

DECISION

THAO NGUYEN, Appellant,

vs.

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

I. INTRODUCTION

Appellant appeals a 10-day suspension, assessed by his employer, the Denver Sheriff's Department (Agency), for alleged violations of specified Career Service Rules, and Agency rules, regulations and orders. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on June 29, 2017. The Agency was represented by Assistant City Attorney John Sauer, while the Appellant was represented by Marcy Ongert, Esq. and David Canter, Esq., of the law firm Foster, Graham, Milstein & Calisher. Agency exhibits 1-12 were admitted by stipulation. Appellant's exhibits A, C-G and I were admitted, exhibit B was withdrawn, and the following portions of exhibit H were admitted; H- 23, H-26, H-27, H-30 through H-36, H-40 through H-46, H-77, and H-78. Civilian Review Administrator Shannon Elwell testified for the Agency. The Appellant testified on his own behalf during his case-in-chief, and presented the following additional witnesses: Officer Eric Miller and Sgt. Stephen Petit.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated either Career Service Rule (CSR) 16-29 A or R.;
- B. if the Appellant violated either of the aforementioned Career Service Rules, whether the Agency's decision to suspend him conformed to the purposes of discipline under CSR 16-41

III. FINDINGS

The facts are not in dispute. The Appellant, Thao Nguyen, has been a deputy sheriff in the Agency for five years. His primary duties, in pertinent part to this appeal, are to provide safety and security for the care and custody of inmates by operating safe, secure, efficient, and humane facilities. He is responsible for understanding and obeying all pertinent policies including the use of force and the use of Tasers.

The Downtown Detention Center (DDC) houses inmates in open housing pods for less-dangerous inmates and in more traditional cell blocks for dangerous and at-risk inmates. Housing unit 2D is a special management unit for housing inmates known to be violent, mentally ill, or otherwise requiring heightened security and restricted freedom of movement. All 2D

inmates are locked in cells unless accompanied for limited specified reasons. Inmate RG¹ was incarcerated in 2D. His posted notifications included requiring “two officers at all times,” “handcuffs,” “violent to inmates,” “and “separation from all.” He had previously threatened and attempted to assault Nguyen.

On August 21, 2015, Nguyen was on duty in 2D, along with then-Deputy Eric Miller. A security video recording showed Nguyen delivering a food tray to RG through the door flap² of his cell, and engaging in conversation with him for over a minute. [Exh. 11]. Every time RG saw Nguyen, he threatened him, used foul language, and tried to injure Nguyen if he could. [Nguyen testimony]. RG is significantly bigger and stronger than Nguyen. [Id].

RG falsely accused Nguyen of poisoning his food, and despite Nguyen's denial, RG became agitated. A struggle ensued. Nguyen repeatedly ordered RG to remove his hands from the door flap so that he could secure it. RG tried to grab Nguyen's hands, and blocked all attempts to close the flap by grabbing and holding onto the flap. Nguyen stepped away from the cell and was out of reach of RG's grasp through the door flap. He pulled out his Taser, stepped forward to re-engage with RG, and discharged his Taser into RG's hand, causing RG to back away momentarily. Nguyen and Miller, who had just arrived to assist, secured the door flap which was a policy requirement, while RG continued to push and bang on the door flap. During the entire struggle, RG was in his locked cell.

RG filed a complaint of assault by Nguyen for his use of the Taser, prompting the Agency's Internal Affairs Bureau to investigate. Following the investigation, the Agency issued a letter in contemplation of discipline and held a pre-disciplinary meeting on February 28, 2017. Nguyen attended with legal counsel. [Exh. 8-1]. On March 28, 2017, the Agency served a notice of discipline on Nguyen. This appeal followed in timely fashion.

IV. ANALYSIS

A. Jurisdiction and Review

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

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove Nguyen violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend Nguyen's employment complied with CSR 16-41. The standard by which the Agency must prove its claims is a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-29 A. Neglect of duty or carelessness in performance of duties and responsibilities.

To sustain a violation under CSR 16-29 A, the Agency must establish that Nguyen failed to perform a known duty. In re Gomez, CSA 02-12 (5/14/12), *citing In re Abbey*, CSA 99-09, 6

¹ The inmate was mistakenly referred to in the Agency's Notice of Discipline as DA once, but called RG otherwise. Exhibit 1-7.

² Cell doors in 2D are equipped with metal flaps which can be unlocked and opened to a horizontal position from outside the cell, and are just large enough to hold a food tray or to pass other items back and forth from the inmate to the officer while the cell remains locked.

(8/9/10). The Agency claimed the Nguyen neglected to provide for the safety and security of an inmate when he unnecessarily used a Taser on RG.

Nguyen did not dispute his duty to provide for the safety and security of inmates. He acknowledged deploying his Taser to stun RG. For reasons detailed more fully below, RG posed no immediate threat to Nguyen, or anyone else, when Nguyen deployed his Taser. The unnecessary deployment of a Taser to stun an inmate who posed no immediate threat was neglectful of Nguyen's duty to provide for the safety and security of an inmate, in violation of this rule.

Nguyen claimed his duty to secure the door flap to the cell of a dangerous inmate required him to deploy his Taser. Had he been unable to pull away from RG while RG was grabbing him through the door flap, Nguyen would have been justified in deploying his Taser. [Elwell testimony; Petit testimony]. While testimony indicated that securing the door flap was a requirement [Elwell cross-exam], Nguyen was not entitled to use any means to do so. The Agency requires the use of the least amount of force necessary to accomplish a lawful objective. Under the circumstances described hereunder, there was no urgency to securing the door flap. Nguyen's deployment of his Taser far exceeded the least amount of force necessary to secure the door flap. This violation was proven by a preponderance of the evidence.

2. CSR 16-29 R. Conduct which violates the Career Service Rules, the City Charter, the Denver Revised Municipal Code, Executive Orders, written departmental or agency regulations, policies or rules, or any other applicable legal authority. When citing this subsection, a department or agency must cite the specific regulation, policy or rule the employee has violated.

Denver Sheriff Department Order 5011.1M – Use of Force

...

Policy. It is the policy of the Denver Sheriff Department (DSD) that officers use physical force only as prescribed by the Colorado Revised Statutes (CRS) and internal Department standards to perform any legitimate law enforcement or detention related function. The amount of force used will be reasonable and appropriate in relation to the threat faced to accomplish a lawful objective. In all cases, force will be de-escalated once the legitimate function is achieved or the resistance has ceased.

...

Explanation: The Denver Sheriff Department (DSD) recognizes the value of all human life and is committed to respecting human rights and the dignity of every individual. The use of a firearm is, in all probability, the most serious use of force in which a Deputy Sheriff will engage. When deciding whether to use a firearm, officers shall act within the boundaries of law, ethics, good judgment, this use of force policy, and all accepted DSD policies, practices and training. With these values in mind, an officer shall use only that degree of force which is necessary and objectively reasonable under the circumstances... The Department will support the use of reasonable and appropriate force by officers in the performance of duty. Use of force that is not lawful, reasonable and appropriate will not be tolerated...

Under this Order, an officer may overcome a threat by use of only such physical force as is reasonable and appropriate to accomplish a lawful objective. The measure of that reasonableness is the degree of force which is necessary and objectively reasonable under the circumstances.

As found both above and below, RG posed no immediate threat when Nguyen deployed his Taser. It was not necessary to secure the flap immediately, particularly if, as Nguyen claimed, he felt threatened by RG. Nguyen's description of being grabbed and held was inapplicable to what was necessary or reasonable once he backed away. In essence, the use of force "necessity meter" was set back to zero when Nguyen backed out of RG's reach, leaving him secured in a locked cell. Similarly, his claims regarding the potential for RG to flood his cell, throw feces or other material through the door flap, and other potential harms, were not imminent, and therefore did not justify the deployment of a Taser. It does not serve a lawful objective to inflict significant harm as justification for potential harm when the potential harm is not imminent. Under the circumstances (a secured inmate out of reach of inflicting harm; Nguyen's ability to call for assistance; his ability to withdraw from the encounter; and his ability to tell others to avoid the immediate area), Nguyen's use of a Taser was not necessary or objectively reasonable in violation of this Agency order, and therefore in violation of CSR 16-29 R.

Department Order 5014.1K – Use of Tasers/Electronic Control Devices.

Electronic Control Devices will not be used as a punishment, under any circumstances, or to effect compliance with verbal commands where there is no physical threat.

The Agency presented no evidence Nguyen used his Taser on RG as punishment. Nguyen acknowledged he deployed his Taser to effect RG's compliance with his command to back away from the door flap.

Sheriff's Directive July 12, 2014.

Any use of the taser is only authorized for conditions of active aggression or aggravated active aggression. Active aggression is defined as follows:

A threat or overt act of an assault, coupled with the present ability to carry out the threat or assault, which reasonably indicates that an assault or injury to any person is imminent.

Aggravated active aggression is defined as follows:

A threat or overt act of an assault, coupled with the present ability to carry out the threat or assault, which reasonably indicates that an assault or injury to any person is imminent.

The Taser is NOT authorized for the below types of resistance:

Verbal non-compliance – Nonverbal cues in attitude, appearance, demeanor or posture that indicates an unwillingness to cooperate or a threat.

Verbal Noncompliance – Verbal responses indicating an unwillingness to comply with officer's directions or threat to injure a person

Passive Resistance – Physical actions that attempt to prevent officer's control including flight or attempt to flee, but do not involve attempts to harm the officer

Defensive Resistance – Physical actions that attempt to prevent officer’s control including flight or attempt to flee, but do not involve attempts harm the officer.

Elwell deemed Nguyen violated these Taser Policies when, after backing away from any physical or threatening behavior, he re-engaged RG with his Taser. She found Nguyen’s use of the Taser at that point was to gain compliance with his verbal commands by infliction of pain in violation of these policies. [Elwell testimony; Exh. 1-11, 1-12]. Nguyen replied RG had just grabbed at him, had a history of assaultive behavior, was out of control, and the door flap had to be closed for the safety of passers-by.

The most salient fact, in analyzing whether a violation occurred under this and the other use of force rules cited in this Decision, is that Nguyen had backed away from his entanglement with RG when he accessed his Taser. [Exh. 1-7; Elwell testimony; Nguyen testimony; Exh. 11]. Because Nguyen was out of RG’s reach and RG was locked in his cell, RG no longer had “a present ability” to inflict harm on Nguyen or anyone else. Consequently, Nguyen’s decision to deploy and stun RG was not based on a physical threat or active aggression as defined under the above Agency order and Sheriff’s directive. His deployment of a “drive stun” to RG was, therefore, an unreasonable and inappropriate use of force.

Nguyen’s justification - his history of intimidation and threats by RG, and his knowledge of the potential violence and damage caused by inmates, along with the resulting interruption to food service [Nguyen testimony], did not entitle him to act with unreasonable force on that potential threat under then-present circumstances. It is that distinction – the circumstances then-existing versus an officer’s knowledge of or history with violent inmates - that seems to create a frequent and fundamental misunderstanding about the use of force. [See In re Lovingier, CSA 48-13 (4/7/14), *aff’d In re Lovingier*, CSB 48-13 (11/7/14)); see also In re St. Germain, CSA 24-14 (11/7/14), *aff’d In re St. Germain*, CSB 24-14 (9/3/15). Moreover, less dangerous means to deal with RG were readily available. Nguyen had a radio to call for assistance; a panic button to call for immediate assistance; he could have yelled for his co-worker Miller, who was just downstairs, to assist him; and he could have left the flap open until RG backed away on his own.³

Sgt. Petit, Nguyen’s supervisor, testified he believed Nguyen did not violate the Taser order. However, he was not present during the incident and the basis for his statement was Nguyen’s reporting RG grabbed him. Petit was unaware Nguyen had backed away, which, as noted above, changed the use of force equation. He also qualified that Nguyen would have been justified in deploying his Taser even after stepping back if RG grabbed him when he re-approached the inmate. [Petit testimony]. However, that important condition was not established at hearing. Petit acknowledged he does not permit his deputies to violate the use of force policy in order to close a door flap. This violation was established by a preponderance of the evidence.

The parties disagreed whether the Sheriff’s directive, above, remained in effect. Even if the directive was no longer in effect, Nguyen violated DO 5014.1K, concerning the use of Tasers, as well as the other use of force rules and orders.

³ Even if, as alleged by Nguyen, he was required to secure the door flap the other options, listed here, remained.

RR 300.22 Inappropriate Force

Deputy sheriffs and employees shall not use inappropriate force in making an arrest, dealing with a prisoner, or in dealing with any other person.

As with the violations established above, the most salient fact under this rule was Nguyen's having backed out of RG's reach. Consequently, his use of a Taser, one of the most severe forms of force available short of firing a bullet, became unnecessary. Other methods to secure the door flap were available, including waiting for his partner Miller to assist, leaving the area while warning tier clerks and others to avoid the area of the open door flap, or calling for assistance. [Elwell testimony]. Because other, less violent options were readily available and there was no immediate risk of harm, Nguyen's use of a Taser on RG to force compliance with his directive to back away from the door flap was an inappropriate use of force in dealing with a prisoner, in violation of this rule, and consequently in violation of CSR 16-29 R.

Nguyen's defenses were unpersuasive. That the District Attorney's Office declined to prosecute Nguyen's use of his Taser is irrelevant to his wrongdoing under this rule, as an entirely different standard of wrongdoing - unable to prove Nguyen committed a crime beyond a reasonable doubt - applied. RG's grabbing of Nguyen became irrelevant to the justified use of a Taser after Nguyen successfully backed away. The requirement to secure door flaps did not state or imply that any and all means, regardless of circumstances, are justified. The Agency is within its rights to change the culture of compliance-by-force as a first response to the failure to follow orders. The Agency is also within its rights to change its existing culture of taking highly aggressive actions toward inmates based on inmates' past actions, by imposing discipline.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-41 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.

A. Seriousness of the proven offenses

The Sheriff's Department has made clear a Taser is a lethal weapon, [Exh. 12-25]. As such, its use is intended as a last-resort weapon when an inmate poses an imminent threat of physical harm and less-dire forms of compliance have failed, or exigent circumstances require such deployment. Officers are required to familiarize themselves with circumstances under which the use of potentially deadly force is authorized.

B. Prior Record

Nguyen is well-regarded. Nguyen's direct supervisor testified he is "very reliable, experienced, hard-working and knowledgeable." [Petit testimony]. Nguyen had no prior disciplinary violations.

C. Likelihood of Reform

Nguyen did not deploy his Taser in anger or for revenge. His demeanor throughout hearing was one of sincerity and honesty. That impression was buttressed by Elwell's finding Nguyen's deployment of his Taser arose from a misunderstanding of the Agency's rules and policies

surrounding the use of force, and not from malice toward RG. [Elwell testimony]. There was no evidence suggesting Nguyen would be unable to correct his improper use of force once the Agency ensures he has proper remedial training - a condition of the Agency's penalty.

D. Other factors.

At the time of this incident, there were no written directions concerning the circumstances under which door flaps must be secured or by what means. There were, however, written directives concerning the limited circumstances under which a Taser may be deployed. Several witnesses in this and other cases testified they were certain then-current policies permitted the use of a Taser to enforce compliance with verbal orders even when an inmate displayed no active aggression. [Miller testimony; Petit testimony; see also St. Germain, *supra*]. While such understandings contravene the Agency's directives limiting the use of force, there remains widespread misunderstanding concerning what circumstances justify the use of a Taser and other forms of force. These misunderstandings result in expensive and time-consuming investigations, pre-disciplinary meetings, and appeal hearings.

When there is widespread misunderstanding of expectations, and that misunderstanding leads to unexpected disciplinary action, the Agency should and must take action to educate its officers.⁴ Otherwise, the Agency violates its own disciplinary philosophy. "Discipline should not be an unexpected event but rather an anticipated consequence of inappropriate conduct..." [Matrix, section 1.3, "The Purpose and Importance of an Effective Disciplinary System"], and "[n]o rule or policy shall be... applied so as to lead to a result which is... contrary to the goals and purposes of these Conduct Principles and Disciplinary Guidelines." [Matrix, section 2.13]. Notwithstanding the foregoing, Nguyen improperly stunned an inmate when the inmate was locked in his cell and did not pose an imminent threat of harm.

Under the Agency's so-called disciplinary matrix the proven Agency rule and order violations fall under the "D" category, which describes conduct that is "substantially contrary to the guiding principles of the Department..." As noted above, officers are expected to care for inmates and treat them with respect. Nguyen's actions violated that trust and expectation. The presumptive penalty for Category D violations is a 10-day suspension. [Matrix, Appendix E]. The Agency's election to impose the presumptive penalty was within range of penalties available to a reasonable and prudent administrator. [In re Economakos, CSB 28-13, 5 (3/27/14); citing Adkins v. Division of Youth Services, Dept. of Institutions, 720 P.2d 626, 628 (Colo.App.,1986)].

VI. ORDER

The Agency's 10-day suspension of Nguyen's employment on March 28, 2017, is AFFIRMED.

DONE July 25, 2017.



Bruce A. Plotkin
Career Service Board Hearing Officer

⁴ Without deciding either merit of the appeal or of the underlying discipline in the pending case, it is noteworthy that three appeals have now involved a use of force on or through a door flap. [In re Roybal, CSA 44-16 (10/3/16), *aff'd In re Roybal*, CSB 44-16 (5/18/17); In re Trujillo, CSA 42-17 (pending).