

**HEARING OFFICER, CAREER SERVICE BOARD  
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 44-16

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**DECISION AFFIRMING DISMISSAL**

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**STEVEN ROYBAL**, Appellant,

v.

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

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**I. INTRODUCTION**

The Appellant appeals his dismissal from employment with the Denver Sheriff's Department, (Agency) on June 27, 2016, for alleged violations of specified Career Service Rules, and Agency regulations. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on August 29 and August 31, 2016. The Agency was represented by Charles Mitchell, Assistant City Attorney, while the Appellant was represented by Reid Elkus, Esq., of the law firm Elkus & Sisson P.C. Agency exhibits 1-19 were admitted into evidence as were Appellant's exhibits G and L. The following witnesses testified for the Agency: Civilian Review Administrator Shannon Elwell; Sgt. James Sanford; and Sgt. Kenneth Juranek. The Appellant testified on his own behalf, and provided testimony by Deputy Jonathan Decker.

**II. ISSUES**

The following issues were presented for appeal:

A. whether the Appellant violated any of the following Career Service Rules: CSR 16-60 A; 16-60 E.; or 16-60 L.<sup>1</sup>

B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to terminate his employment conformed to the purposes of discipline under CSR 16-20.

**III. FINDINGS**

The Appellant, Steven Roybal, was a deputy sheriff in the Denver Sheriff's Department (Agency) for three years. His principal duties were to provide safety and security of inmates.

Unlike other housing units in the Downtown Detention Center (DDC) where inmates spend significant time interacting in an open "pod," inmates in 2D are classified as "special management," and remain in their cells. Inmate JD was housed in 2D because he had exhibited "major symptoms of mental illness." [Exhibit 1-9].

Meals in 2D are served through a cell door "flap," a hinged area in the cell door, that is unlocked from outside the cell by the housing officer. Once unlocked, the flap, can drop to a horizontal position in order to slide food trays in and out of the cell.

On July 31, 2015, Roybal was on duty in 2D. He unlocked the door flap to JD's cell, slid a breakfast tray through the door flap, and re-locked the flap. [Exhibit 18 @ 5:10:37]. When Roybal returned to pick up JD's tray, JD became agitated when Roybal unlocked the door flap. [Exhibit 19 @ 5:37:35]. He cursed at

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<sup>1</sup> Since this appeal was filed, the Career Service Rules have been revised. Because a previous version of the rules was in effect at the time discipline was assessed, that version controls the outcome in this appeal.

Roybal and tried to grab or hit him through the flap. JD threw his food tray out of the flap [Exhibit 19 @ 05:37:42], but it did not strike anyone. A few minutes later, reaching out of the open door flap, JD threw coffee on a tier clerk<sup>2</sup> who was walking up the nearby stairs. Roybal began to close the door flap to lock it, but JD grabbed at Roybal's shirt sleeve through the door flap. Roybal stepped back, spoke with JD for another 30 seconds, then walked away without closing the door flap. [Exhibit 19 @ 5:38:17].

Roybal and his tier clerks picked up breakfast trays from the other 2D cells. As Roybal returned toward JD's cell, JD placed his hands over the top edge of the door flap and began lifting and slamming it down. [Exhibit 17 @ 5:41:34]. JD's hands were on top of the opened, horizontal door flap when Roybal arrived at the cell and kicked the flap forcefully from underneath, causing the flap, with JD's hands on top of it, to slam closed and rebound immediately to the horizontal position. [Exhibit 17 @ 5:41:46]. Roybal said something to JD, then walked away, leaving the flap open. About 15 minutes later, another deputy relieved Roybal. Sometime early during the relief deputy's shift, he secured and locked the door flap to JD's cell without incident.

Roybal filed a complaint against JD for threats and assaultive behavior, but omitted kicking the door flap. He also notified Sgt. Sanford about the incident, but omitted telling Sanford about kicking the door flap.

JD then filed a complaint against Roybal for injuring his hand. An investigation ensued into Roybal's conduct and Roybal was informed of the investigation on August 13, 2015. The following day, which was two weeks after the incident, and at Sanford's urging, [Sanford cross-exam], Roybal created a supplemental report about the incident, which included kicking the door flap to JD's cell "in an attempt to get him to back away from the door."

The Agency held a contemplation of discipline meeting on June 6, 2016. Roybal attended with his attorney-at-law. The Agency served its notice of termination on Roybal June 27, 2016. This appeal followed timely on July 1, 2016.

## IV. ANALYSIS

### A. Jurisdiction and Review

Jurisdiction is proper under CSR § 19-10 A.1.a. I am required to conduct a *de novo* review, meaning to consider all 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 the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to terminate Appellant's employment complied with CSR 16-20. The standard by which the moving party must prove its claims is by a preponderance of the evidence.<sup>3</sup>

### C. Career Service Rule Violations

#### 1. CSR 16-60 A. Neglect of duty.

To sustain a violation under CSR 16-60 A, the Agency must establish that appellant failed to perform a known duty. In re Gomez, CSA 02-12 (5/14/12), *citing* In re Abbey, CSA 99-09, 6 (8/9/10). In its notice of discipline, the Agency cited this rule twice. In the explanatory section following the first citation, the Agency referred to Roybal's inappropriate use of force and punitive use of force, both of which were separately cited,

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<sup>2</sup> A tier clerk is an inmate worker with limited duties as assigned by DSD staff and as described in the following Post Order and Department Order. DSD Van Cise Simonet Housing Post Order, Section XXI, Inmate Workers. Exhibit 1-3, n.1.

<sup>3</sup> During Appellant's contemplation of discipline meeting, Appellant claimed the standard of proof for the Agency's determination was "indisputable evidence". [Exhibit 16 @ 18:27]. To the extent Appellant makes the same claim as to the standard of proof in his appeal, I reject such claim for the same reasons I expressed in In re Roybal, 47-15, 3 (4/22/16).

below. Following its second reference to Neglect of duty, the Agency referred to Roybal's dishonesty and deception, also separately cited below. Civilian Review Administrator Shannon Elwell, the decision maker, did not allege Roybal breached any other duty during her testimony. An agency may not prove Neglect of Duty by the breach of a duty inherent in every other rule. In re Robinson, 03-13, 4 (6/18/13); see also In re Mitchell, 57-13A, 3 (CSB 11/7/14). The Agency failed to establish a violation under this rule.

## **2. CSR 16-60 E. Any act of dishonesty.**

The Agency alleged Roybal was dishonest in his IA interview and at his contemplation of discipline meeting when he misrepresented JD's hand position on the door flap at the time Roybal kicked it and when he wrote he kicked the door flap "in an attempt to get [JD] to back away from the door." [Exhibit 5-1].

As proof Roybal was dishonest about JD's hand position, the Agency relied principally on the video recording of the incident, finding JD's hands were curled over the edge of the door flap immediately prior to Roybal's kick, and that the flap rebounded immediately after Roybal kicked it. Roybal claimed JD's hands lay flat and were not curled over the edge.

When JD began banging the door flap up and down, his hands can be seen wrapped around the edge of the door flap as alleged by the Agency. [Exhibit 17 @ 05:41:34]. From that time until Roybal kicked the door flap, [Id @ 05:41:46], JD's left hand did not move. Consequently, Roybal's assertion, that JD's hands lay flat, was dishonest. The significance of the distinction is Roybal's assertion would tend to diminish the risk of harm to JD's hands.

Shortly after kicking the door flap to JD's cell, Roybal called his supervisor Sergeant James Sanford. Roybal told Sanford he used no force and followed all policies and procedures after JD grabbed his shirt sleeve in an attempt to pull his arm through the door flap to his cell and threw coffee on a tier clerk. [Exhibit 14 @ 1:55]. In view of substantial evidence to the contrary, including his admission that he kicked the door flap with JD's hands on it, along with officers' obligation to report all use of force, [DO 5011.1M], it is unlikely Roybal simply forgot to tell Sanford about the kick. This is all the more true in view of Sanford's specific question concerning the use of force, Roybal's specific denial, and his later statement that he omitted the kick from his initial report because he determined it was "almost insignificant." [Exhibit 6-12]. Consequently, Roybal's statement to his supervisor was dishonest in violation of CSR 16-60 E. Sanford recalled that, several days later, Roybal told him about the kick. [Id @ 3:50; Sanford testimony]. This belated disclosure does not change the initial dishonesty. In arriving at these conclusions, I disregarded the accusations derived from inmate JD as unreliable.

## **3. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules. The Agency claimed the Appellant violated the following written policies.**

### **Department Rules and Regulations**

#### **RR-200.4.2 – Commission of a Deceptive Act**

**In connection with any investigation or any judicial or administrative proceeding, Deputy sheriffs and employees shall not willfully, intentionally, or knowingly commit a materially deception act including but not limited to departing from the truth verbally, making a false report, or intentionally omitting information.**

The same facts which establish a violation of CSR 16-60 E., Dishonesty, above, also establish a violation under this Agency rule. Roybal told the IA interviewer that, immediately prior to kicking the door flap, he told JD to back away from the door. [Exhibit 15 @ 12:45]. Since the video recording makes it evident Roybal kicked JD's door as he approached it without slowing, or hesitating, it is unlikely he said anything to JD beforehand. Certainly JD did not have an opportunity to move his hands before the kick.

Roybal explained he was concerned for his own safety and that of his tier clerks when he kicked the door flap because JD previously tried to grab his sleeve in an attempt to pull his arm through the flap and because JD threw coffee on one of the tier clerks. [Exhibit 15 @ 12:55]. Roybal's kick did nothing to

enhance safety for his tier clerks and did not entice JD to move back for Roybal's safety. It is more likely the kick was retaliatory or to punish JD for his earlier behavior.

### **Departmental Order 5011.1M – USE OF FORCE**

**2. 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. In all cases, force will be de-escalated once the legitimate function is achieved or the resistance has ceased.

**Physical force will not be used as a punishment, under any circumstances.**

**Officers should rely on departmentally approved use of force techniques that are taught in training.**

**4. Explanation... With these values in mind, an officer shall use only that degree of force which is necessary... under the circumstances...**

**It is important for officers to bear in mind that there are many reasons a suspect/inmate may be resisting or may be unresponsive. A person's reasoning ability, physical limitation, language, drug interaction, or emotional crisis, are some examples. An officer's awareness of these possibilities, when time and circumstances reasonably permit, should then be balanced against the facts of the incident facing the officer when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.**

**Officers 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. When reasonable under the totality of circumstances, officers should use advisements, warnings, verbal persuasion, and other tactics and recognize that an officer may withdraw to a position that is tactically more secure or allows an officer greater distance in order to consider or deploy a greater variety of force options. When a suspect is under control, either through the application of physical restraint or the suspect's compliance, the degree of force shall be de-escalated accordingly...**

**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. Department policy as well as relevant federal state and local laws shall govern use of force actions by officers at all times.**

At the time Roybal kicked the door flap to JD's cell, JD was secured in his cell and was not a threat to anyone. Roybal approached the cell, and without hesitating or stopping, forcefully kicked the door flap closed, knowing JD's hands were on the flap. [Exhibit 15 @ 15:22]. JD was not reaching for Roybal, not throwing anything, and no one else was nearby. Roybal did not attempt to secure the door flap after he kicked it, rendering improbable his claim that he sought to make JD back up by kicking the flap. In short, there was no justification for the use of substantial force. Under the circumstances, it is more likely than not that Roybal's kick was unreasonable, inappropriate, and was punishment in retaliation for JD's earlier outburst and physical violence. The Agency established this violation.

Roybal told his IA interviewer that he was compelled to do something to secure JD's cell after JD threw coffee at one of the tier clerks. "The fact that he was now actively assaulting people, I knew that I could not leave the tray slot open." [Exhibit 15 @ 12:07]. Taken alone, Roybal's statement is reasonable. An inmate was acting out, had thrown a tray with some force through the door flap, and threw coffee through the door flap on a passing tier clerk, so it was reasonable to attempt to secure the door flap. However, at the time Roybal kicked the door flap allegedly to protect his tier clerks, he had already told them to avoid JD's cell, obviating the urgency to secure the flap.

In addition, Roybal's kick did nothing to secure (lock) the flap even though one of the reasons for which he told IA he kicked the flap was to secure it. [Exhibit 15 @ 16:42]. Consequently, it more likely than not Roybal's kick was done to punish JD for his actions, in violation of D.O. 5011.1M, and therefore a violation of CSR 16-60 L.

### **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.**

Even if, as Roybal alleged, JD's hands lay flat on top of the door flap and not curled over the edge, the difference is inconsequential to this or any of the alleged violations. Either way, there was a significant risk of harm to JD's hands, irrespective of the location of his fingertips.

Roybal kicked the door flap with substantial force. [See Exhibit 17 @ timestamp 05:41:46]. At the time, JD was secure in a locked cell, and tier clerks had been told to avoid the cell, so if Roybal simply stayed away, there was no risk of JD harming anyone. Kicking the door flap served no legitimate purpose, since it could not have helped secure the door flap. Consequently, Roybal's method of dealing with inmate JD by kicking the door flap to his cell, was an inappropriate use of force, in violation of RR 300.22, and therefore a violation of CSR 16-60 L.

Roybal's various reasons for kicking the door were not persuasive. Hoping the door would stick would not have secured it. Since Roybal immediately kicked the door as soon as he returned to JD's cell, it is more likely than not Roybal did not attempt to ask, command, or use other, less violent methods to have JD back away, including leaving him alone until he calmed down which is precisely what occurred about 15 minutes later when Roybal went off duty. There was no urgency to securing the door flap at the time. As Roybal told IA, he instructed the tier clerks who were serving and picking up breakfast trays to stay away from JD's cell. For all these reasons Roybal's claim - that the degree of force used in kicking the door flap to JD's cell while JD's hands were on the flap - was unconvincing.

## **V. DEGREE OF DISCIPLINE**

The purpose of discipline is to correct inappropriate behavior if possible. Appointing authorities are directed by CSR 16-20 to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR § 16-20.

### **A. Seriousness of the proven offenses**

Roybal's hard kick to the door flap of JD's cell when JD's hands were resting on the flap created a substantial risk of harm to JD's hands. That action was antithetical to the Agency's mission to provide care for inmates. Worse, Roybal, who acknowledged JD had impaired mental function, acted in retaliation for, and to punish, a mentally ill inmate who is not expected to be able to maintain control.<sup>4</sup>

Roybal's supervisor, Sgt. Sanford, and a co-worker, Deputy Jonathan Decker testified they believe Roybal has a reputation for honesty. [Sanford cross-exam; Decker testimony]. Sanford strongly believed termination was an excessive penalty. Despite the endorsements of his character, the evidence indicates Roybal was dishonest in his initial report about the incident to Sanford, and was dishonest with IA during an official investigation. Rather than being a mistake as characterized by Sanford, the evidence indicates it is more probable than not that Roybal intentionally deceived Sanford, deceived IA, and continued the same deception throughout the investigation and hearing in omitting the kick from his initial report, then, after suspect timing in acknowledging the kick, describing it as "inconsequential." The Agency has stated repeatedly it will not brook dishonesty by any member of its staff, no matter what rank. In re Gale, 02-15A

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<sup>4</sup> The duties of deputy sheriffs have become increasingly difficult as the inmate population swells with increasing numbers of the mentally ill. Some within that inmate population can be unpredictable. However, the Agency and the City expect and require its deputies to learn and consistently apply methods of dealing both safely and humanely with all inmates in their care and custody.

(CSB 7/21/16); In re Valerio, 22-14A (CSB 2/19/15) . The Agency views dishonesty as among the most egregious violations by its officers, and presumes dishonesty merits termination. [DSD Discipline Handbook, effective November 12, 2013].

## **B. Prior Record**

The Agency found no prior discipline in Roybal's record. While the Career Service Rules encourage progressive discipline, [CSR 16-50], the Rules also state progressive discipline is not required and permit any degree of discipline depending on the circumstances of the case. [CSR 16-50 A.1.,3].

## **C. Likelihood of Reform**

Roybal denied all wrongdoing. Consequently, it is unknown whether he would reform his misconduct if he were reinstated.

## **VI. ORDER**

The Agency's termination of the Appellant's employment on June 27, 2016, is AFFIRMED.

DONE October 3, 2016.

  
Bruce A. Plotkin  
Career Service Hearing Officer

## **NOTICE OF RIGHT TO FILE PETITION FOR REVIEW**

A party 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 certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

**BY MAIL OR PERSONAL DELIVERY:**

Career Service Board  
c/o Employee Relations  
201 W. Colfax Avenue, Dept. 412  
Denver CO 80202

**BY FAX:**

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.