

DECISION AND ORDER

ANNA ROMERO, Appellant,

v.

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 August 2, 2016 before Hearing Officer Valerie McNaughton. Appellant was represented by Jordan Lubeck, Esq. and Jonathan Abramson, Esq. Assistant City Attorney Jessica R. Allen appeared for the Agency. The Agency called Shannon Elwell. Appellant testified on her own behalf, and also presented the testimony of Jennifer Langan and Sierra Galindo.

I. STATEMENT OF THE APPEAL

Deputy Sheriff Anna Romero appealed her ten-day suspension dated May 9 2016, which was based on an incident with an inmate on May 5, 2015. Agency Exhibits 1, 2, and 4 and Appellant's Exhibits D – Q, CC and DD were admitted in evidence. The Denver Sheriff Department Discipline Handbook effective July 8, 2013, and Exhibits 9 – 13 and AA – BB were admitted under the doctrine of administrative notice. C.R.E. Rule 201.

II. FINDINGS OF FACT

Appellant Anna Romero has been a Deputy Sheriff for the past nine years. Her duties are the care and custody of female inmates at the Downtown Detention Center. At the time of the incident in question, Appellant was assigned to the fingerprint desk at the intake unit, the second stop for newly incarcerated inmates after the booking station. Inmates are first searched, and then wait in an open seating area to have their fingerprints done. They are then routed to the classification desk for possible assignment to a housing area based on any medical or other special needs.

Deputy Sierra Galindo was at the booking desk when an intoxicated inmate, here referred to as TK to protect her privacy, was brought in for booking. Galindo heard loud screaming in front and went to assist. At some point in the booking process TK threatened to kill herself. TK was taken to an isolation cell to await classification. Classification decided that TK should be taken to 3 Medical for evaluation of the risk of suicide. Appellant took her arm to escort her, and TK slapped Appellant's hand, saying "don't touch me." Galindo, Appellant and Deputy Jennifer Langan then escorted TK to

the medical floor. On the way, TK was verbally hostile and resisted following the officers' directions. They placed her in a cell, and told TK to take off her clothes in order to change into a suicide smock. TK threw down her shirt, and kicked her pants at Appellant's feet. Langan put her hand on TK to guide her to the bunk. TK spread her legs and said, "is this what you want to see?" [Langan, 2:00.] At the same time, Appellant approached TK from behind Langan and pulled TK's hair, forcing her head toward Appellant. All the deputies turned to leave the cell. TK stood up and beckoned with outstretched arms to Appellant, who pushed her back on the bunk. TK jumped up and rushed toward Appellant with arms wide and fists clenched. All three officers turned and pushed TK back on the bunk, where she struggled as they attempted to place the suicide smock over her. After resisting for over a minute, during which several male deputies came to assist, TK subsided into crying, and the officers left the cell. [Exh. 4.]

All three female deputies wrote reports immediately after the incident. Appellant's only statement regarding the events in the cell was the following: "As we were walking out of the cell in 3M I heard her coming up behind me. I turned around, and me and two other officers, grabbed her and put her on the bench. We exited the cell one at a time." [Exh. 5-1.] Deputy Langan explanation was more complete.

I told her to take her clothes off and she said 'really' I answered 'yes'. She finally did and took all of them off and threw them to the ground and threw them into the middle of the room, Officer Galindo and Officer Romero started to leave the cell and [TK] jumped up and tried to hit Officer Romero and as Officer Romero turned [TK] missed hitting her. I took control of her legs and yelled turn her around and I tried to roll her over to her stomach. I untwisted her legs and flatten them onto the bed [and] told her 'don't move until we are out of here.' She was crying and I exited the cell last and shut the door.

[Exh. 5-1.]

Deputy Galindo reported that as they were leaving the cell, TK charged Appellant, "making the motion as if she were going to hit [Appellant] again". They ran back into the cell and placed TK on the bed. Galindo reported that Appellant had told her that TK slapped her during the escort. [Exh. 5-2.]

The incident was investigated by Denver Police Department, but the District Attorney's Office declined to prosecute. Denver Sheriff Department Internal Affairs Bureau (DSD IAB) then began an investigation to determine if there were administrative rule violations. Upon review of the jail video, it was observed that Appellant had pulled TK's hair. Neither Galindo nor Langan recalled seeing the hair pull, but stated after seeing the video that it was improper force. Appellant was ultimately charged with an inappropriate use of force, failure to use sound judgment, and cruel and unusual treatment of an inmate.

Civilian Review Administrator Shannon Elwell reviewed the entire Internal Affairs file, including the jail video, witness statements, reports, and audio recordings. She

found that Appellant had pulled the hair of a naked, intoxicated, suicidal inmate when there was no credible threat, aggravating an already uncooperative inmate. Elwell did not consider Appellant's later push of the inmate to be inappropriate force. She found however that the push would not have been necessary if TK had not been goaded by the hair pull. Elwell found that the action violated the principle that deputies use the least amount of force needed to counter a threat, and never employ it as punishment. Elwell noted that Appellant's explanation - that she may have been trying to reposition the inmate - was unlikely, since a one-second, one-handed pull on the hair would be ineffective to reposition TK's legs and body. She found that the force used when none was necessary recklessly placed her fellow deputies at risk, and subjected the city to potential legal and financial liability. She found that the conduct violated Appellant's duty to use only appropriate force, and to use sound judgment and discretion while performing her duties. DSD §§ RR-200-19; 300.22. The last finding, cruel and unusual treatment of prisoners, was later withdrawn at the hearing. [Statement of ACA Jessica Allen, 9:54 A.M.]

The substantive rule violations fall into Conduct Categories D – F under the Discipline Handbook, Appx. E. Elwell considered these violations as appropriate for assignment to Conduct Category D, since the conduct was “substantially contrary to the guiding principles of the department or ... substantially interfere[d] with its mission, operations, or professional image, or ... involve[d] a demonstrable serious risk” to deputies. [Exh. 1-9.] She found that Appellant's positive evaluations and lack of significant discipline were mitigating factors. On the other hand, Elwell noted Appellant's lack of candor in explaining the behavior, and her failure to acknowledge the part her conduct played in inflaming the inmate to the point where she attempted to attack the deputies. Elwell determined that the mitigating and aggravating factors on balance were insufficient to outweigh the value of imposing the presumptive penalty for the first violation, a ten-day suspension.

III. ANALYSIS

The Agency bears the burden of proving the asserted rule violations, and the reasonableness of the penalty under the applicable Career Service Rules. In re Economakos, CSB 28-13 (3/24/14).

1. Neglect of duty, CSR § 16-60 A.¹

An employee violates this rule by failure to perform a known work duty. In re Compos, et al, CSB 56-08 (6/18/09). The Agency did not present any evidence on this allegation, and none was apparent in the record as a whole. It is therefore determined to be unproven.

¹ CSR Rule 16 was amended on Feb. 12, 2016. The former version of Rule 16 is applicable in this appeal, since the conduct on which it is based occurred on Jan. 8, 2015, prior to that amendment. Am. Comp. Ins. Co. v. McBride, 107 P.3d 973, 977 (Colo.App.2004.)

2. Failure to observe departmental regulations, CSR § 16-60 L

Appellant was charged with two rule violations: failure to use sound judgment and discretion, and inappropriate use of force. Appellant concedes that her use of a hair pull was an inappropriate use of force, but disputes that she took that action to punish the inmate.

a. RR-200.19 Use of judgment and discretion in the performance of duties

As the incident began, the jail video shows Appellant standing at the far wall of the cell opposite inmate TK, who is swaying. Appellant made a face and waved her hand in front of her nose, in apparent reaction to the strong smell of alcohol noticed by all the eyewitnesses. After TK kicked her pants onto Appellant's legs, Langan stretched her hand out to guide TK to the bunk. Appellant walked around Langan and yanked TK's hair. She then joined the other deputies in turning away from TK, who had spread her legs wide, almost kicking Langan.

Langan and Galindo did not witness the hair pull, since Langan was trying to avoid being kicked by TK's flailing legs, and Galindo's view was blocked by Langan. They both testified that Appellant did not seem angry or vengeful at the time. [Galindo, 1:17; Langan, 2:05.] Langan rated TK as a "9 and a half on a scale of one-to-ten" for obnoxious behavior, but stated that she believed the hair pull was still inappropriate. [Langan, 2:02.]

On the date of hearing, Appellant did not recall having pulled TK's hair. She admitted that the jail video showed it happened, and she accepted responsibility for it. Appellant denied that she had done it to punish the inmate. However, the video shows that right after the pants were kicked at her, Appellant approached TK, pulled her hair, and walked away. No detention-related purpose was served by that action. Appellant offered no such purpose in her testimony because she could not recall the incident. Appellant speculated that she may have been attempting to reposition TK on the bunk. If so, she would have taken hold of TK's outstretched left leg located right at her own midsection, rather than TK's motionless head an arm's length away. The hair pull moved TK two feet off center, requiring her to push herself back up to a seated position. I find that Appellant reacted in anger to an extremely difficult inmate. She failed to allow her training to temper her own frustration with the inmate's outrageous drunken actions. As a result, the Agency proved Appellant failed to use sound judgment and discretion, in violation of RR-200.19 and CSR § 16-60 L.

b. RR-300.22 Inappropriate force

Appellant also used more force than was necessary in light of the circumstances. Just before the hair pull, TK posed no immediate threat. She was leaning back on the bunk with her legs out and her arms behind her in a tripod position for support. [Exh. 4, 01:21:18.] The other two deputies were right in front of TK, fully able to take any necessary defensive action. As found above, the pull did not aid in controlling the inmate, but incited her to rush the deputies in a furious, fighting mode. That placed all of the deputies at risk of injury by the unpredictable prisoner. After TK tried to attack

Appellant, two male deputies entered the cell, and two more stood at the door, donning gloves to serve as backup. Appellant's improper use of force caused seven officers to become involved, when the original three would have sufficed without it. This un rebutted evidence established that Appellant used inappropriate force in violation of RR-300.22 and CRS § 16-60 L.

3. Penalty decision

Civilian Review Administrator Shannon Elwell determined that Appellant had violated CSR § 16-60 A and L, and departmental regulations 200.19 and 300.22. A violation of the first regulation can be classified as anywhere from a Category A to an F, depending on the nature of the misconduct. RR-300.22 can be classified as Categories D through F.

Elwell found that Appellant's actions were "substantially contrary to the guiding principles of the department" under Category D for two reasons: First, she lacked candor during the investigation, and her actions affected and endangered other deputies. Elwell noted that deputies' reports about their core duty of care and custody of inmates must be accurate and complete. Elwell found that Appellant's report and explanation did not square with the facts. Appellant stated she did not recall the hair pull, but the video showed a different picture. Deputies are trained to reposition the limbs in circumstances such as these, and Appellant conceded that pulling hair is not a use of force technique taught by the Academy or in later training. Secondly, the other deputies were required to come back to control TK's angry reaction to the hair pull. They were also obligated to give statements in Appellant's Internal Affairs investigations, and to present testimony in this appeal.

Elwell then considered the factors relevant to whether a mitigated, presumptive or aggravated penalty should be imposed. Appellant's nine years of positive performance and relatively minor past discipline history were weighed as mitigating factors. She also recognized that the one-second hair pull caused no injury to the inmate. On the other hand, Elwell viewed Appellant's conduct with concern because it had the potential to endanger other deputies, and Appellant proffered a specious explanation for her unauthorized use of force. Elwell decided that the presumptive penalty of a ten-day suspension was most appropriate under all of the circumstances, after balancing mitigating and aggravating factors consistent with both the matrix and the Career Service Rules. Elwell determined that the penalties arising from the incident should be concurrent in accordance with the Discipline Handbook prohibition against stacking, at p. 37. Since the withdrawn rule violation rule bears the same penalty level as the sustained charge and they are concurrent, Elwell's earlier finding that the conduct was cruel and unusual treatment does not affect the appropriateness of the penalty determination.

Appellant argues that the penalty is inconsistent with the Agency's previous use of force determinations, in violation of the Discipline Handbook's policy statement that penalties must be reasonably consistent in order to foster predictability and trust in the disciplinary system. Other decisions have imposed similar penalties for a taser shot or bumping a prisoner repeatedly against the wall and seizing his neck. In re St. Germain,

24-14 (11/7/14); In re Fuller, 39-14 (12/15/14). Elwell defended the ten-day suspension in this case for a minor hair pull because of additional circumstances, including the fact that Appellant worsened what was a relatively stable situation with the retaliatory pull, and thereby endangered her law enforcement co-workers.

Appellant has received successful or excellent evaluations for her entire career at the city, and a PRIDE award in 2008 for saving the life of a suicidal inmate who was attempting to strangle herself. [Exh. H.] After the event with inmate TK, Appellant voluntarily took a course in crisis intervention. [Exh. F.] She stated at hearing that while she sees drunk and disorderly inmates a few times a week, she had never encountered one who appeared as hostile or mentally unstable as TK. TK presented Appellant with issues she had never before faced in her hitherto successful career as a deputy. TK was arrested in a drunken, smelly, loud, resistant and aggressive condition. She attempted to take off her clothes at least twice and refused to follow any directions. Before entering the cell, she struck Appellant in the hand in the classification area. When they got to the cell, TK furiously threw her shirt down and kicked her pants at Appellant's feet. Appellant reacted by walking up to TK and pulling her hair. When considering the incident as a whole in the light of the Agency's mission and the training provided to prevent such events, the penalty is reasonably consistent with other penalties imposed under other circumstances.

I find that the Civilian Administrator properly viewed this incident as substantially contrary to the Agency's mission. Elwell testified that she believed any penalty over ten days would be fundamentally unfair, but also viewed the conduct as serious enough to warrant that length of suspension based on all of the relevant factors. The penalty decision is consistent with the purposes of discipline under the Career Service Rules, and is well within the discretion accorded an Agency decision-maker.

IV. ORDER

Based on the above findings of fact and law, it is hereby determined that the Agency's disciplinary action dated May 9, 2016 is AFFIRMED.

DONE this 9th of September, 2016.


Valerie McNaughton
Career Service Hearing Officer