.P. 41(b)(1); C.R.C.P. 52.

As the proponent of discipline, the Agency bears the burden of persuasion to demonstrate Appellant violated one or more of the cited Career Service Rules, and that the degree of discipline complies with CSR 16-20. In re Lovingier, CSB 48-13A, 4 (11/7/14). The standard by which the Agency must prove each violation is by a preponderance of the evidence. To summarize the evidence admitted into the record:

Elwell was not the decision-maker in this case and, according to her own testimony, was not delegated the authority to determine discipline. Thus, the portion of Elwell's testimony in which she conveyed the underlying basis for discipline on behalf of O'Malley, were out of court statements offered for the truth of those assertions. As such, those statements were hearsay.[7] No exception was sought, thus Elwell's testimony, as it concerned the underlying basis for discipline, became inadmissible hearsay.[8] At that point, all that remained of the Agency's case lay in its stipulated exhibits, most pertinently, the notice of discipline and video recordings of the underlying incident. The next step was to weigh that remaining evidence. As found above:

(1) The Agency alleged Appellants used excessive force in violation of CSR 16-60 L., via DO 5011.1M and RR 300.22 when they forced DA's head into the corner of the inmate transport elevator. The CRO and Elwell disagreed that any violation was established; the decision maker did not testify; the video evidence did not prove excessive force.

(2) The Agency alleged Appellants forced DA to the elevator floor in a manner that was an excessive use of force in violation of CSR 16-60 L, via DO 5011.1M and RR 300.22. Neither the CRO nor Elwell found Appellants' conduct violated these rules; the decision-maker did not testify; and the video evidence tended to show Appellants used due care to avoid injury to DA, even while DA was violent toward them.

(3) The Agency alleged Appellants violated CSR 16-60 L, via DO 5011.1M and RR 300.22 when they hoisted DA by handcuffs, while his restrained hands were behind his back. Jones did not participate in that activity. Garegnani used only such force as was reasonable and appropriate in relation to the threat DA posed. Garegnani desisted in the handcuff-carry as soon as the deputies gained control of DA, and repositioned to carry him outside the elevator [Exh. 3-7];

(4) The Agency alleged Garegnani violated CSR 16-60 L via DO 5011.1M and RR 300.22 because he did not use the least amount of force necessary to achieve a legitimate detention-related function when he kneeled on DA in 3D. Neither Elwell nor the CRO found those actions violated any rule or order. The decision maker did not testify. The video evidence does not show Garegnani used his knee on the back of DA's head/neck area to keep him face-down on the floor of 3D [Exh. 3-11; 3-12], and the only evidence presented was Garegnani's admission at his contemplation of discipline meeting where he admitted to placing his knee "slightly" on the inmate's head "just enough to control him." Using his body to prevent a resisting inmate from kicking or spitting does not amount to excessive force.

---

[7] Hearsay is defined is defined as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Colorado Rules of Evidence (CRE) 801(c). While authorized statements made by an agent of the declarant on the subject raised by the declarant is not hearsay, (CRE 801 (2)), Elwell specified she had no such authority.

[8] Administrative appeals have their own relaxed test for admissible hearsay, including the nine-factors set forth by the Colorado Supreme Court. Industrial Claims Appeals Office v. Flower Stop Marketing Corp., 782 P.2d 13, 18 (Colo. 1989). Of those factors, the first, fourth, and ninth were largely met, while the remainder were not, or were unknown.

VII. Order

The Agency failed to establish that either Appellant violated any of the alleged Career Service or Agency rules or orders. Accordingly, Appellants' motion to dismiss is granted. Both suspensions are reversed,[9] and back pay and benefits shall be restored accordingly.

DONE March 6, 2017.

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. See Career Service Rules at www.denvergov.org/csa. **All petitions for review must be filed with the:**

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

Career Service Hearing Office
201 W. Colfax, Dept. 412, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND opposing parties or their representatives, if any.

[9] Even if the Agency had established one or more violations, the 31 months between the incident and the Agency's letter in contemplation of discipline was an unconscionable delay in bringing an action against the appellants, requiring a significant reduction in penalty. *See* In re Leyba, CSB 59-14A, 10-12 (2/5/16); *but see* In re Leyba, CSB 31-16A, 6 (3/2/17).